

ORIGINAL

In the Supreme Court of Ohio

STATE OF OHIO,	)	Supreme Ct. Case No. 04-1163
)	
Respondent-Appellee,)	
)	
-vs-	)	Trial Ct. No. 03-CR-116
)	
MARVIN JOHNSON,)	
	)	Death Penalty Case
Petitioner-Appellant.)	

**On Appeal From The Court Of Common Pleas
Of Guernsey County, Case No. 03-CR-116**

**Appellant Marvin Johnson's Application For Reopening Pursuant To
S.Ct. Prac. R. 11.6**

DANIEL G. PADDEN (0038781)
Guernsey County Prosecutor
Office of the Guernsey County Prosecutor
139 West 8th Street
P.O. Box 640
Cambridge, Ohio 43725

KORT GATTERDAM (0040434)
Carpenter, Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Facsimile: (614) 365-9145
Counsel of Record

LAURENCE E. KOMP (0060142)
Attorney at Law
P.O. Box 1785
Manchester, MO 63011
Telephone: (636) 207-7330
Facsimile: (636) 207-7351

COUNSEL FOR APPELLEE

COUNSEL FOR APPELLANT

FILED
APR 12 2012
CLERK OF COURT
SUPREME COURT OF OHIO

In the Supreme Court of Ohio

STATE OF OHIO,	)	Supreme Ct. Case No. 04-1163
)	
Respondent-Appellee,)	
)	
-vs-	)	Trial Ct. No. 03-CR-116
)	
MARVIN JOHNSON,)	
)	
Appellant-Appellant.	)	This is a death penalty case.

**Appellant Marvin Johnson's Application For Reopening Pursuant To
S.Ct. Prac. R. 11.6**

Appellant Marvin Johnson asks this Court to grant his Application for Reopening. S.Ct. Prac. R. 11.6; *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

A. Introduction and procedural posture.

A Guernsey County Court of Common Pleas jury convicted Appellant Marvin Johnson of two counts of aggravated murder; each carrying a death specification, along with one count each of aggravated robbery, kidnapping, and aggravated rape. The trial court sentenced him to death. Johnson was represented at trial by attorneys Jack Blakeslee and Andrew Warhola. Attorneys Kathleen McGarry and Dennis Sipe represented Johnson on his direct appeal to this Court. On December 13, 2006, this Court affirmed Johnson's sentence.

Appellant previously filed an Application for Reopening, which this Court denied. *State v. Johnson*, 870 N.E.2d 728 (Ohio 2007). Appellant proceeded to federal court where the federal district court permitted the depositions of Attorneys McGarry and Sipe.

The federal district court found that Appellant had good cause for not developing this evidence earlier and ordered this evidence to be exhausted in state court. *Johnson v. Bobby*, 2012 U.S. Dist. LEXIS 24327 (S.D. Ohio, Feb. 27, 2012). **This good cause finding satisfies**

S.Ct. Prac. R. 11.6(B)(2), and the State is barred from seeking reconsideration of this finding which should bind this Court.

B. Appellate Counsel was ineffective for failing to raise meritorious issues

It is apparent that his appellate attorneys were prejudicially ineffective for failing to raise meritorious issues that arose during his capital trial. This Court must reopen his appeal. Specifically, Johnson re-raises the below instances of appellate ineffectiveness, supported with the depositions of Attorneys Kathleen McGarry (Exhibit A) and Dennis Sipe (Exhibit B).

Sipe revealed that McGarry drafted a list of potential issues for the two of them to utilize. Ex. B p. 24-25. McGarry stated that she compiled this “master” list after both had read the transcript and talked with each other about the issues. Ex. A p.16. Each issue was then color coded according to which attorney would be responsible for researching and drafting the issue. Ex. B p. 24-25. At both depositions, Sipe and McGarry identified a copy of the master issue list they developed. Ex. B p.24, 59–65; Ex. A p.17, 37–43.

One of the issues listed as “possible” was “Confrontation issues with Mickey Alexander.” Ex. B p.36–38, 64; Ex. A p.23, 42. Under this heading, it stated: “state able to get in his statements without any confrontation of witness,” “Tr 1585- Mickey directed them where to go,” “Tr 1634-1648 Harbin relays MA information.” *Id.* The issue was color coded yellow, which indicated it was Sipe’s responsibility. *Id.*

Sipe acknowledged that while Johnson’s direct appeal was pending, the Supreme Court issued *Crawford v. Washington*, 541 U.S. 36 (2004), meaning Johnson could benefit from *Crawford*’s holding. Ex. B p.26. Sipe remembered reviewing the confrontation issue, trying to determine if *Crawford* and other state cases applied. *Id.* p. 38-41. Sipe also remembered the defense objecting to the Alexander evidence presented through the testimony of the two

detectives, but then failing to object as the presentation continued despite the judge sustaining the initial objections. *Id.* p.39.

Sipe ultimately decided not to raise this issue (*id.* p.38), stating he “concluded that it was offered not for its truthfulness but for the fact that the officers went and looked for [evidence]” that Alexander provided to the police after talking to Appellant. *Id.* p.42; *see also id.* p. 40. Sipe did not find bad case law, but rationalized the evidence was introduced to show what the officers did. *Id.* p.43. McGarry discovered within the last two days of brief drafting that Sipe did not raise the issue as a confrontation claim. Ex. A p. 25. McGarry never communicated with Sipe as to why Sipe did not draft the confrontation issue. *Id.* p.26.

The *Crawford* case, which Sipe acknowledging reviewing, held that if the prosecution offers testimonial hearsay, the defendant must have an opportunity to cross-examine the declarant, unless the declarant is unavailable. *Crawford*, 541 U.S. at 68. While *Crawford* did not provide a specific definition of “testimonial,” *id.*, it did cite “[s]tatements taken by police officers in the course of interrogations” as an example of the “core class of ‘testimonial’ statements.” *Id.* at 51–52; *see also id.* at 68 (“Whatever else the term covers, it applies at a minimum...to police interrogations.”); *United States v. Cromer*, 389 F.3d 662, 675–79 (6th Cir. 2004) (holding that admission of non-testifying informant’s statements via police officer’s testimony violated accused’s Sixth Amendment Confrontation Clause rights). Thus, at the time of direct appeal briefing, federal law supported Johnson’s assertion that the trial court erred in admitting the evidence, and that trial counsel was ineffective for failing to object. Obviously, Sipe misinterpreted *Crawford*.

Sipe attempted to justify the issue’s exclusion with what is known as the “course of investigation” hearsay exception. Under this exception, an “out-of-court statement to law

enforcement is not hearsay if that statement is offered into evidence ‘as an explanation of why the [subsequent] investigation proceeded as it did.’” *Jones v. Basinger*, 635 F.3d 1030, 1045 (7th Cir. 2011) (quoting *United States v. Eberhart*, 434 F.3d 935, 939 (7th Cir. 2009)). This also stands contrary to the United States Supreme Court’s recent decision in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011). As noted in the Exhibit C (Affidavit of Kort Gatterdam), this exception is commonly abused, as evidenced by this case.

In this case, no limited purpose justified admitting the Mickey Alexander evidence under the “course of investigation” exception. The detectives’ testimony about Mickey Alexander’s statement was more than a brief bridge gap—the testimonial statement was offered for the truth of the matter that Johnson told Alexander where to find incriminating evidence stemming from the crime. This was used as substantive evidence to prove Johnson’s guilt.

Alexander had testified at a pretrial hearing and was not unavailable to testify at trial. TR. 1685–86. Because the testimony came from two detectives instead of Alexander himself, the testimony likely carried more weight. Had Alexander been forced to testify, he would have been cross-examined about the conversation with Johnson, and the jury would have heard about Alexander’s extensive criminal history, how he was known to law enforcement as a snitch, and how he had been acting as an informant for approximately seven years. In other words, the jury could assess Alexander’s credibility, potential biases, and inducement for testifying, a layer of scrutiny removed by the trial court in permitting the detectives to testify in Alexander’s place.

In sum, the depositions reveal that the below identified and credible constitutional claims simply were not raised on the basis of an erroneous understanding of the law. This claim was strong as noted by federal Magistrate Judge Kemp who noted that:

The fact that **the trial court initially sustained several hearsay-based objections** by defense counsel to Detective Harbin’s testimony about the

information that Alexander provided demonstrates the legitimacy of Petitioner's assertion that this was an issue important to his case and worth raising on appeal.

Johnson v. Bobby, 2010 U.S. Dist. LEXIS 103351 * 37 (S.D. Ohio Sept. 30, 2010).

C. Meritorious Issues That Were Not Raised on Appeal

The Due Process Clause guarantees effective assistance of counsel on a criminal appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). Appellate counsel must act as an advocate and support the cause of the client to the best of their ability. *Anders v. California*, 386 U.S. 738 (1967); *Penson v. Ohio*, 488 U.S. 75 (1988). The failure to raise the below Propositions establish that appellate counsel were prejudicially ineffective in this case.

As noted in the attached Exhibits A, B and C, there is neither a tactical reason nor a reasonable tactical reason for failing to raise the issues below. This Court must reopen his appeal. *State v. Murnahan*, 63 Ohio St. 3d 60 (1992); S.Ct. Prac. R. 11.6.

PROPOSITION OF LAW NO. I

A defendant's right to confront a witness under the Confrontation Clause of the Sixth Amendment to the United States Constitution is violated when the State introduces and the trial court admits hearsay statements of an available witness through the testimony of another witness. U.S. Const. VI and XIV.

While Johnson was awaiting trial at the Guernsey County Jail, detectives placed another inmate, Mickey Alexander, in the cell with Johnson. Alexander had been arrested on a number of crimes and regularly provided law enforcement officers with information regarding legal activities. Tr. 88. Alexander had been acting as an informant for law enforcement officials for approximately seven years. Tr. 89. Appellant filed a motion seeking to suppress any statement made by him to Alexander based on the fact that Alexander was placed in Johnson's cell to obtain incriminating information. Johnson argued that any statements made were inadmissible because Miranda warnings were not given. Tr. 74.

During the suppression hearing, Alexander testified regarding the information he obtained from Johnson. Specifically, Alexander testified that during the time he shared a cell with Johnson, Johnson admitted to the murder of Daniel Bailey. Tr. 103. Johnson also informed Alexander about the location of the money taken from Tina Bailey, and agreed to give half of the money to Alexander if he located the money. Tr. 109. After hearing Alexander's testimony, the trial court found that the statements Johnson made to Alexander were admissible during Johnson's trial. Dkt. 122.

At trial, the State did not call Alexander as a witness despite the fact that Alexander was available as a witness. Tr. 1685-86. Instead, the State introduced Alexander's statement through the testimony of detectives Brian Harbin and Greg Clark, with whom Alexander worked.

Det. Harbin conveyed information to the jury that Alexander was roomed with Johnson at the Guernsey County Jail, that Alexander contacted him about information he received from Johnson, and that after speaking with Johnson, law enforcement officials were able to recover the money that was taken from Tina Bailey. (Tr. 1638-40, 1644-45). During Harbin's testimony, there were several times that Harbin testified about information Alexander provided to him. Specifically, the State asked Harbin whether Alexander relayed to him where he thought the money was. Harbin responded that Alexander did. (Tr. 1640).

The State continued to question Harbin regarding Alexander's statements:

Q. Was he telling you where to go?

A. That is correct. He had us get off of State street exit. From there we made a left onto State Street, another left onto west Muskingum, I believe, and then a right onto Ridge Avenue.

Tr. 1643.

Q. So you were relying solely on the information that Alexander was giving to you?

A. Yes, sir. ***

Q. On the 15th Mickey Alexander was in jail?

A. Yes, he was.

Q. But yet he was giving you this information of where the money was?
A. Correct.

Tr. 1644.

Q. And who showed you where that was?
A. Mickey Alexander.

Tr. 1647.

Defense counsel objected to these questions and the trial court twice sustained those objections. Tr. 1636, 1640. Still, the introduction of the hearsay evidence continued. Although Harbin never used the words "Mickey Alexander said," his testimony regarding his meetings with Alexander were a way to communicate hearsay evidence to the jury.

The State also introduced Alexander's statements through the testimony of Det. Greg Clark. Clark testified that law enforcement officials knew where in Zanesville to go to locate the money because Alexander directed them there. "There is 1178 is the house I believe it's a vacant house next to a parking lot right here which is what Mickey instructed us to go to this parking lot." Tr. 1587. Clark provided the jury with specifics from Alexander's statement. "Then he said immediately after the culvert look for a news stand." *Id.*

Harbin's and Clark's testimony consisted of improper hearsay statements. Harbin and Clark provided the jury with information that Johnson told Alexander where to locate the money stolen from Tina Bailey. The State should have been required to produce Alexander as a witness in order to get this evidence admitted. The State disguised this testimony as non-hearsay testimony as an attempt to circumvent the prohibition against hearsay evidence by providing the jury with the type of information that is clearly impermissible under constitutional law.

The Confrontation Clause of the Sixth Amendment provides that, "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." The Supreme Court has consistently declared that the role of confrontation in testing

accuracy is so important that the absence of confrontation at trial calls into question the ultimate integrity of the fact-finding process. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004) (citations omitted). The importance of the hearsay right to confront was addressed in *Crawford*. In *Crawford*, the Court held that testimonial, out-of-court statements offered against the accused to establish the truth of the matter asserted may only be admitted when the witness is unavailable and where the defendant has had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 36, 68.

It was error for the trial court to allow Harbin and Clark to testify about the information Alexander provided. The State should have been required to have Alexander testify so that defense counsel would have had an opportunity to cross-examine Alexander regarding Alexander's bias and possible inducement for testifying.

More importantly, Alexander was not an unavailable witness. The jurors should have been able to judge Alexander's credibility for themselves. Instead, the State was allowed to circumvent the constitutional requirements of the Confrontation Clause and have Harbin and Clark testify in place of Alexander.

Johnson had a right to confront Alexander regarding the statements about which Harbin and Clark testified. The failure of the trial court to require that Alexander testify violated Johnson's right to Confrontation and should result in the reversal of his conviction.

PROPOSITION OF LAW NO. II

A capital defendant is denied the right to the effective assistance of trial counsel when trial counsel fails to object to the admission of improper hearsay evidence. U.S. Const. VI and XIV.

The Sixth and Fourteenth Amendments guarantee the accused the right to counsel at trial. *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963). The standard for judging counsel's

effectiveness is found in *Strickland v. Washington*, 466 U.S. 668 (1984). When evaluating claims of ineffective assistance of counsel under *Strickland*, this Court must first determine if counsel's performance was deficient. *Id.* at 686–87. Second, this Court must determine if petitioner was prejudiced by counsel's deficient performance. *Id.* Appellant need not demonstrate outcome determinative error. *Glenn v. Tate*, 71 F.3d 1204, 1210–11 (6th Cir. 1995). Johnson's trial counsel rendered deficient performance by failing to continue his previously sustained objections to the admission of hearsay testimony. Trial counsel's failure prejudiced Johnson because the State was able to introduce prejudicial information without Johnson being able to test the credibility of the witness against him. *See Strickland*, 466 U.S. 668; *Crawford*, 541 U.S. at 36, 38.

The trial court allowed the State to introduce statements of Alexander through the testimony of Harbin and Clark. Johnson incorporates the previous proposition's discussion of the facts and prejudice resulting from this error. Defense counsel objected to the admission of the hearsay testimony, and the trial court sustained defense counsel's objections. Tr. 1636, 1640. Nevertheless, the State continued to introduce the hearsay evidence through Harbin and Clark with no further objections. It is arguable that defense counsel's objections properly preserved the hearsay violation issue. However, to the extent that trial counsel should have continued the objections to Harbin's and Clark's testimony, defense counsel was ineffective for failing to do so. Trial counsel's performance in failing to continue to object to the hearsay evidence was deficient and prejudicial to Johnson. The jury was provided with prejudicial information and was not allowed to test the credibility of Alexander's statements.

D. Conclusion

Appellant has shown that there are genuine issues regarding whether he was deprived of effective assistance of counsel on appeal. Appellant requests that this Application for Reopening be granted, counsel formally appointed and full briefing be permitted. S.Ct. Prac. R. 11.6 and *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

Respectfully Submitted,



KORT GATTERDAM (0040434)
Carpenter, Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Facsimile: (614) 365-9145
E-mail: gatterdam@carpenterlipps.com

-and-

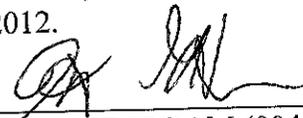


LAURENCE E. KOMP (0060142)
Attorney at Law
P.O. Box 1785
Manchester, MO 63011
Telephone: (636) 207-7330
Facsimile: (636) 207-7351
E-mail: lekomp@swbellnet

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellant Marvin Johnson's Application for Reopening Pursuant to S.Ct. Prac. R. XI, Section 5(A) was sent by regular U.S. mail to Daniel G. Padden, Office of the Guernsey County Prosecutor, 139 West 8th Street, P.O. Box 640, Cambridge, Ohio 43725, on this 12th day of April, 2012.



KORT GATTERDAM (0040434)
COUNSEL FOR APPELLANT

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

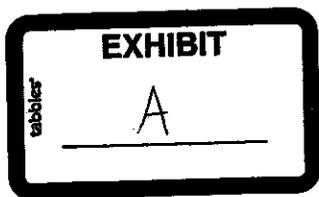
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

- - -

Marvin G. Johnson,)	
Petitioner,	)	Case No. 2:08-cv-55
vs.	)	Judge Sargus
David Bobby, Warden,	)	Magistrate Judge Kemp
Respondent.)	

- - -

Deposition of Kathleen McGarry, Esq., a witness herein, called by the Petitioner for examination under the applicable rules of Federal Civil Court Procedure, taken before me, Linda D. Riffle, Registered Diplomate Reporter, Certified Realtime Reporter and Notary Public in and for the State of Ohio, pursuant to notice and stipulations of counsel hereinafter set forth, at the offices of Carpenter, Lipps & Leland, LLP, 280 Plaza, Suite 1300, 280 North High Street, Columbus, Ohio, on Thursday, February 17, 2011, beginning at 8:46 o'clock a.m. and concluding on the same day.



MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 APPEARANCES:

2

3 ON BEHALF OF THE PETITIONER:

4 Laurence E. Komp, Esq.

5 P.O. Box 1785

6 Manchester, Missouri 56064

7 (636) 207-7330 Fax: (636) 207-7351

8 lekomp@swbell.net

9 Kort W. Gatterdam, Esq.

10 Carpenter, Lipps & Leland, LLP

11 280 Plaza, Suite 1300

12 280 North High Street

13 Columbus, Ohio 43215

14 (614) 365-4100 Fax: (614) 365-9145

15 gatterdam@carpenterlipps.com

16 ON BEHALF OF THE RESPONDENT:

17 Mike DeWine, Esq.

18 Ohio Attorney General

19 By: Seth Kestner, Esq.

20 Assistant Attorney General

21 Capital Crimes Section

22 150 East Gay Street, Floor 16

23 Columbus, Ohio 43215

24 (614) 728-7055 Fax: (888) 805-6090

25 seth.kestner@ohioattorneygeneral.gov

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

S T I P U L A T I O N S

- - -

1
2
3 It is stipulated by and among counsel for
4 the respective parties that the deposition of
5 Kathleen McGarry, Esq., a witness herein, called
6 by the Petitioner for examination under the
7 applicable rules of Federal Civil Court Procedure,
8 may be taken at this time by the Notary pursuant
9 to notice; that said deposition may be reduced to
10 writing in stenotype by the Notary, whose notes
11 may thereafter be transcribed out of the presence
12 of the witness; that proof of the official
13 character and qualification of the Notary is
14 waived; that the reading and signature of the said
15 Kathleen McGarry, Esq. to the transcript of her
16 deposition are expressly waived by counsel and the
17 witness; said deposition to have the same force
18 and effect as though the witness had signed her
19 typewritten deposition.

- - -

20
21
22
23
24
25

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1	I N D E X	
2	- - -	
3	WITNESS	PAGE
4	Kathleen McGarry, Esq.	
5	Examination by Mr. Komp	5
6	Examination by Mr. Kestner	26
7	- - -	
8	EXHIBITS	MARKED
9	Deposition Exhibit No. 1 -	13
10	Motion, Entry, and Certification	
11	for Appointed Counsel Fees	
12	Deposition Exhibit No. 2 -	17
13	State v. Marvin Johnson Issue List	
14	- - -	
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 KATHLEEN MC GARRY, ESQ.
2 of lawful age, being by me first duly placed under
3 oath, as prescribed by law, was examined and
4 testified as follows:

5 EXAMINATION

6 BY MR. KOMP:

7 Q. Could you state and spell your name for
8 the record?

9 A. Kathleen, K-a-t-h-l-e-e-n, McGarry,
10 M-c-G-a-r-r-y.

11 Q. And what's your current business address?

12 A. Mailing or physical?

13 Q. Mailing.

14 A. PO Box 310, Glorieta, G-l-o-r-i-e-t-a,
15 New Mexico 87535.

16 Q. Okay. And I know that you've conducted
17 depositions before. Have you ever been deposed
18 before?

19 A. I have not.

20 Q. Okay. So having conducted depositions,
21 you know the drill. If there's a question you
22 need me to rephrase, just ask me. And, you know,
23 we're not trying to wear you down. If you need a
24 break to make a call or for any reason, just let
25 us know and we'll accommodate you.

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 A. Okay.

2 Q. Could you briefly describe your
3 education, starting with undergraduate?

4 A. I graduated from Connecticut College in
5 1978. I did a certificate -- paralegal
6 certificate program at Dyke College in Cleveland,
7 and then I eventually went to law school and
8 graduated from Ohio State University in 1987.

9 Q. Okay. And what are your current Bar
10 admissions, state Bar admissions?

11 A. I am admitted to the Bar of Ohio and
12 New Mexico.

13 Q. And are both of those Bar status in good
14 standing?

15 A. They are.

16 Q. Okay. And I always hate to ask this
17 question, but I have to. Any suspensions or
18 disciplinary proceedings?

19 A. No.

20 Q. Are you death penalty certified in Ohio?

21 A. I am.

22 Q. Okay. And how -- have you -- When did
23 you first get that certification?

24 A. Whenever they started the certification,
25 I got it. I qualified as second chair for trial

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 and for -- as appellate counsel.

2 Q. Okay. And you're currently certified?

3 A. I am.

4 Q. Okay. And is it fair to say that you
5 were certified during the time of Mr. Johnson's
6 appeal?

7 A. That is fair to say.

8 Q. Okay. I just want to talk generally
9 before we get into -- to the issues that we're
10 here on today on focusing on the appointment. How
11 were you approached to become involved in
12 Mr. Johnson's case?

13 A. I believe I was already being -- I was
14 already cocounsel with Dennis Sipe on Darryl
15 Durr's case. And Dennis was approached about
16 doing the appeal in Marvin Johnson's case, and he
17 happened -- we happened to be having a
18 conversation, and he asked me if I wanted to do
19 the case with him.

20 Q. Okay. And he was approached by the trial
21 court judge, do you know, was it the clerk?

22 A. I'm not sure who, no.

23 Q. Okay. And you mentioned Mr. Sipe. He
24 ended up being your cocounsel in this case?

25 A. He did.

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 Q. Okay. And had -- was it just that -- You
2 mentioned also the Durr case, so you're
3 anticipating now my -- did you -- have you -- was
4 it -- Any other cases you've worked with Mr. Sipe,
5 other than Mr. Durr?

6 A. No. That was my first contact -- The
7 Durr case was my first contact with Dennis.

8 Q. Okay. And just so the record is clear,
9 was Durr a direct appeal, or was it --

10 A. Durr was a federal habeas case and he was
11 in the Sixth Circuit when Dennis and I got on it.

12 Q. Okay. And just in general, not focusing
13 specifically on Mr. Johnson's case, when you
14 initially receive an appointment in a capital
15 appeal, how do you start the process of getting to
16 the -- to the end product, which is the brief?
17 How do you become involved in --

18 A. I guess I'm not sure what you're asking
19 me. Are you asking how I --

20 Q. What's the first thing --

21 A. -- prepare a brief or --

22 Q. -- you do -- What's the first thing you
23 do when you're appointed on the case?

24 A. I write a letter to the client and
25 introduce myself to the client and let them know

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 that I'm on the case.

2 Q. Okay. And then?

3 A. Then I prepare -- I check to see what, if
4 any, of the documents that needed to be filed are
5 filed. In other words, was the notice of appeal
6 filed? Was the transcript request filed? Is
7 there a date -- execution date; so if so, I need
8 to file a stay of execution. So those are the
9 initial things that I do.

10 Q. Okay. And once all of that's in order,
11 how do you -- do you -- Do you make sure that the
12 record's complete?

13 A. I do. I -- Once the record is filed, I
14 generally come -- go to the court and look through
15 the record, see if there's anything obviously
16 missing from -- based on the trial court docket,
17 you know, talk to my client and see, you know, if
18 there were any hearings that maybe I missed. So
19 that's generally what -- Generally, I get a copy
20 of the original papers from the Ohio Supreme
21 Court, as well, which we did in this case.

22 Q. Okay. In Mr. Johnson's case, did you,
23 yourself, personally obtain -- have a copy of the
24 entire record?

25 A. I did.

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 Q. Okay. And did you have an opportunity to
2 review the entire record?

3 A. I did.

4 Q. Okay. Do you recall how many times you
5 met with Mr. Johnson?

6 A. I do not. I believe at the time that I
7 was on his case, I was living in New Mexico. And
8 my practice is whenever I come to Ohio, I meet
9 with my client. And I tell them upfront that
10 that's the situation. And, oddly enough,
11 sometimes I end up meeting more with my clients
12 and cocounsel who live in Ohio.

13 Q. All right. I think I may understand
14 that.

15 Why is it important, would you say, to
16 meet with -- with a client during the direct
17 appeal process?

18 A. Well, you know, that's the first step
19 after they get sentenced to death. And so I think
20 they're at a very fragile stage. They don't know
21 what the process is. They're hearing all the
22 stories from people in the row. And I -- you
23 know, I'd like to make sure that they're involved
24 in the appeal if they want to be. Some don't want
25 to be, but I try to make sure that they're

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 involved if they want to be.

2 Q. Do you recall how many times you were
3 able to meet with Mr. Sipe?

4 A. I think most of my contact with Dennis
5 was done on the phone. I don't -- you know, until
6 we were actually finishing up the brief.

7 Q. And you ended that with what -- you were
8 tailing away with until we ended up filing a brief
9 or --

10 A. Well, it was a very strange case because
11 we ended up having to file two motions to
12 supplement, if I can recall right. I know there
13 was at least one. We got supplementation and we
14 were unsure if the time restarted after the --

15 Q. Reset the clock?

16 A. -- after the supplemental brief was
17 filed. And I contacted the Supreme Court Clerk's
18 office to talk to them about that. They were
19 unable to give me any answer that would indicate
20 that we were going to be okay if we -- our time
21 ran from the date of the supplementation, so we
22 were kind of put in a bind to get the brief
23 filed --

24 Q. Right.

25 A. -- within a shorter period of time.

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 So I happened to be, I believe, in Ohio
2 for something or another, and I just remained here
3 until the brief was done.

4 Q. Okay. And in those final days, were you
5 working at Mr. Sipe's office, or were you
6 working -- you know --

7 A. At that time, my husband and I still
8 owned our house down in Belpre, Ohio, which is not
9 very far from Marietta, and so I was working
10 there.

11 Q. Okay. All right. And let me -- At the
12 time of Mr. Johnson's appeal, how did you keep
13 track of your billable time for -- did you have a
14 program; do you recall?

15 A. I'm trying -- I had numerous programs. I
16 have been unhappy with a lot of them, so I'm
17 trying to think what I had at the time. I had
18 some sort of a program.

19 Q. Okay.

20 A. I use QuickBooks now. I might have been
21 using Amicus Attorney at the time.

22 Q. Okay. And when you made those entries,
23 would they be contemporaneous to the -- to the
24 action you took, or would you write a note and
25 then enter it at some point?

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 BY MR. KOMP:

2 Q. I hand you what's marked as Depo
3 Exhibit 1. And just take a moment and let me know
4 when you've had a chance to glance over it.

5 A. Okay.

6 Q. Okay. What does that appear to be?

7 A. This appears to be my time log and
8 billing request for the Ohio Supreme Court in
9 Marvin Johnson's case.

10 Q. And on Page 1, is that -- is that your
11 signature?

12 A. That is my signature.

13 Q. Okay. And also on Page 2?

14 A. Correct.

15 Q. And did you end up signing each and --
16 the page that's sort of in --

17 A. I did.

18 Q. And those are all your signatures?

19 A. They are.

20 Q. Okay. And this is how you prepared, at
21 the time -- or, is this a fair and accurate copy
22 of the voucher you submitted in Mr. Johnson's
23 case?

24 A. It is a fair and accurate copy of the
25 voucher I submitted.

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 Q. Okay. And what period did this voucher
2 cover?

3 A. It appears to cover from June 14th of
4 2004 to December 20th of 2006.

5 Q. Okay. And would that be fair to say
6 that's the entirety of the case, while it was at
7 the Ohio Supreme Court stage?

8 A. While it was at the Ohio Supreme Court
9 stage, it was.

10 Q. Okay.

11 A. I do believe I -- I prepared and filed
12 his cert petition, which is not reflected here.

13 Q. Okay. Now -- And who would have been --
14 Would you have prepared a voucher for that for the
15 Ohio Supreme Court, or did you just eat that time?

16 A. I just ate it.

17 Q. Okay. I'm familiar with that, too.

18 A. Indeed.

19 Q. In Mr. Johnson's case, do you recall
20 developing an issue list?

21 A. I did.

22 Q. Okay.

23 A. I did -- I do.

24 Q. And how was that compiled?

25 A. Generally, what I do is I keep notes as I

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 go through the transcript. And as I'm going
2 through the transcript, if I come up -- something
3 that strikes me as something that needs to be
4 looked at further, I make a note of it. And then
5 when I finish the transcript and reviewing
6 everything, I create an issue list that has the
7 issues and the transcript citations or record
8 citations to it so I know where to go to look
9 further on that issue.

10 Q. Okay. So would it be fair to describe
11 that as you condensed sort of your notes that
12 you've taken and -- into a separate document
13 that's -- be an issue list?

14 A. That would be fair.

15 Q. Okay. And what involvement did Mr. Sipe
16 have with -- with developing the issue list in
17 Mr. Johnson's case, if you recall?

18 A. I believe that what happened is that
19 after we both finished reading the transcript, we
20 each created a list of issues, and we talked about
21 what issues we thought were there. Some of them
22 we both had on our list, some of them one or the
23 other of us had. And so then I created a master
24 list of all the issues that, you know, we had,
25 either that we both had or that one or the other

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 of us had.

2

- - -

3 Thereupon, Deposition Exhibit No. 2 was
4 marked for purposes of identification.

5

- - -

6 BY MR. KOMP:

7 Q. Okay. And let me go ahead and I can hand
8 you what's marked as Deposition Exhibit 2.

9 What does that appear to be?

10 A. This appears to be the Issue List in
11 Marvin Johnson's case.

12 Q. Okay. And earlier, you used the term
13 master list. Would this appear to be what you
14 described as the master list?

15 A. It does appear to be that.

16 Q. Okay. And does this -- Is this a fair
17 and accurate copy of the master list that you
18 developed in Mr. Johnson's case?

19 A. It appears to be. I mean, I would have
20 to compare it with the one on my computer, but it
21 would appear that it is, yes.

22 Q. Okay. And is it color coded?

23 A. It is color coded.

24 Q. Okay. And can you explain that?

25 A. When Dennis and I created the issue list,

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 we then went through the list and we each took
2 issues, either because we were interest --
3 specifically interested in them or we thought that
4 we knew a lot about that issue. And so I
5 highlighted in green on the issues that were -- I
6 was responsible for and I highlighted in yellow
7 the issues that Dennis was responsible for.

8 Q. Okay. And when you say, "responsible
9 for", what does that mean?

10 A. That means researching and writing the
11 issue.

12 Q. Okay. And do you recall when the
13 decision was made as far as who was responsible
14 for what issue?

15 A. I do not.

16 Q. Okay. I want you to look at Page 6, if
17 you could. And it's the second -- It's
18 color-coded yellow, and yellow would be which --
19 which attorney's issues?

20 A. Dennis's.

21 Q. Dennis's issues.

22 And it reads, "Confrontation issues with
23 Mickey Alexander." Do you see that on that?

24 A. I do.

25 Q. Okay. Do you recall who suggested that

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 issue be on the issue list?

2 A. I do not.

3 Q. Okay. Do you recall any specific reason
4 why Dennis was assigned that issue versus
5 yourself?

6 A. Actually, I don't --

7 Q. Okay.

8 A. -- recall that.

9 Q. Are you familiar with -- you used the
10 term -- or, the term on the master list is
11 "confrontation issues". Let me strike that, back
12 up a little bit.

13 Did you, yourself, generate the master
14 list?

15 A. I did.

16 Q. Okay. So you used the terminology
17 "confrontation issues"?

18 A. I did.

19 Q. Okay. What -- Would you agree the
20 confrontation clause or confrontation issues are
21 important Constitutional questions, protections?

22 A. I would.

23 Q. Okay. Why is that?

24 A. Well, particularly at this time, the
25 Crawford case had come out within the previous

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 year, so it was an issue that kind of was being
2 more revived than it had been prior to that. So,
3 obviously, the Sixth Amendment right to something,
4 that's important to all clients, particularly
5 death row clients.

6 Q. Okay. And you mentioned Crawford.
7 What's your understanding of the holding in
8 Crawford?

9 A. My understanding is that statements of
10 witnesses that are testimonial cannot be admitted
11 into a trial without the witness testifying,
12 unless the witness is unavailable and defense
13 counsel has had an opportunity to cross-examine.

14 Q. Okay. And you -- as you noted, Crawford
15 came out in 2004 and Mr. Johnson's brief was in
16 2005. So you'd agree there would -- Crawford was
17 fully applicable to Mr. Johnson's case?

18 A. I would agree it's fully applicable. I
19 would say that it all hadn't been sorted out. I
20 mean, the words "testimony" and "nontestimonial"
21 were kind of still and are still now being
22 defined.

23 Q. Okay. Are you familiar with the
24 definition of hearsay?

25 A. I am.

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 Q. Okay. And what's -- what's the
2 definition of hearsay?

3 A. It's a out-of-court statement offered for
4 the truth of the matter asserted.

5 Q. Have you relied on Crawford in other
6 cases?

7 A. Well, I have one right now that I'm
8 actually relying on Crawford; so, yeah, I guess
9 the answer to that would be yes.

10 Q. Okay. How about in 2004, 2005? I mean,
11 like you said, it was right after Crawford.

12 A. Well, most of the cases I had in 2004 and
13 2005 were federal cases, and so, again, it wasn't
14 determined at that time whether Crawford was
15 either going to -- was even going to be applicable
16 to a case in federal court. So probably at that
17 time, not as much.

18 Q. Okay. Do you recall the name of Mickey
19 Alexander from Mr. Johnson's case?

20 A. I do.

21 Q. Okay. And who is Mickey Alexander?

22 A. He was the person I would define as the
23 snitch in the case who had been celled with Marvin
24 and was trying to obtain information from Marvin
25 concerning the case.

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 Q. And do you recall if he was successful in
2 obtaining --

3 A. He was.

4 Q. -- information?

5 Okay. And would you agree that the
6 information he obtained was harmful to
7 Mr. Johnson?

8 A. Define "harmful".

9 Q. Well, would you agree he represented a
10 source of information that led to the introduction
11 of the money which helped establish the robbery;
12 he led to the introduction of a key from the
13 wallet to the victim's home --

14 A. He did, but that had all been testified
15 to, as well, by the --

16 Q. -- shoes and laces --

17 A. -- wife --

18 Q. -- that helped establish --

19 A. -- or, ex-girlfriend.

20 Q. -- the kidnapping?

21 A. Yes.

22 Q. So the State did rely on him to collect
23 evidence?

24 A. They did.

25 Q. Okay. Do you agree discrediting him

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 would have been important?

2 A. Yes, I do.

3 Q. Okay. Do you recall if Mr. Alexander
4 testified at Mr. Johnson's trial?

5 A. He did not testify.

6 Q. Okay. And looking at your Depo
7 Exhibit 2, Page 6, could you please read what it
8 says under, "Confrontation issues with Mickey
9 Alexander"?

10 A. It says, "State able to get in his
11 statements without any confrontation of witness."
12 The transcript Page 1585, "Mickey directed them
13 where to go." In transcript 1634 to 1648, "Harbin
14 relays MA information."

15 Q. Okay. So your -- your master issue list
16 reflects two different cites where -- where they
17 were able to get in statements without the defense
18 ability to confront Mr. Alexander, and one of
19 those covering 14, 15 pages.

20 Do you recall in those -- and I know it's
21 been a long time and I have -- if you want to read
22 it, those transcript pages, we'll -- we can
23 provide them to you. Do you recall that two
24 defense objections were sustained within that 14-,
25 15-page window of what's described on the issue

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 list?

2 A. I do recall that.

3 Q. Okay. And what was the basis of the
4 defense objections?

5 A. Hearsay.

6 Q. Okay. Do you recall -- Do you recall if
7 the State agreed that this was hearsay?

8 A. I believe during one of the objections,
9 they did agree.

10 Q. Okay. Do you have a recollection, given
11 that -- that this is on the issue list assigned to
12 Dennis, of why this issue is not in the final
13 brief?

14 A. My recollection was that Dennis decided
15 to present the issue as a Massiah violation rather
16 than a Crawford violation.

17 Q. Okay. And you -- And I'm using your
18 terminology, "Dennis decided". Were you consulted
19 with that decision, or were you informed of that
20 decision after it had been made?

21 A. I don't have any specific recollection of
22 a conversation.

23 Q. Okay. How was that decision -- Do you
24 recall how that decision was communicated to you?

25 A. My memory is that I discovered it when I

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 read his draft of the brief -- or, his draft of
2 his issues.

3 Q. And did he ever explain why he converted
4 the issue into a Messiah issue?

5 A. Not that I recall.

6 Q. Okay. Since this was his issue, do you
7 know if the issue was researched, the Crawford
8 question, the confrontation question, was
9 researched before that determination was made?

10 A. I do not.

11 MR. KOMP: Step out for a couple minutes.
12 I think we're very close.

13 (Discussion held off the record.)

14 MR. KOMP: Just a couple more, and then
15 Mr. Kestner.

16 BY MR. KOMP:

17 Q. You were talking about how the -- when
18 the -- when his draft of the brief came to you,
19 that it wasn't a confrontation issue; it came to
20 you as a Messiah issue. Do you recall how close
21 that was to when the brief was filed?

22 A. Very close.

23 Q. A day? Two days? A couple hours?

24 A. It wouldn't have been more than two days.
25 It would have been within the last two days.

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 Q. Okay. And when you saw that, do you have
2 any recollection of e-mailing Dennis or calling
3 Dennis and asking him, you know, "What -- What
4 happened to the confrontation issue? Why is it a
5 Massiah issue?"

6 A. I do not.

7 Q. Okay. Would you agree that there is a
8 difference between a Massiah issue and a
9 confrontation issue?

10 A. I would.

11 Q. And did, after the fact, after the brief
12 was filed, did -- do you recall any conversation
13 with Dennis about why a Massiah issue versus a
14 confrontation issue?

15 A. I do not recall.

16 MR. KOMP: Okay. That's all I have.

17 - - -

18 EXAMINATION

19 BY MR. KESTNER:

20 Q. I've just got a couple questions.

21 Was your working relationship with
22 Mr. Sipe good on this case?

23 A. Yes. I mean, it was difficult for --
24 sometimes for me to reach him, but yeah, we had a
25 good relationship.

MCGINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 Q. During -- While working on this brief,
2 did you have any reason to question Mr. Sipe's
3 competency to handle the appeal?

4 A. No, I did not.

5 Q. Okay. Did you have any reason to doubt
6 Mr. Sipe's judgment on addressing issues in the
7 brief?

8 A. No, I did not.

9 MR. KESTNER: Okay. That's all I've got.

10 MR. KOMP: We have nothing.

11 You know the drill. You can waive or
12 read it if you want to.

13 MR. GATTERDAM: Never been asked it from
14 this side, have you?

15 THE WITNESS: No, I haven't, as a matter
16 of fact.

17 I'll waive.

18 (Signature waived.)

19 - - -

20 (Thereupon, the deposition was concluded
21 at 9:14 o'clock a.m. on Thursday,
22 February 17, 2011.)

23 - - -

24

25

ORIGINAL

ORIGINAL

SUPREME COURT OF OHIO

ON COMPUTER - JJ

MOTION, ENTRY, AND CERTIFICATION FOR APPOINTED COUNSEL FEES

State of Ohio,
Plaintiff

V.

MARVIN G. JOHNSON
Defendant

FILED
FEB 09 2007
MARCIA J. MENGEL CLERK
SUPREME COURT OF OHIO

Supreme Court No. 04-1163

Appeals Court No. N/A

Trial Court No. Guernsey County #03-CR-116

MOTION FOR APPROVAL OF PAYMENT OF APPOINTED COUNSEL FEES AND EXPENSES

The undersigned, having been previously appointed counsel for the defendant for the appeal to this court, as evidenced by the attached entry of appointment, now moves for an order approving payment of fees earned and expenses incurred as reflected by the itemized statement of the reverse hereof, pursuant to R.C. 2941.51.

Hours Worked:	IN COURT 0.8	OUT OF COURT 200.4	Expenses (if any):	\$ 147.40
---------------	-----------------	-----------------------	--------------------	-----------

O.R.C. charge section number, name and classification

- A. Aggravated Murder with death penalty specifications, RC 2903.01, 2929.04 (A) (7)
- B. Kidnapping, RC 2905.01 (A) (3)
- C. Rape, RC 2907.02 (A) (2)
- D. Aggravated Robbery, RC 2911.02 (A) (1)

SUPREME COURT DECISION State v. Marvin Johnson, 112 Ohio St3d 210, 2006-Ohio-6404	TERMINATION DATE
Affirmed	

\$TT251(Y'S1\$M/ Kathleen McGarry	SOC. SEC. NO. [REDACTED]	\$TT251(Y'S,G1\$TU5(<i>Kathleen McGarry</i>
\$TT251(Y'S\$DD5(SS 1UMB(5\$1D\$T5EET P.O. Box 310, Glorieta, NM 87535	CITY	STATE ZIP

INFORMATION BELOW TO BE COMPLETED BY SUPREME COURT AND COUNTY AUDITOR ONLY

JUDGMENT ENTRY

This court finds that counsel performed the legal services set forth in the itemized statement on the reverse hereof, and that the fees and expenses hereinafter approved are reasonable. IT IS THEREFORE ORDERED that appointed counsel fees are approved in the sum of \$ _____ and expense in the sum of \$ _____ for a total allowance of \$ _____ which amount is ordered certified to the _____ County Auditor for payment.

SEE ATTACHED ENTRY

SEE ATTACHED ENTRY

CHIEF JUSTICE

CERTIFICATION

The County Auditor, in executing this certification, attests to the accuracy of the figures contained herein. A subsequent audit by the Ohio Public Defender Commission and/or Auditor of the State which reveals unallowable or excessive costs may result in future adjustments against reimbursement or repayment of audit exceptions to the Ohio Public Defender Commission.

COUNTY NUMBER	WARRANT NUMBER	WARRANT DATE
---------------	----------------	--------------

COUNTY AUDITOR

PET. EXHIBIT
tabbies
1

McGarry Law Office
Kathleen McGarry
 Files > Facts > Time Spent > My Time

Printed by: Kate McGarry

Date	Duration	Description
12/20/2006	0.80	Motion for Reconsideration
12/13/2006	1.40	review decision, letter to client, e-mails to co-counsel, telephone call to client
09/19/2006	0.50	Phone call from client, follow-up
07/07/2006	0.30	Telephone Conference w/client
06/20/2006	1.20	Reviewing Documents final prep for oral arg
06/20/2006	0.60	Other Misc. travel to/from court
06/20/2006	0.80	Trial/in Court --oral arg
06/19/2006	8.60	Reviewing Documents , prepare for oral arg, moot court
06/18/2006	6.60	Reviewing Documents, preparation for oral argument
06/17/2006	5.10	Reviewing Documents --prepare for Oral arg.
06/06/2006	0.80	Notice of additional authority
05/26/2006	0.50	Send Johnson materials to moot judges -
04/27/2006	1.20	Interview & Conferences with Client
11/09/2005	0.20	Telephone Conference w/ client
06/01/2005	2.30	Reviewing Documents --reply brief
05/31/2005	8.10	Reviewing Documents and writing reply
01/24/2005	3.00	Johnson Brief - travel to Col, file brief, check on records
01/23/2005	12.00	Legal Research & Writing Finish Brief
01/22/2005	12.90	Legal Research & Writing draft o s crt brief, while committing issue and stmt of case/facts
01/21/2005	8.00	Legal Research & Writing, Ohio S. Crt Brief
01/20/2005	7.30	Legal Research & Writing , Ohio S. Crt brief
01/19/2005	10.20	Legal Research & Writing, Ohio S. Crt Brief
01/17/2005	2.20	Legal Research & Writing juror issue
01/16/2005	7.40	Legal Research & Writing, draft brief
01/15/2005	3.00	Obtain & Review record, review state court record
01/15/2005	4.60	Legal Research & Writing, research and draft juror issues
01/13/2005	0.80	Other Misc. travel to Marietta, drop off copy of s. crt record
01/12/2005	5.00	Other Misc. travel to Columbus, S. Crt clerk's office, meet with Pam, pick up questionnaires, travel to Belpre
12/16/2004	3.20	Issues List
12/15/2004	1.60	Issues list
12/08/2004	0.80	Legal Research & Writing, second motion to supplement
12/06/2004	1.00	Motion to supplement jury questionnaires
12/05/2004	0.20	E-mail correspondence with Prude-Smithers, Pam; Correspondence
12/01/2004	2.00	Interview & Conferences with Client
12/01/2004	0.50	Meet with co-counsel
12/01/2004	0.70	Formulate Issues list
11/30/2004	7.00	Read Transcript
11/30/2004	11.70	Travel to airport and then to OH and hotel
11/29/2004	8.50	Read transcript
11/28/2004	3.50	Read transcript
11/27/2004	6.00	Read transcript
11/26/2004	8.30	Read transcript
11/25/2004	2.20	Reviewing Documents Read transcript
11/24/2004	4.60	Read Transcript

Kathleen McGarry

11/23/2004	0.80	Read transcript
11/22/2004	3.80	Read transcript
11/20/2004	0.80	Read Transcript
11/16/2004	0.80	Read Transcript
11/03/2004	0.80	Motion to Supplement the record
10/19/2004	0.50	Call Mandl for reservations -; Correspondence with client, co-counsel
10/16/2004	0.30	E-mail correspondence with Sipe, Dennis
10/04/2004	4.40	Reviewing record at clerk's office
09/23/2004	2.00	Read transcript
09/21/2004	0.70	Read transcript
09/20/2004	3.40	Read Transcript
08/09/2004	2.00	Meet; Meeting with client
07/04/2004	1.10	Drafting Documents, copies and letters on appellate documents
06/29/2004	1.00	Drafting Documents, draft motion for stay of execution and letters
06/28/2004	0.20	E-mail correspondence with Sipe, Dennis Correspondence from client, e-mail to co-counsel
06/14/2004	0.60	E-mail correspondence with Sipe, Dennis,; Reviewing Documents, entry and trial court opinion, draft IFP

Kathleen M. Gandy



***** WELCOME TO *****
 NEWPORT POST OFFICE
 NEWPORT, OR 97365-3818
 07/16/04 01:45PM

Store USPS Trans 43
 Wkstn sys5002 Cashier KBNW5T
 Cashier's Name DELMER
 Stock Unit Id WIN03
 PO Phone Number 800-275-8777
 USPS # 4067870565

CEIPT

USE

Fragile Liquid
 Perishable
 Insurance Coverage: *NO*

002.....
 7.84 +
 2.20 +
 10.04 *

GLORIETA NM 97335
 SEP 04 2004
 USPS

69-784
 ush dutor
 USA

Mansfield 07
 PS Form 3813-P, May 2004 See Reverse for Instructions

TOTAL \$10.04

ALL SALES FINAL ON STAMPS AND POSTAGE
 REFUNDS FOR GUARANTEED SERVICES ONLY

WE DELIVER FOR YOU

CUSTOMER COPY

- 1. First Class 1.06
 Destination: 43725 - pros
 Weight: 3.20oz
 Postage Type: PVI
 Total Cost: 1.06
 Base Rate: 1.06
- 2. 83c Stamp 0.83
- 3. 23c Stamp 0.23
- 4. 37c Stamp 0.37
- 5. First Class 1.06
 Destination: 45750 - co-counsel
 Weight: 3.50oz
 Postage Type: PVI
 Total Cost: 1.06
 Base Rate: 1.06
- 6. First Class 2.21
 Destination: 43215 - ent
 Weight: 8.70oz
 Postage Type: PVI
 Total Cost: 2.21
 Base Rate: 2.21
- 7. First Class 1.06
 Destination: 44901 - client
 Weight: 3.30oz
 Postage Type: PVI
 Total Cost: 1.06
 Base Rate: 1.06
- 8. 7.40 Egret Book 7.40

Subtotal 14.22
 Total 14.22

MasterCard 14.22

<23-903400752-98>

MasterCard ACCT. NUMBER EXP CLERK TO

AUTH 047009 CREDIT TRANS # 457

ALL SALES FINAL ON STAMPS AND POSTAGE.
 REFUNDS FOR GUARANTEED SERVICES ONLY.

Order stamps at USPS.com/shop or call
 1-800-Stamp24. Go to
 USPS.com/clicknship to print shipping
 labels with postage. For other
 information call 1-800-ASK-USPS.

Number of Items Sold: 8

Thank You
 Please come again!



TownePlace Suites Worthin
 7272 Huntington Park Drive
 Columbus, OH 43235
 614-885-1557

Johnson

KATHLEEN MCGARRY
 PO BOX 310
 GLORIETA NM 87535-0310

 MCGARRY LAW OFFICE

Room: 229 QAZC
 Room Type: ONBR
 No. Of Guests: 1
 Rate: 89.00
 Clerk: JLR

Arrive Date	Reference Number	Description	Charges	Credits
16Jun06	J2229	Room Charge-Studio	89.00	
16Jun06	T1229	Occupancy Sales Ta	6.01	
16Jun06	T3229	City Tax	4.54	
16Jun06	T4229	County Tax	4.36	
17Jun06	J2229	Room Charge-Studio	89.00	
17Jun06	T1229	Occupancy Sales Ta	6.01	
17Jun06	T3229	City Tax	4.54	
17Jun06	T4229	County Tax	4.36	
18Jun06	J2229	Room Charge-Studio	89.00	
18Jun06	T1229	Occupancy Sales Ta	6.01	
18Jun06	T3229	City Tax	4.54	
18Jun06	T4229	County Tax	4.36	
19Jun06	J2229	Room Charge-Studio	89.00	
19Jun06	T1229	Occupancy Sales Ta	6.01	
19Jun06	T3229	City Tax	4.54	
19Jun06	T4229	County Tax	4.36	
20Jun06	VI07:36AM	Visa		415.64-

* THIS CARD WAS * * * * *				
* ELECTRONICALLY * * * * *				
* SWIPED ON 16Jun06 * * * * *				

* CARD #: * * * * *				
* Amount: 415.64 Auth: 045916 * * * * *				
* ** Signature on File ** * * * * *				

** BALANCE **			.00	

Johnson

Marriott Rewards Club Member:

Retain this receipt for your records.

IN THE COURT OF COMMON PLEAS
GUERNSEY COUNTY, OHIO

2011 JUN 11 AM 9:41

CLERK OF COURTS
GUERNSEY CO., OHIO

STATE OF OHIO,

PLAINTIFF,

VS.

MARVIN GAYE JOHNSON

DEFENDANT.

CASE NO. 03-CR-116

ENTRY

* * * * *

Attorney Dennis L. Sipe and Attorney Kate McGarry are hereby appointed to represent Defendant as Appellate Counsel, pursuant to Superintendent Rule 20.

The Court Reporter is **ORDERED** to prepare transcript of all proceedings and provide copies to the Prosecuting Attorney and Appellate Counsel. Cost of transcript shall be paid by the Court due to Defendant having been found indigent.



JUDGE DAVID A. ELLWOOD

cc: Prosecuting Attorney
Dennis L. Sipe & Kate McGarry, Appellate Counsel
Rhonda Boney, Court Reporter
Defendant

THE SUPREME COURT OF OHIO

In the Common Pleas Court of Guernsey County

COPY

Disposition of a Capital Case by the Trial Court

This form is used pursuant to Rule 20 of the Rules of Superintendence for the Courts of Ohio to report the disposition of a capital case. Return this form within two weeks of disposition to: Cindy Johnson, Supreme Court of Ohio, 30 E. Broad Street, Third Floor, Columbus, OH 43215-3431.

Defendant's Name: Marvin Gaye Johnson Case No. 03 CR 116

Lead Trial Counsel: Jack A. Blakeslee Trial Co-Counsel Andrew J. Warhola

Outcome of the Proceedings in this Court:

- Found not guilty
- Plead guilty
- Plead guilty to lesser offense: _____
- Found guilty of aggravated murder & specification by jury
- Found guilty of lesser offense by jury: _____
- Found guilty of aggravated murder & specification by three judge panel
- Found guilty of lesser offense by three judge panel: _____
- Other: _____

Sentence: Death

Complete the following ONLY if the defendant was sentenced to death. Attach a copy of the sentencing entry.

This court has appointed the following two counsel to represent defendant on appeal:

Name: Dennis L. Sipe
 Atty. Reg. No. 0006199
 Address: 322 Third Street
Marietta, Ohio 45750
 Telephone: (740) 373-3219

Name: Kathleen McGarry
 Atty. Reg. No. 0038707
 Address: P.O. Box 310
Glorieta, NM 87535
 Telephone: 505-757-3989

Certified under Sup.R. 20 as:

- Lead Counsel
- Co-Counsel
- Appellate Counsel

Certified under Sup.R. 20 as:

- Lead Counsel
- Co-Counsel
- Appellate Counsel

Judge: Richard A. Ellard

Date of Appointment: June 11th 2004

ATTORNEY CERTIFICATION

We hereby accept appointment as appellate counsel in this case, affirm that we are currently certified under Sup.R. 20 to accept appointment as appellate counsel, and certify that this appointment will not create a total workload so excessive that it interferes with or prevents the rendering of quality representation in accordance with constitutional and professional standards.

[Signature]
 Appellate Counsel Date 6-15-04

[Signature]
 Appellate Counsel Date 6-21-04

STATE V. MARVIN JOHNSON

ISSUE LIST

[REDACTED]

Dennis' Issues

PRE-TRIAL

Competency/procedure

- Tr. 20--Motion filed with suggestion of Incompetency
- Tr. 36—DC withdraws suggestions of incompetency
- Tr. 2073 Δ wants the death penalty, wants it over with
- Tr. 2074-DC says competency exam is in order
- Tr 2079-Δ says he wants counsel relieved of their duties, like he requested on March 10
- Tr. Trial court denied request for competency exam after Δ questions Tina 2183 renews motion for mental eval, that was previously filed and withdrawn
- court grants in part and denies in part
- Any problems with procedure--Δ found competent

VOIR DIRE

[REDACTED]

- Were questionnaires destroyed? (Tr470, 668)
- -Tr. 430 crt encourages jurors to not answer questions to refer counsel to questionnaires.

[REDACTED]

Tr. 1090-Delbert Bumgardner

- Prison guard at Belmont
- Allegations that he and his partner assaulted an inmate
- J tells DC your mitigation does not supercede this
- Wants defense to prove that mitigating factors outweigh aggravating circumstances



- Tr. 1281 DC uses a preemptory challenge

Tr. 979 Phyllis Kritz

- Thinks DP is a deterrent
- Religious beliefs support it
- Society is better protected with it
- Tr. 1281 DC uses a preemptory challenge

Tr 1255 Paul Starr

- Feels dp should be used any time there is a killing
- Considers himself a strong supporter of DP
- Would have to prove mit outweighs agg

[REDACTED]

[REDACTED]

- Tr. 640-says there are two specifications
- Tr. 739-reads both alternatives in A& spec, but he was not indicted on both
- Tr 812-crt says the agg circumstance calls premeditated murder, prior calc and design (*this juror was excused for med reasons*)
- Tr 822 crt says those specifications are the aggravating circumstances in Ohio law and there are 2 alleged in this case, prior calculation and design and principal offender Crt ask parties is that correct—Both say yes (*this juror is later excused*)
- Tr. 851 crt tells DC to use prior calculation and design and principal offender (juror later Preempted by DC)
- Tr. Reads that there are 2 agg circumstances (This juror is seated)
- Tr. 871-888 court reads “2” agg circumstances, finally warhola tells court he is wrong and juror (who is later seated) is brought back in for reinstruction
- Tr. 898 Messed up weighing process—if you find the mit factors outweigh the agg cirm (this juror is seated)
- Tr, 958-the fact that there was a murder with prior calculation and design that allow you to consider DP (excused for cause)

But then. . .

- Tr. 1312 tells jury if there was a different instruction on spec in voir dire, they are instructed to disregard it.

DC fails to challenge for cause

Tr. 766 Shirley Lucas

- You can be brought up in bad environment and overcome it with will power
- Would not give physical or sexual abuse any weight

Tr. 781 Barbara Grant (seated as a juror)

- She is concerned about the amount of money to support someone for life in prison
- She is afraid society would not be protected if a life sentence imposed
- She says she could not vote for a life sentence if a child deliberately murdered—then she says she could

TR. 1056 Sara Danadik

- Believes a premeditated murder of a child warrants death (this juror is seated)

Tr. 1182 Russell Landers//

- Corrections officer at Noble Corr.

TRIAL

Victim Character Evidence

TR. 1328—1330--Opening statement
Tr. 1894-1899 Tina Bailey testimony,
1898 shows 7th grade picture of V

Problems with Specification

See voir dire stuff

Verdict form on ct 2 spec is not what indictment says (tr 2267

Tr 2178 crt says verdict forms were reviewed by both sides and approved

Pros elects to have Δ sentenced on ct 2'
crt makes two specs out of one
pros. says only one of three necessary
Motion 36
Pros. says kidnap or rape or agg robbery
Tr 2305 Merger of counsts and specs//
Motion 35
Tr. 2349 prosecutor says two specs

Insufficiency of Kidnapping

- Tr. 688 Pros tells prospective jurors that Δ beat him to death then tied him up
- TR 1577-believes after investigation that murder took place upstairs
- Tr 1620-Harbin is confident he was assaulted and killed in living room
- TR 2014 Lee testifies there was no question he was alive when he was tied up
- Tr 2027-all injuries were inflicted before ligatures were placed on hands and feet
- 2039 R. 29 on kidnapping
- R. 2163--2171 R. 29 after defense case

 . . of to be tied to felony agg murder and spec

Sufficiency of rape and agg robbery??
Tr 2043-2045 Rule 29

Jury instructions

1321—gist of the offense
1327 pros and defense approve instruction
2253-Gist of the offense
RD-willing to act
Tr. 2162 crt denies LIO of sexual battery and abuse of a corpse

IAC

Tr. 1342-in opening says he is not going to dispute most of what Pros. said
Tr 1350 Conceded guilt on agg murder with prior calc and design, not often
I say my client killed
DC says at beginning of penalty phase it is an “uphill battle”

Failure to see error in verdict form
Fails to object to admission of all trial phase exhibits in penalty phase
But pros later removes robbery exhibits (2624)

[REDACTED]
Tr 1697, crt brings up, but waiver never signed??
Dc says he discussed with Δ and Δ agreed
Depo p. 8 DC waives Δ's presence

Bias by trial court??

Tr. 2133 Δ says he wants the death penalty, court says "well under the law you have the right to receive it"

Improper interference with trial by court

Tr 1652 crt is interested in saving time, wants DC to stipulate on shoe laces—DC says no

Trial court comment about Δ being a fool

Appropriateness and proportionality

Possible Issues Suggested ????

These are issues mentioned by one of us or Δ, look into and decide if worth raising

Ex parte motion for forensic pathologist

Tr.117—motion heard

1/16/04—COURT GRANTS MOTIONS

Tr. 209—no report yet from forensic pathologist

[REDACTED]
Tr. 167

Δ has on street clothes and stun belt, it is on his right leg and not visible

Δ asks for attorneys to be removed

- Tr. 274-Δ feels he is not being represented properly
- Tr. 281-DC says Δ wants them removed because Δ does not like what they are telling him
- Tr.285-Δ wants to know how newspaper can print something that is not true

[REDACTED]

Tr. 2132

2200 Court fails to individually vd jurors after DC makes request

[REDACTED]

-Tr. 312 no objection

TR 2634 tells jurors notes are personal property and suggest they return to bailiff to destroy

Tr 2638 crt now tells them to return notes to bailiff

Gruesome photos

Tr. 347-crt gives court reporter all photos tendered to court as part of discovery, there were 74

Tr 356-crt find some pictures are cumulative and denies admission

Tr 1298 crt finds the photos are too numerous and overly duplicative

Problems in meeting with client, cannot meet with him over the weekend.

Tr. 1285

[REDACTED]

Tr. 1294-1296

Confrontation issues with Mickey Alexander

-state able to get in his statements without any confrontation of witness

Tr 1585- Mickey directed them where to go

Tr 1634-1648 Harbin relays MA information

Inference on hair in photo

[REDACTED]

[REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

* * * * *

MARVIN G. JOHNSON,

ORIGINAL,

Petitioner,

CASE NUMBER
2:08CV55

vs.

DAVID BOBBY, Warden,

Respondent.

* * * * *

The deposition of DENNIS L. SIPE, ESQ., taken by the Petitioner under the Ohio Rules of Civil Procedure in the above-mentioned action, pursuant to notice, before Catherine L. Cordy, Court Reporter, Tuesday, February 8, 2011, at 10:52 a.m. - 11:53 a.m., at law office of Buell & Sipe, 322 Third Street Marietta, Ohio 45750.

WORD FOR WORD
Catherine L. Cordy, CSR
P.O. Box 768
Ripley, WV 25271
1-304-372-4973

EXHIBIT
B

APPEARANCES

1
2 Appearing on behalf of the Petitioner:

3 Kort W. Gatterdam, Esq.

4 CARPENTER LIPPS & LELAND, LLP
5 280 Plaza, Suite 1300
6 280 North High Street
7 Columbus, OH 43215
8 1-614-365-4100

9 and

10 Lawrence Komp
11 P.O. Box 1785
12 Manchester, MO 63011
13 1-636-207-7330

14 Appearing on behalf of the Respondent:

15 Seth P. Kestner, Esq.
16 Assistant Attorney General

17 RICHARD CORDRAY
18 Ohio Attorney General
19 Criminal Justice Section
20 Capital Crimes Unit
21 19 East Gay Street, Floor 16
22 Columbus, OH 43215
23 1-619-728-7055
24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

I N D E X

DEPONENT	EXAMINATION	PAGE
DENNIS L. SIPE, ESQ.		
	BY MR. GATTERDAM . . .	4, 47
	BY MR. KESTNER . . .	46

E X H I B I T S

DEPOSITION	DESCRIPTION	PAGE
1	Motion, Entry and Certification for Appointed Counsel Fees	20
2	Issue List	24

1 D E N N I S L. S I P E, E S Q.,
2 was called as a witness by the Petitioner,
3 pursuant to notice, and having been first duly sworn,
4 testified as follows:

5
6 EXAMINATION

7 BY MR. GATTERDAM:

8 Q. Could you please state your full name and
9 business address for the record.

10 A. Dennis L. Sipe. 322 Third Street, Marietta,
11 Ohio 45750.

12 Q. Current occupation?

13 A. Attorney.

14 Q. How long have you been an attorney?

15 A. Since 1973.

16 Q. All right. The whole time here in Marietta?

17 A. No.

18 Q. All right. What's -- you're a private firm,
19 correct?

20 A. Correct.

21 Q. How many people in your firm?

22 A. Two.

23 Q. Let's get a little educational background.
24 Where did you do your undergrad?

1 A. Michigan State.

2 Q. Graduated in what year?

3 A. '70.

4 Q. And law school?

5 A. Ohio State.

6 Q. Can you give us -- when'd you graduate from Ohio
7 State?

8 A. '73.

9 Q. Give us a brief overview of your experience
10 since graduating law school.

11 A. Became the -- well, initially I worked for my
12 cousin in Columbus, Ohio who was in private practice. I
13 actually spent the last year at Ohio State as -- I think
14 they called it a legal intern. So I was at her office
15 and participated in at least one felony trial. And then
16 upon graduation, became the first public defender in
17 Wilmington, Ohio. Started that in 1974, early. And was
18 there until I replaced Michael Dewine as assistant
19 prosecuting attorney in Xenia, Ohio about a year and a
20 half later, give or take. Was there until 1977 when I
21 returned to Columbus to become assistant attorney
22 general. Spent six years in what was called the Division
23 of Criminal Activities -- which is the precursor of your
24 office -- where I became the deputy section chief. I was

1 primarily responsible for the defense of 1983 Civil
2 Rights Actions involving the Department of Rehabilitation
3 and Correction, Department of Mental Health, Mental
4 Retardation and Developmental Disabilities. And I was
5 Governor Rhodes' attorney after Kent State for major
6 cases.

7 Q. Okay.

8 A. After six years there I got an offer to come to
9 Marietta, Ohio. I met a gentleman there named Randall
10 Burnworth, whose father is the former mayor of Marietta.
11 After four years at the DAG's office, he had returned
12 home. So when Bill Brown decided not to run for
13 reelection as attorney general, I was offered the
14 opportunity to come here. So in 1983 we opened the law
15 firm of Buell, Burnworth, Schneider & Sipe.

16 Q. Okay.

17 A. And I've been here ever since.

18 Since 1985 I've been the acting municipal court
19 judge for four different judges. I think that pretty
20 much, I think, takes care of my legal stuff.

21 Q. Okay. You began representing Marvin Johnson on
22 direct appeal beginning in June of 2004. Does that sound
23 about right?

24 A. I'll take your word for it. Sounds about

1 right.

2 Q. So I am going to ask you some questions about
3 experience. Let's assume -- well, let me back up for a
4 second. It took about two years or so to represent him
5 on direct appeal in front of the Ohio Supreme Court,
6 2004, 2006. Does that seem fair?

7 A. Seems correct.

8 Q. Okay. At that point in time -- and a lot of
9 these questions, let's assume then, not today, assume
10 when you were representing Marvin -- what percentage of
11 your practice was criminal defense at that time, '04 to
12 '06?

13 A. Sixty.

14 Q. So is the other 40 percent civil or were there
15 other things you were doing in the law then?

16 A. Well, I'm not including any of the acting
17 judges, because that's simply a telephone call that the
18 judge is sick, ill, off on vacation or whatever. The
19 rest of my practice would be employment, personal injury
20 and then general civil litigation in a variety of areas.
21 And then, of course, back when I was doing Marvin
22 Johnson, I was probably representing John Fauntenberry,
23 Daryl Durr, both of these were habeas actions. And
24 probably Gary Hughbanks as well. All three of those

1 gentleman were at that time on death row.

2 Q. Is that how -- did you get them -- those three
3 gentlemen at the habeas level?

4 A. Yes. Yeah. And I'd had one other one prior to
5 that, Danny Hooks. But Danny died of natural causes.

6 Q. Okay. Of the criminal -- 60 percent criminal
7 practice that you did, what would you say percentage-wise
8 was trial, appeal, post conviction, habeas?

9 A. These would be wild -- wild guessing. That 10
10 percent habeas, 10 percent appeal. The rest of it either
11 trial or negotiations, since you don't tend to try a lot
12 of criminal cases.

13 Q. At the time you started representing
14 Mr. Johnson, were you certified by the Supreme Court as
15 lead or co-counsel for death penalty trials and/or
16 appeals?

17 A. Yes.

18 Q. Okay. Both? Were you certified as both?

19 A. Both.

20 Q. Okay. Do you know when you got that
21 certification?

22 A. Years before.

23 Q. Do you recall at the time you represented Marvin
24 approximately how many death penalty trial cases you had

1 been involved in?

2 A. No. My first one, I remember, was 1974.

3 Q. Okay. And do you recall how many of those cases
4 you actually tried, death penalty cases?

5 A. At least two. Although one was truncated. It
6 happened to be in Guernsey County. The young man's last
7 name I think was Mitchell; and we got through jury
8 selection and one witness. Or three witnesses, hard to
9 tell. They were all witnesses to the event. And at that
10 point in time, the families had a conference and -- and
11 an agreement was struck that avoided the death penalty.

12 Q. At the time you started representing Marvin,
13 approximately how many capital direct appeals had you
14 handled?

15 A. Again, I couldn't tell you. Because at the
16 habeas level, if you're talking about on habeas corpus --
17 well, no, you're talking just direct appeal.

18 Q. Direct appeal. And let's say for the defense
19 side.

20 A. Death penalty cases? I'm going to say one, two.

21 Q. All right. And do any of them come to mind?

22 A. No. I apologize, they don't.

23 Q. That's all right.

24 Do you recall approximately how many agg. murder

1 or murder cases you handled on appeal that were not death
2 penalty cases?

3 A. Probably less than 10. Or maybe less than 15.
4 Probably less than 10.

5 Q. All right. And then of the nonmurder cases, any
6 guesstimate of how many as defense attorney you handled
7 over the course of your career?

8 A. Unknown number. I do a lot of appellate work.

9 Q. And you mentioned you were handling, you think,
10 at or around the time Marvin's case was going on at
11 least, three federal capital habeas cases?

12 A. Correct.

13 Q. All right. And you handled those all the way up
14 through either relief or execution, I presume?

15 A. Unfortunately, so far two executions.

16 Mr. Hughbanks, we are back in State Court.

17 Q. So that's still going on?

18 A. So there's hope.

19 Q. Okay. So the case, you get a -- I assume you
20 get appointed to represent Mr. Johnson?

21 A. Correct.

22 Q. How did that come about? If you recall. Did
23 you receive a call or an entry or --

24 A. I believe I received a call from the Common

1 Pleas Court Judge's Office. And I suspect at some moment
2 I would have talked with the judge, as I know the judge.
3 Again, remember Mr. Mitchell's case was in front of that
4 judge, Ellwood. And so I'm guessing his office called
5 and he may have spoke to me about whether I would be
6 interested in doing it.

7 Q. All right. Do you recall at the time whether he
8 had appointed Kate McGarry as your co-counsel or were --
9 were you first and she second or was there -- do you
10 recall if he mentioned that?

11 A. I personally believe I suggested Kate, because
12 of Daryl Durr. We were handling that as a tandem.

13 Q. Okay. Do you know who was considered, if either
14 of you were considered, lead counsel on this direct
15 appeal of Mr. Johnson? Did you guys consider one person
16 lead versus the other?

17 A. I always considered Kate slightly more lead,
18 because I think part of my reasoning for suggesting her
19 was that she formally worked for the Ohio Supreme Court.
20 So I felt to the extent that there was any advantage to
21 be gained, it would be having someone that might know
22 either the staff or some of the judges or clerks on a
23 personal level should that come into play.

24 Q. Okay.

1 A. So --

2 Q. Now, I presume you obtained a copy of the record
3 in this case?

4 A. Yes, the transcript.

5 Q. All right. And did you and Ms. McGarry both
6 have a separate copy of the transcript, if you know?

7 A. I do not know. But I'm -- my guess at 90
8 percent confidence is, yes, we both had a copy.

9 Q. And do you recall if both of you read the entire
10 transcript or did you split parts of it up or --

11 A. I have no memory of splitting it.

12 Q. Okay.

13 A. And I read it.

14 Q. Okay.

15 A. So Ms. McGarry would have to speak for
16 herself.

17 Q. Can you tell us just generally other than the
18 transcript what, if anything, you recall reviewing in
19 terms of the record itself? Just generally what that
20 entails?

21 A. I believe we got a -- I got a copy of the
22 docket. And, again, my memory is, reviewed some or all
23 of the underlying paperwork. You know, indictment going
24 forward. Although I don't have a specific recollection

1 of -- of the individual things, I just recall the
2 transcript was roughly 20-some volumes, I believe.

3 Q. Okay.

4 A. It seemed to be the thing I remember most.

5 Q. Do you recall whether you reviewed trial
6 counsel's file?

7 A. I have no memory of that one way or the other.
8 I have a specific memory of talking, I believe, to both
9 Mr. Warhola and Mr. Blakeslee.

10 Q. Okay. What, if anything, do you recall of those
11 conversations?

12 A. Primarily their -- the thrust of their case
13 dealing with what I'll call the death of the child being
14 separate from the rape and the robbery. Or theft or --
15 well, it was charged as a robbery. That being separate
16 from that. And the fact that the child died and there
17 was no kidnapping, since the child was deceased.

18 Q. Do you recall if you talked to them early on in
19 the process before, for lack of a better word, you knew
20 everything about the case? I mean, is this them
21 volunteering stuff to you or were you questioning them?

22 A. My memory is I questioned them.

23 Q. Okay.

24 A. Warhola, I have no memory of visiting with him

1 personally. Blakeslee, I don't know that I visited. But
2 since I see Jack here and in other courts, I have a
3 memory of speaking with him. But I don't want to say
4 that that memory dealt with Mr. Johnson's case. Only
5 that I have memory of seeing him. And if it were at that
6 time, it would just follow that I would have wanted to
7 speak to him about, you know, what transpired.

8 Q. Uh-huh.

9 A. Because the case had some sort of interesting
10 twists, I guess, from trial lawyer discussion with
11 Mr. Johnson's involvement in the case.

12 Q. Do you recall if they ever put anything in
13 writing to you as to what issues that they sort of
14 thought were good appellate issues?

15 A. I have no memory of receiving anything in
16 writing from either.

17 Q. And I take it this discussion that you were just
18 talking about, was that sort of their way of giving you
19 the issues orally?

20 A. Correct.

21 Q. Okay. Anything else that -- in those
22 discussions that they mentioned, other than what you just
23 testified to? In terms of potential issues for you to
24 consider.

1 A. There could have been, I don't recall.

2 Q. Did you consult with Mr. Johnson?

3 A. Yes.

4 Q. All right. And how did that take place?

5 Visits? Letters? Phone calls?

6 A. Both. Or all.

7 Q. All? Okay.

8 A. Although, I don't want to say phone calls.

9 Because that may not be accurate. I get enough phone
10 calls from clients, I would hate to lump him into that I
11 did get a phone call from him. I know that he
12 corresponded in writing, I know we met with him. And I
13 believe Kate met with him more often than I did. Because
14 she was also, I think, visiting some other folks and
15 would stop by and sort of take care of that since she was
16 coming through.

17 Q. And at this point in time, do you recall, was
18 death row still in Mansfield or up at OSP in
19 Youngstown?

20 A. My recollection is that I met with Mr. Johnson
21 in Mansfield.

22 Q. Okay.

23 A. And I say that because of visiting, quite
24 frankly, a restaurant that's outside of Mansfield. So it

1 would have been no reason to have visited that locale if
2 I wasn't visiting with him in Mansfield, since Youngstown
3 wouldn't require me to be on 71.

4 Q. Was Mr. Johnson helpful at pointing out
5 potential issues for your consideration?

6 A. I think Mr. Johnson pointed out things he wanted
7 to discuss with us. I'm not sure if -- yeah. He tried
8 to be helpful.

9 Q. All right. What's your next step after
10 reviewing the record?

11 A. Well, at some point -- and, again, there may
12 have been steps that are in between, but there was
13 discussion about what issues were we going to raise. And
14 how we were going to -- I don't know if we had a
15 discussion initially about dividing them up; but at some
16 point in time, it strikes me we began to -- I don't want
17 to say winnowed the issues but sort of decide who might
18 take an area.

19 Q. All right. And do you recall the
20 conversation -- I assume you're talking more than one
21 conversation with Ms. McGarry?

22 A. I'm believing there's more than one. Again, I
23 remember very early on we had a discussion right after a
24 meeting with Mr. Johnson where we started going over some

1 issues. And also trying to sort of put into words what
2 perhaps his issues or his concerns would look like as an
3 issue.

4 Q. Okay. How did you primarily communicate with
5 Ms. McGarry? Because you guys are in separate cities,
6 correct?

7 A. Separate states.

8 Q. Yeah. So I presume you were not a lot of
9 in-person communication?

10 A. Correct. Telephone, email.

11 Q. All right.

12 A. I must admit, Kate is a huge emailer compared to
13 me. If I emailed, almost assuredly it was by hitting the
14 reply button or most likely going to a staff person and
15 having them do it.

16 I guess I'm too old to -- to be all that
17 friendly with a computer and emailing.

18 Q. Do you recall after -- at some point you guys
19 divided up the issues, correct?

20 A. That's correct.

21 Q. And then at some point in time you drafted your
22 issues and she drafted hers, correct?

23 A. That's correct.

24 Q. Did you review each other's work for edits, if

1 you recall?

2 A. I know she reviewed mine, because I was sending
3 them to her. Because we had discussions about whether we
4 were going to use brackets or some other form. How we
5 would refer to the transcript, how that was going to be
6 done. Because I think we had two alternate positions.
7 And then -- I could be totally wrong about this, but for
8 some reason I have a memory that we're probably something
9 called WordPerfect and she may be Word. And that
10 presented challenges simply to my staff people in trying
11 to meld those two together, or in her melding it
12 together. Because my memory is she put the final product
13 together.

14 Q. Other than what you just mentioned there, were
15 there any other potential problems that you recall during
16 the time, in terms of you two working together?

17 A. Only the problem probably faced by most folks,
18 there's not enough time at the end.

19 Q. Uh-huh.

20 A. And so there was simple discussions of, you
21 know, getting it and shortening it or lengthening it or
22 putting a paragraph in or I don't think this issue is
23 going anywhere and maybe we're not going to include this
24 issue. Or there's been a change. Or, you know, either

1 in case law or, you know, it doesn't appear that the
2 issue has, you know, any viability after researched.

3 Q. Okay.

4 A. Things like that. But, again, not much in the
5 way of specifics because -- was that 2004?

6 Q. 2004 -- you filed the brief in early '05.

7 A. Yeah.

8 Q. So the issues, is it fair to say, were you would
9 have a list but they were changing as either one of you'd
10 be doing research or writing?

11 A. Yeah. That would be correct. And I think I
12 recall getting a couple of emails from Kate, maybe. Or
13 some communication where she thought, I think I'm going
14 to drop this. Or I'm not going to put it in. And they
15 weren't -- I don't know that they were my issues, I think
16 they were more on her side of the column, so to speak.

17 And we sort of had two columns. And columns is
18 probably the wrong phraseology, but we had our list. And
19 then we had a group that for some reason I want to think
20 we had put down as possible.

21 Q. Uh-huh.

22 A. As opposed to, This is an issue, it was, Is this
23 a possible issue, sort of the question marks that sort of
24 follow with, you know, looking at different things.

1 Q. Okay. I think I'll be showing you that in just
2 a minute. Let me back up, though. Did you keep track of
3 your time while you were doing this?

4 A. I'm certain I did in that we use a time sheet
5 and scribble thing that eventually turns into a
6 billing.

7 Q. Okay.
8 Number or letter, do you care?

9 MR. KOMP: No.

10 MR. KESTNER: No.

11 (Petitioner's Exhibit 1 marked.)

12 BY MR. GATTERDAM:

13 Q. All right. I'm going to hand you what's been
14 marked Petitioner's Exhibit 1 and ask you if you could
15 take a look at it. And tell us what it appears to be.

16 A. It appears to be the Supreme Court what I'll
17 call request for payment. And together with a list of
18 expenses and activity and time.

19 Q. All right. And if you look at -- does that
20 appear to be a fair and accurate copy of what you
21 submitted to the Supreme Court for payment?

22 A. Yes.

23 Q. If you can look at the second page, which looks
24 to be the first page of your actual billing. What's the

1 earliest entry you see on there?

2 A. June 8.

3 Q. Okay.

4 A. Of 2004.

5 Q. So would that be initially when you -- and it
6 says, "Telephone conference." Is that possibly with the
7 judge, the trial judge? About getting on the case?

8 A. Could be.

9 Q. All right. And does it show on June 21st,
10 "Telephone conference with trial counsel"?

11 A. It does.

12 Q. All right. Would that, to your memory, be the
13 only discussion you had with trial counsel?

14 A. Not necessarily.

15 Q. Okay.

16 A. You need to know that I'm horrendous at billing.

17 Q. All right. And at the bottom of that page that
18 we're on, would that be the date you actually went to
19 Mansfield correctional, to meet with Mr. Johnson?

20 A. The 12/1/04?

21 Q. Yes.

22 A. I'll say yes.

23 Q. And if the record reflects that you filed your
24 brief on January 24th, 2005, so you met with Mr. Johnson

1 a little under two months before filing the brief; is
2 that fair to say?

3 A. That would appear to be the case.

4 Q. And you, I think, said, is that also the time
5 that you may have discussed with Ms. McGarry potential
6 issues?

7 A. Correct. Or at least one of the times.

8 Q. Now, did you -- when you were reviewing the
9 record in this case, did you make any notes, either on
10 your computer or handwritten notes?

11 A. About reviewing the record?

12 Q. Yes.

13 A. I don't have any memory specifically of doing
14 it. I looked around and couldn't find any. Typically
15 I'd scribble down something, but it's never been my
16 practice to hold on to a lot of that stuff.

17 Q. Okay. And not just reviewing a trial
18 transcript, anything else with phone conversations? Do
19 you maintain or have any notes in your file that you know
20 of?

21 A. I might have a few notes.

22 Q. Okay. And/or correspondence? Do you know if
23 you still maintain any of that?

24 A. Oh, I would have typically kept anything that

1 either we would have drafted or would have received or
2 something from the client. Didn't get rid of that.

3 Q. I'm going to ask if you could in the next couple
4 weeks take a look and see what you have. And I will just
5 put on the record you did send me all the pleadings that
6 you had on the case. But any notes or correspondence.
7 And if so, just contact us and we can arrange to make
8 copies.

9 A. Okay.

10 Q. Do you recall how ultimately you and Ms. McGarry
11 decided who was going to do what issues?

12 A. I think she proposed something, and I think I
13 agreed.

14 Q. All right. Now, I'm looking at your billing
15 sheet. And the last entry on, I guess would be the third
16 page, is January 5th, 2005. "Read trial transcript." Do
17 you see that?

18 A. I do.

19 Q. And then if you flip one more page to where it
20 starts out 1/15/05; do you have that?

21 A. I do.

22 Q. "Drafting documents." Would that be drafting
23 the brief?

24 A. Yes. I would say that's how I would have put

1 that down.

2 Q. And is that your memory of when you would have
3 started actually physically drafting the brief?

4 A. I have no memory.

5 Q. All right. Now, you mentioned earlier an issue
6 list. Mark this -- oh, it's already marked. Thanks.

7 (Petitioner's Exhibit 2 marked.)

8 BY MR. GATTERDAM:

9 Q. Handing you what's been previously marked
10 Petitioner's Exhibit 2 and ask if you can identify that.

11 A. This looks like the list. And, again, my memory
12 is Kate drafted this. And when it was presented, it was
13 marked with the colors green and yellow. Again, that's
14 my memory.

15 Q. All right. Green meaning what and yellow
16 meaning what?

17 A. Green was Kate. Yellow was Dennis. With regard
18 to the issues.

19 Q. Does this appear to be a fair and accurate copy
20 of the list that you received from Kate?

21 A. As best I recall, yes, it does.

22 Q. Now, if you can turn on that list to page 5.
23 About three-quarters of the way down. Can you tell us
24 what's in bold?

1 A. "Possible issues suggested," followed by
2 question marks.

3 Q. Okay. And, again, the issues that follow that,
4 are those ones that Kate would have suggested or you or
5 do you have any specific recollection?

6 A. Not really certain. I would have -- again, my
7 memory sort of is that we -- we were bouncing issues back
8 and forth. And these may have been a list of issues that
9 got put in writing and -- but I -- I honestly -- that's
10 the best I can do for you.

11 Q. Okay. I know it's a lot of years ago, and we
12 appreciate you trying to look back.

13 Okay. So these issues -- and, again, they
14 appear to be color coded, correct?

15 A. That's correct.

16 Q. So an issue would get suggested and then whoever
17 it got color coded to would actually do the research and
18 decide it stays or it goes?

19 A. Right.

20 Q. All right. Okay. Let's get into the specifics
21 of I guess why we're here today. You would agree the
22 confrontation clause is an important federal
23 constitutional right, correct?

24 A. It is.

1 Q. And do you recall a case coming out of the U.S.
2 Supreme Court while you were working on Marvin's case?

3 A. Crawford.

4 Q. Okay. And obviously you've read Crawford?

5 A. More than once.

6 Q. Uh-huh. What proposition does it stand for?

7 A. Well, clearly stands for the issue of
8 confrontation and the right of a person to confront
9 his -- I don't want to say accusers but those witnesses
10 that would testify against him and give the attorney the
11 opportunity to examine, cross-examine the witness to
12 determine, you know, all things that cross-examination
13 does. Including bias, sympathy, prejudice, ability to
14 tell the truth, vantage point, eye sight, hearing,
15 whatever.

16 Q. And would you agree that since Marvin's case was
17 on direct appeal when Crawford came out, if you raised a
18 confrontation issue he would be able to benefit from or
19 use the holding of Crawford?

20 A. Yes. Crawford, yes.

21 Q. And I assumed since Crawford has come out you've
22 used it in arguments or in briefs in other cases you've
23 handled?

24 A. I have.

1 Q. And being a trial guy, you've used it in court,
2 I assume, also?

3 A. True.

4 Q. And just generally speaking, not specifically
5 about Crawford, but you're obviously familiar with the
6 rules of evidence, particularly hearsay?

7 A. Yes.

8 Q. And you would agree that as a trial attorney,
9 you would object if hearsay is coming in if it may harm
10 your client?

11 A. You would.

12 Well, most likely you would. I could fathom a
13 trial strategy that while there was harm there was going
14 to be greater good down the road. So you don't object.

15 Q. You'd consider it based on the circumstances?

16 A. Right.

17 Q. And would you agree that not getting to confront
18 somebody is -- can be particularly harmful because you
19 can't point out their biases, their motives and all the
20 other things you would do as a trial attorney?

21 A. That could happen.

22 Q. Do you think -- tell me why it's a problem. And
23 if you think it's a problem, why it would be a problem if
24 a particular witness for the government is not called to

1 testify. But their evidence comes in.

2 A. Well, let's suppose that the witness could
3 testify to five issues, five things. The government uses
4 him for four but not the fifth. You're permitted to
5 cross-examine the government officials as to the witness'
6 bias, sympathy, reason to lie, deals, et cetera. You
7 might determine that it was in your client's best
8 interest to not have the fifth issue, say a confession to
9 the crime, brought before the jury. Because that's the
10 fifth thing that the government doesn't bring out that
11 your client confessed to this individual. So you just as
12 soon not see him on the stand if, in fact, you could get
13 all of the cross-examination out of that individual by
14 use of the office.

15 Q. Okay.

16 A. I'll just use that as an example.

17 Q. Okay. Let me ask you this: Looking at it from
18 an appellate perspective, you may not know what those
19 strategic reasons are, correct?

20 A. Oh, to be sure, you might not.

21 Q. All right.

22 A. To be sure. But I -- the question I --

23 Q. No, no. You answered --

24 A. Sort of covered both sides of the --

1 Q. Yeah. So now let's move on to the appellate
2 perspective. When you're reviewing issues for a direct
3 appeal, are you able to go outside the record?

4 A. No.

5 Q. Okay. Whether you raise an issue or not is
6 based on what you see in the cold record, correct?

7 A. Correct.

8 Q. Okay. In the Marvin Johnson appeal, or case
9 file, if you will, do you recall an individual by the
10 name of Mickey Alexander?

11 A. Oh, I remember his name coming up.

12 Q. What, if anything, do you recall about him?

13 A. What I recall for the most part is -- again, I
14 think this involves both a hearing prior to trial and
15 trial, if we're talking about the record.

16 Q. Uh-huh.

17 A. And it seems to me Alexander was an inmate in
18 the Guernsey County jail that was either befriended or --
19 or was befriended by Mr. Johnson, one way or the other.
20 And they apparently had conversations together. And
21 Mr. Alexander decided to reveal the content of those
22 conversations with law enforcement.

23 Q. Okay.

24 A. And ultimately law enforcement used that to --

1 to go collect up evidence.

2 Q. Do you recall researching and raising an issue
3 related to Mr. Alexander celling with Mr. Johnson? A
4 Messiah issue?

5 A. Was the Messiah issue. And I'll be honest, I'd
6 have to look back. Because I don't have a recollection
7 if I raised that or if Kate looked at it. I honestly
8 don't -- I apologize.

9 Q. Well, and correct me if I'm wrong. I'm not sure
10 it's actually on your list.

11 A. It may not even be in. It may have been one of
12 those -- again, I didn't read through these. I remember
13 it because it was an early issue, at least, with regard
14 to what the trial counsel did.

15 And, again, I've not reviewed this transcript in
16 total. So please understand I'm -- I don't want to say
17 I'm shooting from the hip, but nobody said, read it, so I
18 don't do what I'm not told. I got the impression or my
19 memory was that the government took the position that
20 Alexander did this on his own.

21 Q. Okay.

22 A. And that they didn't procure his placement with
23 Johnson, didn't give him instructions to go back in and
24 ask, you know, this question or determine the location of

1 this or that sort of thing. He just seemed to be one of
2 those wonderful guys that wanted to try to help himself
3 and so did it on his own and figured he could sell the
4 information for his own benefit at some point.

5 And then I thought at trial, if I remember
6 correctly, that one of the attorneys for Marvin
7 questioned officers in front of the jury about Mar- -- or
8 Alexander's motives or the course of conduct that was --
9 that happened. And, again, my memory is the officer said
10 that, no, they -- they at least didn't, that -- and those
11 two officers -- one of them is Harbin, the other is --
12 last name I think is Clark.

13 Q. Good memory.

14 MR. KOMP: Great memory.

15 THE WITNESS: Well, I know Harbin because I go
16 up there periodically and I see him.

17 Harbin -- well, anyway, my memory is those guys
18 said they didn't know that Alexander was doing this.

19 BY MR. GATTERDAM:

20 Q. But do you recall -- I think you've said this
21 but do you recall trial counsel actually filed a motion
22 and had a hearing on that issue?

23 A. Memory is that that happened, because that was a
24 separate part of the transcript that I looked at.

1 Q. And do you have any reason to doubt if you
2 then -- I don't mean you personally, you and/or
3 Ms. McGarry actually raised that Messiah issue on appeal
4 to the Ohio Supreme Court?

5 A. If it's in there, we raised it; but I don't have
6 a memory of it happening. I apologize for that. I just
7 remember looking at it. And my observation is today as I
8 thought of it, you know, might have been a tough row to
9 hoe without the government coming sort of clean or it may
10 have been a better post-conviction issue if something
11 could be turned over or, you know, or found that somebody
12 forgot to provide to the trial lawyers about a deal cut
13 with Alexander.

14 Q. Okay. And you don't know why it wouldn't have
15 ended up on that issue list, if it's not on there?

16 A. No.

17 Q. Okay.

18 A. Other than, again, we may have kicked it around
19 and said that it -- there's no evidence to support it or
20 there is evidence and here, we'll brief it. Because I
21 apologize, I just don't remember that issue.

22 Q. That's okay.

23 All right. You obviously then -- if you read
24 the entire transcript, you read what Mickey Alexander's

1 testimony was at the suppression hearing, correct?

2 A. Yeah.

3 Q. Do you remember reading about his prior record
4 and the various questions that would have been asked of
5 him on cross-examination to reveal, I think as you had
6 said, motive, bias and that kind of thing?

7 A. Correct.

8 Q. Okay.

9 A. Yeah. He was not without a record.

10 Q. Okay. And would you agree he was an important
11 witness in terms of the information he allegedly got out
12 of Marvin?

13 A. Yes. I'll say he was an important witness to
14 get the information.

15 Q. So in terms of if he had testified, would you
16 agree discrediting him would have been an important thing
17 to try to do as trial counsel?

18 A. You would have wanted to try to discredit him.

19 Q. And do you have any reason -- I mean, let me ask
20 it the other way. He wasn't called as a witness at
21 trial, Mickey Alexander, was he?

22 A. He was not.

23 Q. Okay. Did you see in the record any showing
24 made by the prosecution that he was unavailable as a

1 witness?

2 A. No.

3 Q. And do you recall Detectives Harbin and Clark
4 then testifying about various things that -- pieces of
5 information they got from Mr. Alexander?

6 A. Yes.

7 Q. Do you have a specific recollection of what that
8 was or what areas they asked him about?

9 A. I know they located -- I remember them locating
10 money. Couldn't tell you what exactly. And -- a wallet?

11 Q. Okay. Key?

12 A. Although, I think the police had the wallet.
13 Yeah. Okay. And the key was in the wallet, maybe, but
14 the police had the wallet already. And apparently hadn't
15 looked at it or -- well, I don't know. A wallet and a
16 key.

17 Q. All right. And why would those two pieces of
18 evidence be important in terms of -- or harmful to
19 Marvin, if you recall?

20 A. Well, you keep saying, "Harmful," and I'm not
21 trying to hurt Marvin here. But if I recall correctly,
22 and maybe I'm wrong, but didn't his lawyers get up in
23 opening and say, "Our client did this"? And, "What we're
24 looking to do is avoid the" -- "avoid the specs"? So --

1 I mean, I just -- I want to be precise about this. So if
2 they -- the harm, which I agree is that the government
3 got to get money in -- and I don't know if they'd have
4 found it without Alexander. They may have, they may not
5 have -- and they got the key. So to the extent they got
6 the key, which I think showed ingress and egress and they
7 got money that I guess substantiated the mother of the
8 young boy who died, the mother's testimony that she got
9 money for Marvin. Or at least Marvin knew where the
10 money was that was got. So putting in those terms, it's
11 harmful. But, again, I at least have to say, if I
12 remember correctly, I think as I read this, I was sort of
13 taken aback that he sort of fessed up up front.

14 Q. So that caused you some concern?

15 A. Well, I certainly was like apparently you've
16 decided they're going to prove -- you're going to prove
17 the murder and you're trying to save the client's life.
18 And, of course, trial lawyers do that all the time. You
19 know, try to make a tough call of, Are we going to admit
20 to all of this. Because at the end of the day, Marvin,
21 what we need to do here is get you some kind of life with
22 the possibility of parole or life without parole.

23 Q. Okay. Do you recall -- and not specifically but
24 generally speaking -- that the two detectives, Harbin and

1 Clark, then -- I guess in their testimony brought out
2 things that Mickey had told them, which he got from
3 Marvin? Like told them where to go to find the money,
4 where the key would be, those kinds of things. Do you
5 recall Harbin and Clark getting into that?

6 A. Yes.

7 Q. Okay. Not getting into whether, you know, the
8 issues of raising the issue or not but you would agree
9 that that's hearsay, if it's one person said something to
10 them and the person's not testifying?

11 A. It's hearsay under a recognized exception.

12 Q. Okay. And what's the recognized exception?

13 A. That the officers did what they did.

14 Q. Okay. Let's go to your issue list, then, while
15 we're on that. And you're on page 6 already.

16 A. Right.

17 Q. Do you see near the bottom there -- why don't
18 you just read into the record that bold there that starts
19 with the word, "Confrontation."

20 A. "Confrontation issues with Mickey Alexander."
21 And then following, "State able to get in his statements
22 without any confrontation of witness." And then, "TR."
23 I'm going to say that's the page number.

24 Q. Uh-huh.

1 A. "1585. Mickey directed them where to go." And
2 then TR 1634 through 48, "Harbin relays Mickey Alexander
3 information."

4 Q. Okay. First of all, I guess, do you recall who
5 actually physically put that into the document?

6 A. I have no memory of doing it. So I would have
7 to guess that Kate did it. And I'm certain Kate, if she
8 did, would recall this or have it on a computer or on a
9 disk.

10 Q. Do you recall who ended up raising that as a
11 potential issue first, you or Kate or both?

12 A. No idea. It certainly was one of the issues I
13 would say bounced around, for lack of a better phrase.

14 Q. And those TR page numbers, do you know what
15 they're to mean? Is that supposed to mean where in the
16 transcript the issue comes up?

17 A. That would be my guesstimate. And I'd be
18 willing to at least surmise given the different page
19 numbers and distance between them that we have identified
20 Mr. Harbin at the 1600 numbers. So I would want to think
21 that perhaps maybe that's him. But it could also be, I
22 think, the other officer, who I think his name was Clark,
23 would have been maybe testifying. I don't know.

24 Q. Okay. And you have the sentence, "State able to

1 get in his statements without any confrontation of
2 witness," correct?

3 A. Correct.

4 Q. All right. This is color coded in yellow,
5 correct?

6 A. Yeah. That's correct.

7 Q. So would that be your memory then that you
8 ultimately made the call not to raise this issue?

9 A. Correct.

10 Q. All right.

11 A. And just to be fair, I don't have a memory of
12 talking to Kate. But it would have been odd that I
13 wouldn't have.

14 But it doesn't mean I did or I didn't.

15 Q. Okay.

16 A. It's just that we talked.

17 Q. Now, do you recall -- since these page numbers
18 are there, I assume you went back and looked at the
19 testimony before deciding what to do with the issue?

20 A. Oh, I -- as this is sort of coming back to me, I
21 remember going through it and looking at it, trying to
22 determine, you know, will this fly under Crawford.

23 Q. Okay. Do you recall when -- on several of the
24 pages that you have marked there, when the State tried to

1 introduce this evidence, do you recall the defense
2 actually objecting?

3 A. I remember -- I remember objections. And I
4 remember they weren't all objected -- in other words,
5 there was an objection and then there was some -- I'm not
6 sure.

7 Q. Okay.

8 A. My memory is today, and I could be absolutely
9 wrong here, that there was some colloquy or discussion
10 about the prosecutor stopping a witness perhaps or
11 something and saying, "Don't say what he said but you can
12 testify as to what he did." And that seemed to satisfy
13 everybody with regard to, You're going to be able to
14 testify as to why you did something but not specifically
15 what was said but you'll be allowed to testify why you
16 went to Zanesville.

17 Q. All right.

18 A. Or something like that.

19 Q. Do you have any reason to doubt that at least
20 two objections to this hearsay were sustained by the
21 trial judge?

22 A. If you -- I'm going to defer to your statement,
23 because the record will speak for itself. So that
24 certainly is possible.

1 Q. Would that be a factor in determining whether to
2 raise an issue -- I mean, not saying it's the only
3 factor, but did trial counsel even object to it? Is that
4 a consideration for you?

5 A. It's a consideration --

6 Q. All right.

7 A. -- about whether they did or did not object.

8 Q. And then if -- if an objection is sustained but
9 yet, hypothetically speaking, the other side continues to
10 introduce hearsay and there's no objection, what does
11 that mean to you?

12 A. Well, it means, one, they know of the objection.
13 Because they made it previously.

14 Q. Uh-huh.

15 A. So they're either deciding they're not going to
16 object or they have concluded that -- again, with my
17 memory of it, that it's being offered not for the truth
18 of the matter asserted but why the officer did what he
19 did.

20 Q. Okay. Do you -- would you expect to see
21 somebody saying that on the record, like the prosecutor
22 when an objection is raised saying, "Oh, no, no. I'm not
23 doing it for that reason, I'm doing it to show what the
24 officer did"?

1 A. I have certainly seen it in the record that way.
2 And then I've seen others where I guess I would say it's
3 implied.

4 Q. Uh-huh.

5 A. Because of just the colloquy or the way the
6 question is worded. Different ways I've seen it in
7 transcripts where you conclude that it's being offered
8 not for the truth of the matter but why the officer went
9 where the officer went. Or just the very nature of it,
10 you're sort of -- well.

11 I was going to say something, but it will take
12 25 minutes to say, so --

13 Q. Is there a possible other scenario that trial
14 counsel could have believed, having raised two
15 objections, that they had preserved the issue and that it
16 was going to be no good to continue to object?

17 A. Yeah. Except if it was sustained, I would think
18 they'd probably -- again, I don't want to think for them
19 but I would think it would be more likely if the judge is
20 predisposed to like us, you'd probably want to raise it
21 again. Unless, again, you thought that the way the
22 objection was sustained or the colloquy was, that we're
23 limiting this to a certain format that objecting is not
24 going to get you anywhere.

1 Q. Okay. And not objecting, while it may be a
2 factor for you, it's not fatal in terms of whether you
3 can raise an issue, correct?

4 A. Correct.

5 Q. All right. How would you raise it if they
6 don't --

7 A. Well, ineffective assistance.

8 Q. All right. Could you also raise it as plain
9 error?

10 A. Oh, and if it's a plain error issue, then it
11 would also be plain error.

12 Q. Okay. Do you recall having any specific
13 discussions with either trial counsel about this
14 particular issue, the confrontation issue?

15 A. I do not.

16 Q. Okay. And in deciding whether or not to raise
17 the issue, do you recall whether you conducted any
18 specific research on this issue?

19 A. I know I looked at Crawford. I know I looked at
20 some other state cases. And my recollection of why it
21 wasn't raised is that -- I guess I concluded that it was
22 offered not for its truthfulness but for the fact that
23 the officers went and looked for -- I know it was -- I'm
24 sure it's Zanesville and not some other city. And I have

1 a memory of some kind of concrete or maybe culvert or
2 steel tunnel or -- something along those lines.

3 Q. Uh-huh. So -- but is it fair to say, Mr. Sipe,
4 then, you're familiar with the case on confrontation and
5 it wasn't necessarily that there was bad case law, just
6 you made a decision that this was why it was probably
7 coming in?

8 A. Correct.

9 Q. Okay.

10 A. I would say that's true.

11 Q. I mean, the case law's pretty settled on hearsay
12 and then confrontation, there's a big case that's just
13 come out, right?

14 A. Correct.

15 Q. Okay. And -- so your thought was that it wasn't
16 offered for its truthfulness, it was to show what the
17 officers -- or why they did what they did?

18 A. That's how I read it.

19 Q. And you would agree, then -- because I asked the
20 question about this a little bit earlier -- there may not
21 have been anything in the record indicating that's why it
22 was coming in, that's what your thought was, correct?

23 A. Yeah. Or I read into it based on -- again, I
24 would have to reread it to see if there was any colloquy

1 with the judge about, Well, the way it's worded, I'm
2 going to sustain it. And he's going, Well, don't tell me
3 if -- if there was a colloquy like that, Don't tell me
4 what he said, what did you do after you heard it?

5 Q. The record would speak for itself?

6 A. The record will definitely speak for itself on
7 an appeal issue.

8 Q. Okay. And do you recall any insight or input
9 that either Ms. McGarry or Mr. Johnson had on this
10 issue?

11 A. None, that I recall. They may have had tons,
12 but I have no memory of it.

13 Q. All right. And I probably know the answer to
14 this but I have to ask it. Do you recall when in the
15 process you made the decision, "I'm not going to raise
16 this"?

17 A. No. For some reason, I'm thinking I sort of
18 clicked down through the issues as they were on here.

19 Q. Okay.

20 A. Perhaps at least as far as working on them or
21 looking at them or, you know, looking -- digging up some
22 research or what have you. And then -- but I'd hate to
23 say that I put it off until I got the rest of those done.
24 Because I might have been more likely also to hop around

1 if I thought two of the issues sort of had common ground.
2 So I could be mistaken.

3 Q. Okay. So when you say that, about common
4 ground, is it possible you looked at this issue when you
5 were looking at the Messiah issue?

6 A. That may well have been.

7 Q. Because you would agree they're sort of
8 similar?

9 A. Well, certainly involved the same sort of issues
10 and obviously the same individual and they are sort of
11 tied to one another in that sense. Because, again, I
12 just have some memory of -- of the hearing. And then for
13 some reason I thought the defense attorneys brought some
14 of those same issues back up again in the trial itself.
15 I wasn't sure if they were preserving it or if they were
16 trying to get different answers or hoped they'd get a
17 different answer.

18 Q. Okay.

19 Do you want to give us just a minute?

20 A. Oh, sure.

21 (Recess taken.)

22 BY MR. GATTERDAM:

23 Q. I regret to inform you, I don't have any further
24 questions but Mr. Kestner may. I don't know.

EXAMINATION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

BY MR. KESTNER:

Q. Well, I only have two questions for you.

Would it be a fair statement with regards to the confrontation issue that you looked at the facts -- at the facts of Marvin Johnson's case, relevant case law and used your professional judgment not to include it?

A. Yeah.

Q. Okay. And would it be safe to say that this Exhibit 2, this list of issues, this wasn't an exhaustive list, there might have been issues that you thought about that didn't make this list; is that possible?

A. It's possible but I have no memory to tell you that that occurred.

Q. Okay. Would you agree that you exercised your professional judgment in picking the strongest claims to include for Marvin Johnson?

A. Well, I'd like to think in hindsight that we did. Because we certainly didn't go out of our way to harm Marvin. I mean, we wanted to win. And we thought there were issues that we raised -- I think what we thought were good issues. Hindsight might say that that's not going to be accurate. I'll leave that up to wiser people.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Q. Okay. That's all I have.

FURTHER EXAMINATION

BY MR. GATTERDAM:

Q. You've made mistakes before, correct?

A. Oh, this is a job where you make mistakes. And you miss things.

Q. I have nothing further. Do you want to read?

A. I'll waive.

(Whereupon, the deposition was concluded)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

STATE OF OHIO, To-wit:

I, Catherine L. Cordy, a Notary Public and Court Reporter within and for the State aforesaid, duly commissioned and qualified, do hereby certify that the deposition of DENNIS L. SIPE, ESQ., was taken by me and before me at the time and place specified in the caption hereof.

I do further certify that said deposition was correctly taken by me in stenotype notes, that the same was accurately transcribed out in full and reduced to typewriting, and that said transcript is a true record of the deposition.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which these proceedings were had, and further I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

My commission expires the 26th day of April, 2011.

Given under my hand and seal this 22nd day of February 2011.



CATHERINE L. CORDY, Notary Public
In and For The State of Ohio
My Commission Expires 4-26-11

Catherine L. Cordy

Catherine L. Cordy
Notary Public-Court Reporter

SUPREME COURT OF OHIO
MOTION, ENTRY AND CERTIFICATION FOR APPOINTED COUNSEL FEES

ORIGINAL
ON COMPUTER - 11

State of Ohio,
Plaintiff

v.

MARVIN GAYE JOY
Defendant

FILED
MAR 15 2007
DISPENSER
MENGEL, CLERK
SUPREME COURT OF OHIO

Supreme Court No. 2004-1163
Appeals Court No. NA
Trial Court No. 03 CR 116

MOTION FOR APPROVAL OF PAYMENT OF APPOINTED COUNSEL FEES AND EXPENSES

The undersigned, having been previously appointed counsel for the defendant for the appeal to this court, as evidenced by the attached entry of appointment, now moves for an order approving payment of fees earned and expenses incurred as reflected by the itemized statement of the reverse hereof, pursuant to R.C. 2941.51.

Hours Worked:

IN COURT	OUT OF COURT
<u>1.0</u>	<u>134.3</u>

Expenses (if any): \$ 1834.27

O.R.C. charge section number, name and classification

A. 2903.01(B) 2929.04(A)(1) 2 COUNTS AGG. MURDER w/SPEC.

B. 2905.01(A)(3) KIDNAPPING F-1

C. 2907.02(A)(2) RAPE F-1

D. 2914.01(A)(1) AGG. ROBBERY F1
SUPREME COURT DECISION

TERMINATION DATE

12-13-06 MARCH 7, 2007

ATTORNEY'S NAME
DENNIS L. SIPE
ATTORNEY'S ADDRESS NUMBER AND STREET
322 THIRD STREET

SOC. SEC. NO.
[REDACTED]

ATTORNEY'S SIGNATURE
[Signature]
CITY STATE ZIP
MARIETTA OH 45750

INFORMATION BELOW TO BE COMPLETED BY SUPREME COURT AND COUNTY AUDITOR ONLY

JUDGMENT ENTRY

This court finds that counsel performed the legal services set forth in the itemized statement on the reverse hereof, and that the fees and expenses hereinafter approved are reasonable. IT IS THEREFORE ORDERED that appointed counsel fees are approved in the sum of \$ SEE ATTACHED ENTRY and expense in the sum of \$ SEE ATTACHED ENTRY for a total allowance of \$ SEE ATTACHED ENTRY, which amount is ordered certified to the SEE ATTACHED ENTRY County Auditor for payment.

SEE ATTACHED ENTRY

CHIEF JUSTICE

CERTIFICATION

The County Auditor, in executing this certification, attests to the accuracy of the figures contained herein. A subsequent audit by the Ohio Public Defender Commission and/or Auditor of the State which reveals unallowable or excessive costs may result in future adjustments against reimbursement or repayment of audit exceptions to the Ohio Public Defender Commission.

COUNTY NUMBER _____ WARRANT NUMBER _____ WARRANT DATE _____
COUNTY AUDITOR _____

PET. EXHIBIT
tabbies
7
Dennis Sipe
11-8-11
3-8-11

DATE	ACTIVITY	TOTAL TIME
06-08-04	TELEPHONE CONFERENCE (2)	.3
06-10-04	TELEPHONE CONFERENCE	.2
06-15-04	LETTER, PREPARATION OF DOCUMENTS	.5
06-15-04	TELEPHONE CONFERENCE GUERNSEY CO COURT	.5
06-21-04	TELEPHONE CONFERENCE WITH TRIAL COUNSEL	.3
06-21-04	REVIEW FILE E-MAIL NEWSPAPER ARTICLES	.2
06-22-04	REVIEW NEWSPAPER ARTICLES	.5
07-02-04	REVIEW FILE	.5
07-09-04	TELEPHONE CONFERENCE GUERNSEY CO. CLERK	.2
07-14-04	REVIEW ORDER, STAY AND DOCKET	.5
08-06-04	REVIEW DOCUMENTS	.3
09-10-04	DRAFT MOTION	1.0
10-05-04	REVIEW DOCUMENTS, LETTER (2)	.2
10-18-04	REVIEW LETTER AND DOCUMENTS	.3
11-30-04	REVIEW DOCUMENTS	3.0
12-01-04	CONFERENCE WITH CLIENT, REVIEW DOCUMENTS, TRAVEL	5.5

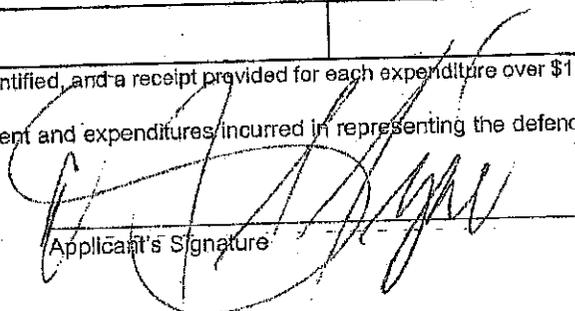
Time is to be recorded in tenth of an hour (6 minute) increments.

EXPENSE	PAID TO	AMOUNT
TRAVEL 12/1/04	DENNIS L. SIPE	122.25
TRAVEL 6/20/06	DENNIS L. SIPE	111.25
COPIES 6320 @ .25 EA MADE BY BUELL + SIPE	BUELL + SIPE	1580.00
POSTAGE PAID BY BUELL + SIPE	BUELL + SIPE	20.17

To obtain reimbursement, the purpose of each expense must be clearly identified, and a receipt provided for each expenditure over \$1.00.

I hereby certify the above is a true and accurate account of the time spent and expenditures incurred in representing the defendant in the Supreme Court of Ohio.

Applicant's Signature



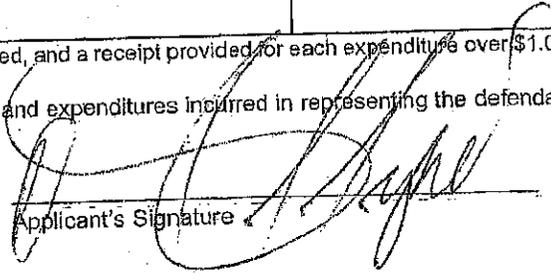
DATE	ACTIVITY	TOTAL TIME
12-13-04	READ TRANSCRIPT	1.2
12-14-04	READ TRANSCRIPT	.9
12-15-04	PREPARE DOCUMENTS TO EXTEND TIME TO FILE BRIEF	.4
12-15-04	READ TRANSCRIPT	2.3
12-23-04	READ TRANSCRIPT	4.1
12-24-04	READ TRANSCRIPT	3.7
12-26-04	READ TRANSCRIPT	3.2
12-27-04	READ TRANSCRIPT	3.9
12-28-04	READ TRANSCRIPT	2.9
12-29-04	READ TRANSCRIPT	4.6
12-30-04	READ TRANSCRIPT	3.7
12-31-04	READ TRANSCRIPT	5.6
01-02-05	READ TRIAL TRANSCRIPT	2.9
01-03-05	READ TRIAL TRANSCRIPT	3.3
01-04-05	READ TRIAL TRANSCRIPT	4.6
01-05-05	READ TRIAL TRANSCRIPT	2.4

Time is to be recorded in tenth of an hour (6 minute) increments.

EXPENSE	PAID TO	AMOUNT

To obtain reimbursement, the purpose of each expense must be clearly identified, and a receipt provided for each expenditure over \$1.00.

I hereby certify the above is a true and accurate account of the time spent and expenditures incurred in representing the defendant in the Supreme Court of Ohio.


 Applicant's Signature

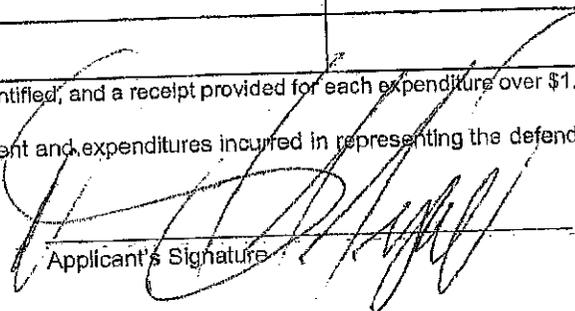
DATE	ACTIVITY	TOTAL TIME
01-15-05	DRAFT DOCUMENTS	3.2
01-16-05	DRAFT DOCUMENTS	2.6
01-17-05	DRAFT DOCUMENTS	3.1
01-18-05	DRAFT AND REVIEW DOCUMENTS	2.5
01-19-05	DRAFT DOCUMENTS	5.6
01-20-05	DRAFT DOCUMENTS	8.3
01-21-05	RESEARCH AND DRAFT DOCUMENTS	6.0
01-22-05	DRAFT DOCUMENTS AND MAKE REVISIONS	5.7
02-28-05	TELEPHONE CONFERENCE (3) AND REVIEW DOCUMENTS	.5
05-24-05	TELEPHONE CONFERENCE (3), RESEARCH, AND MOTION	1.5
05-25-05	TELEPHONE CONFERENCE (2)	.3
05-26-05	TELEPHONE CONFERENCE (8) AND REVIEW DOCUMENTS	3.5
05-29-05	DRAFT REPLY BRIEF	3.5
05-30-05	DRAFT REPLY BRIEF	5.6
06-01-05	REVIEW REDRAFT AND FORMAT BRIEF	.7
07-01-05	LETTER AND LETTER REVIEWED	.3

Time is to be recorded in tenth of an hour (6 minute) increments.

EXPENSE	PAID TO	AMOUNT

To obtain reimbursement, the purpose of each expense must be clearly identified, and a receipt provided for each expenditure over \$1.00.

I hereby certify the above is a true and accurate account of the time spent and expenditures incurred in representing the defendant in the Supreme Court of Ohio.


Applicant's Signature

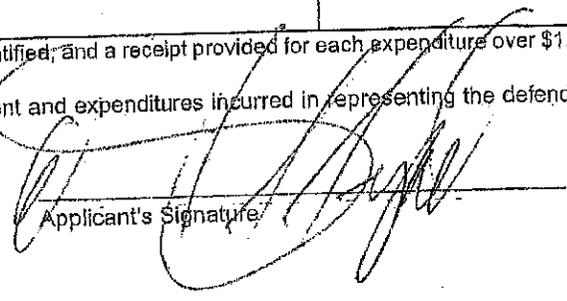
DATE	ACTIVITY	TOTAL TIME
06-01-06	TELEPHONE CONFERENCE AND REVIEW DOCUMENTS	1.0
06-19-06	REVIEW DOCUMENTS	1.0
06-30-06	APPEARANCE-HEARING	1.0
06-20-06	TRAVEL	4.0
09-05-06	LETTER, REVIEW DRAFT AND RE-DRAFT	.8
09-13-06	LETTER TO CLIENT	.3
12-13-06	REVIEW DOCUMENTS AND TELEPHONE CONFERENCE	1.0
12-20-06	REVIEW DOCUMENTS	1.0
12-21-06	READ SUPREME COURT OPINION	1.1
12-22-06	DRAFT MOTION	5.2
01-05-07	LETTER TO CLIENT	.3

Time is to be recorded in tenth of an hour (6 minute) increments.

EXPENSE	PAID TO	AMOUNT

To obtain reimbursement, the purpose of each expense must be clearly identified, and a receipt provided for each expenditure over \$1.00.

I hereby certify the above is a true and accurate account of the time spent and expenditures incurred in representing the defendant in the Supreme Court of Ohio.


Applicant's Signature

BUSINESS EXPENSE VOUCHER

Case: 2:08-cv-00055-EAS-TPK Doc #: 49-1 Filed: 04/19/11 Page: 54 of 65 PAGEID #: 657

Date: 12/1/07 Amt: 122.85

Explanation: visit Johnson

Mileage: 390

Destination: Mansfield

CK# 4720

return

Initials: DLS

Paid By Initials: JHW

BUSINESS EXPENSE VOUCHER

Date: 6/20/06 Amt: 111.25

Explanation: Travel M. Johnson

Mileage: 250

Destination: Colo return

CK# 6056

Initials: DLS

Paid By Initials: JHW

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, :

Appellee, :

vs. :

MARVIN G. JOHNSON, :

Appellant. :

Case No.: 04-1163
Death Penalty Case

On appeal from Guernsey County
Court of Common Pleas
Case No. 03 CR 116

APPELLANT'S COUNSEL'S AFFIDAVIT OF EXPENSES

Daniel Padden
Prosecuting Attorney
139 West 8th Street
Cambridge, Ohio 43725

*Counsel for Appellant,
State of Ohio*

Dennis L. Sipe, #0006199
BUELL & SIPE CO., L.P.A.
322 Third Street
Marietta, Ohio 45750
(740) 373-3219 (voice)
(740) 373-2892 (facsimile)

Kathleen McGarry, #0038707
McGARRY LAW OFFICE
P.O. Box 310
Glorieta, New Mexico 87535
(505) 757-3989 (voice)
(505) 757-3989 (facsimile)

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO,

Appellee,

vs.

MARVIN G. JOHNSON,

Appellant.

Case No.: 04-1163
Death Penalty Case

On appeal from Guernsey County
Court of Common Pleas
Case No. 03 CR 116

APPELLANT'S COUNSEL'S AFFIDAVIT OF EXPENSES

STATE OF OHIO, COUNTY OF WASHINGTON, SS:

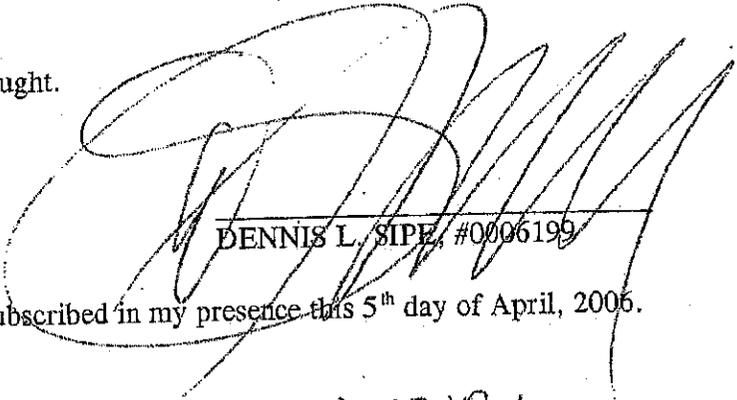
DENNIS L. SIPE, being first duly cautioned and sworn according to law,
deposes and says:

1. Affiant is competent to testify as to the matters contained herein.
2. Affiant has knowledge of all facts contained herein.
3. Affiant is a duly licensed attorney in the State of Ohio since 1973.
4. Affiant was appointed as counsel for the Defendant-Appellant by the Honorable David A. Ellwood, Common Pleas Court Judge of Guernsey County, Ohio by Entry dated June 11, 2004.
5. Affiant filed a Motion, Entry and Certification For Appointed Counsel Fees and Expenses on March 13, 2007.
6. Affiant has reviewed the Motion, Entry and Certification For Appointed Counsel Fees and Expenses and presents this Affidavit in Support of the expenses.
7. Affiant has listed photocopying costs of \$1,580.00. This number was reached as counsel has prepared a total of six thousand three hundred twenty photocopies at the rate of twenty five cents per photocopy. The postage fees of \$20.17 was paid by counsel's

law firm to mail the documents to this Court.

8. Affiant submits that the costs were reasonable and necessary and involve costs associated with the representation of Marvin Johnson before the Supreme Court of Ohio in Case Number 04-1163.

9. Affiant further saith naught.



DENNIS L. SIPE, #0006199

Sworn to before me and subscribed in my presence this 5th day of April, 2006.

Bonnie B. Parks

Notary Public



BONNIE B. PARKS, Notary Public
In and For The State of Ohio
My Commission Expires March 24, 2009

IN THE COURT OF COMMON PLEAS
GUERNSEY COUNTY, OHIO

APR 19 2011 10:41
CLERK OF COURTS
GUERNSEY COUNTY, OHIO

STATE OF OHIO,

PLAINTIFF,

VS.

MARVIN GAYE JOHNSON

DEFENDANT.

CASE NO. 03-CR-116

ENTRY

* * * * *

Attorney Dennis L. Sipe and Attorney Kate McGarry are hereby appointed to represent Defendant as Appellate Counsel, pursuant to Superintendent Rule 20.

The Court Reporter is **ORDERED** to prepare transcript of all proceedings and provide copies to the Prosecuting Attorney and Appellate Counsel. Cost of transcript shall be paid by the Court due to Defendant having been found indigent.

David A. Ellwood
JUDGE DAVID A. ELLWOOD

cc: Prosecuting Attorney
Dennis L. Sipe & Kate McGarry, Appellate Counsel
Rhonda Boney, Court Reporter
Defendant

STATE V. MARVIN JOHNSON

ISSUE LIST

Dennis' Issues

PRE-TRIAL

Competency/procedure

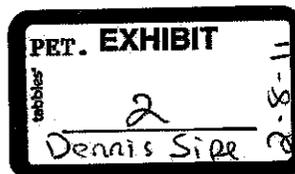
- Tr. 20--Motion filed with suggestion of Incompetency
- Tr. 36—DC withdraws suggestions of incompetency
- Tr. 2073 Δ wants the death penalty, wants it over with
- Tr. 2074-DC says competency exam is in order
- Tr 2079-Δ says he wants counsel relieved of their duties, like he requested on March 10
- Tr. Trial court denied request for competency exam after Δ questions Tina 2183 renews motion for mental eval, that was previously filed and withdrawn
- court grants in part and denies in part
- Any problems with procedure--Δ found competent

VOIR DIRE

- Were questionnaires destroyed? (Tr470, 668)
- -Tr. 430 crt encourages jurors to not answer questions to refer counsel to questionnaires.

Tr. 1090-Delbert Bumgardner

- Prison guard at Belmont
- Allegations that he and his partner assaulted an inmate
- J tells DC your mitigation does not supercede this
- Wants defense to prove that mitigating factors outweigh aggravating circumstances



- Tr. 1281 DC uses a preemptory challenge

Tr. 979 Phyllis Kritz

- Thinks DP is a deterrent
- Religious beliefs support it
- Society is better protected with it
- Tr. 1281 DC uses a preemptory challenge

Tr 1255 Paul Starr

- Feels dp should be used any time there is a killing
- Considers himself a strong supporter of DP
- Would have to prove mit outweighs agg

[REDACTED]

[REDACTED]

- Tr. 640-says there are two specifications
- Tr. 739-reads both alternatives in A& spec, but he was not indicted on both
- Tr 812-crt says the agg circumstance calls premeditated murder, prior calc and design (*this juror was excused for med reasons*)
- Tr 822 crt says those specifications are the aggravating circumstances in Ohio law and there are 2 alleged in this case, prior calculation and design and principal offender Crt ask parties is that correct—Both say yes (*this juror is later excused*)
- Tr. 851 crt tells DC to use prior calculation and design and principal offender (juror later Preempted by DC)
- Tr. Reads that there are 2 agg circumstances (This juror is seated)
- Tr. 871-888 court reads “2” agg circumstances, finally warhola tells court he is wrong and juror (who is later seated) is brought back in for reinstruction
- Tr. 898 Messed up weighing process—if you find the mit factors outweigh the agg cirm (this juror is seated)
- Tr, 958-the fact that there was a murder with prior calculation and design that allow you to consider DP (excused for cause)

But then...

- Tr. 1312 tells jury if there was a different instruction on spec in voir dire, they are instructed to disregard it.

DC fails to challenge for cause

Tr. 766 Shirley Lucas

- You can be brought up in bad environment and overcome it with will power
- Would not give physical or sexual abuse any weight

Tr. 781 Barbara Grant (seated as a juror)

- She is concerned about the amount of money to support someone for life in prison
- She is afraid society would not be protected if a life sentence imposed
- She says she could not vote for a life sentence if a child deliberately murdered—then she says she could

TR. 1056 Sara Danadik

- Believes a premeditated murder of a child warrants death (this juror is seated)

Tr. 1182 Russell Landers//

- Corrections officer at Noble Corr.

TRIAL

[REDACTED]

TR. 1328—1330--Opening statement
Tr. 1894-1899 Tina Bailey testimony,
1898 shows 7th grade picture of V

[REDACTED]

See voir dire stuff
Verdict form on ct 2 spec is not what indictment says (tr 2267
Tr 2178 crt says verdict forms were reviewed by both sides and
approved

Pros elects to have Δ sentenced on ct 2`
crt makes two specs out of one
pros. says only one of three necessary
Motion 36
Pros. says kidnap or rape or agg robbery
Tr 2305 Merger of counsts and specs//
Motion 35
Tr. 2349 prosecutor says two specs

Insufficiency of Kidnapping

- Tr. 688 Pros tells prospective jurors that Δ beat him to death then tied him up
- TR 1577-believes after investigation that murder took place upstairs
- Tr 1620-Harbin is confident he was assaulted and killed in living room
- TR 2014 Lee testifies there was no question he was alive when he was tied up
- Tr 2027-all injuries were inflicted before ligatures were placed on hands and feet
- 2039 R. 29 on kidnapping
- R. 2163--2171 R. 29 after defense case

Rape and Robbery . . . of to be tied to felony agg murder and spec

Sufficiency of rape and agg robbery??
Tr 2043-2045 Rule 29

Jury instructions

1321—gist of the offense
1327 pros and defense approve instruction
2253-Gist of the offense
RD-willing to act
Tr. 2162 crt denies LIO of sexual battery and abuse of a corpse

IAC

Tr. 1342-in opening says he is not going to dispute most of what Pros. said
Tr 1350 Conceded guilt on agg murder with prior calc and design, not often
I say my client killed
DC says at beginning of penalty phase it is an “uphill battle”

Failure to see error in verdict form
Fails to object to admission of all trial phase exhibits in penalty phase
But pros later removes robbery exhibits (2624)

Δ was robbed at depo of phone

Tr 1697, crt brings up, but waiver never signed??
Dc says he discussed with Δ and Δ agreed
Depo p. 8 DC waives Δ's presence

Bias by trial court??

Tr. 2133 Δ says he wants the death penalty, court says "well under the law you have the right to receive it"

Improper interference with trial by court

Tr 1652 crt is interested in saving time, wants DC to stipulate on shoe laces—DC says no

Trial court comment about Δ being a fool

Appropriateness and proportionality

Possible Issues Suggested ????

These are issues mentioned by one of us or Δ, look into and decide if worth raising

Ex parte motion for forensic pathologist

Tr.117—motion heard

1/16/04—COURT GRANTS MOTIONS

Tr. 209—no report yet from forensic pathologist

Δ will have to pay for motion

Tr. 167

Δ has on street clothes and stun belt, it is on his right leg and not visible

Δ asks for attorneys to be removed

- Tr. 274-Δ feels he is not being represented properly
- Tr. 281-DC says Δ wants them removed because Δ does not like what they are telling him
- Tr.285-Δ wants to know how newspaper can print something that is not true

On the way to the courtroom - witness issues

Tr. 2132

2200 Court fails to individually vd jurors after DC makes request

more witness issues

-Tr. 312 no objection

TR 2634 tells jurors notes are personal property and suggest they return to bailiff to destroy

Tr 2638 crt now tells them to return notes to bailiff

Gruesome photos

Tr. 347-crt gives court reporter all photos tendered to court as part of discovery, there were 74

Tr 356-crt find some pictures are cumulative and denies admission

Tr 1298 crt finds the photos are too numerous and overly duplicative

Problems in meeting with client, cannot meet with him over the weekend.

Tr. 1285

Bill of particulars on the weekend - DC issues

Tr. 1294-1296

Confrontation issues with Mickey Alexander

-state able to get in his statements without any confrontation of witness

Tr 1585- Mickey directed them where to go

Tr 1634-1648 Harbin relays MA information

Inference on hair in photo

Are DC applied to police report

High Court Opinion

In the Supreme Court of Ohio

STATE OF OHIO,	)	Supreme Ct. Case No. 04-1163
)	
Respondent-Appellee,)	
)	
-vs-	)	Trial Ct. No. 03-CR-116
)	
MARVIN JOHNSON,)	
	)	Death Penalty Case
Petitioner-Appellant.)	

AFFIDAVIT OF KORT GATTERDAM

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, Kort Gatterdam, after being duly sworn, hereby state as follows:

1. I am an attorney licensed to practice law in the State of Ohio since 1988. In 1988 to 1989, I worked at the Franklin County Public Defender for approximately eight months, representing criminal defendants primarily in trial proceedings. I worked in the Office of the Ohio Public Defender from 1989–2001 as an Assistant State Public Defender, representing defendants in trial, appellate, post-conviction, and federal habeas corpus proceedings. While employed with that office, I served as chief of the trial section, which involved trying felony cases and providing advice to other criminal defense attorneys across the State regarding trial issues, particularly in capital cases. Beginning in 2001, I have been in private practice. From 2001–2006, I was a partner in the firm Kravitz, Gatterdam & Brown, LLC. Since 2006, I have been with Carpenter Lipps & Leland LLP. I am presently a partner in the firm.
2. The majority of my private practice is criminal defense in state and federal court. I have tried numerous cases in state and federal court and I also handle criminal defense appeals and federal habeas corpus cases. I am certified by the State of Ohio as lead counsel in capital cases and have handled and tried numerous capital cases. I have also tried one federal capital case, *United States v. Lawrence*, and continue to serve as counsel on direct appeal. I have also lectured at seminars on trial related issues.
3. I am a member of the following federal bars: United States Supreme Court, United States Court of Appeals for the Sixth Circuit, and United States District Court for the Southern and Northern Districts of Ohio.
4. I was appointed to represent Appellant Marvin Johnson in federal habeas proceedings and have reviewed the record in *State v. Johnson*, Guernsey County Common Pleas Case No.



03-CR-116. I have also reviewed the direct appeal briefs and examined the direct appeal record.

5. In the course of my federal representation of Appellant Johnson, the depositions of Appellant Johnson's former direct appeal counsel were conducted.
6. Because of the focus of my practice of law, my Rule 20 certification, and my attendance at death-penalty seminars, I am aware of the standards of practice involved in the appeal of a case in which the death sentence was imposed.
7. The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on an appeal as of right. *Evitts v. Lucey*, 469 U.S. 587 (1985).
8. Since the reintroduction of capital punishment in response to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the area of capital litigation has become a recognized specialty in the practice of criminal law. Many substantive and procedural areas unique to capital litigation have been carved out by the United States Supreme Court. As a result, anyone who litigates in the area of capital punishment must be familiar with these issues to raise and preserve them for appellate review.
9. Appellate representation of a death-sentenced client requires recognizing that the case will most likely proceed to the federal courts via a Petition for Writ of Habeas Corpus filed in a federal district court. Appellate counsel must preserve all issues throughout the state-court proceedings on the assumption that relief is likely to be sought in federal court.
10. It is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be fairly presented and exhausted throughout the state courts. The standard of practice is to cite directly to the relevant provisions of the United States Constitution and appropriate United States Supreme Court authority in each proposition of law to avoid any fair presentment and exhaustion problems in federal court.
11. Based on the foregoing standards, I reviewed the record in Appellant's case. I have identified the following issues that should have been presented by appellate counsel to the Ohio Supreme Court:
 - **Proposition Of Law No. I: A defendant's right to confront a witness under the Confrontation Clause of the Sixth Amendment to the United States Constitution is violated when the State introduces and the trial court admits hearsay statements of an available witness through the testimony of another witness. U.S. Const. VI and XIV.**
 - **Proposition Of Law No. II: A capital defendant is denied the right to the effective assistance of trial counsel when trial counsel fails to object to the admission of improper hearsay evidence. U.S. Const. VI and XIV.**

12. These issues are meritorious and warrant relief. Thus, appellate counsel's failure to present these errors amounts to ineffective assistance of appellate counsel in this case.
13. Previous appellate counsel Sipe testified that they identified these issues to be raised in their issue list, but Attorney Sipe made the decision not to raise the issue without consultation with Attorney McGarry.
14. The basis of Sipe's decision to not raise the identified issue is legally erroneous. Sipe attempted to justify the issue's exclusion with what is known as the "course of investigation" hearsay exception. Under this exception, an "out-of-court statement to law enforcement is not hearsay if that statement is offered into evidence 'as an explanation of why the [subsequent] investigation proceeded as it did.'" *Jones v. Basinger*, 635 F.3d 1030, 1045 (7th Cir. 2011) (quoting *United States v. Eberhart*, 434 F.3d 935, 939 (7th Cir. 2009)). This also stands contrary to the United States Supreme Court's recent decision in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).
15. This exception is commonly abused. See *United States v. Sallins*, 993 F.2d 344, 346 (3d Cir. 1993) ("While officers generally should be allowed to explain the context in which they act, the use of out-of-court statements to show background has been identified as an area of 'widespread abuse.'"); *Jones*, 635 F.3d at 1045-46. The Seventh Circuit recently explained that the hearsay evidence lacks probative value because "the details of an investigation are generally 'of only minimal consequence to the determination of the action,'" and because "the probative value of a tip on which an investigation was based is 'marginal, at best,' absent perhaps a (relevant) allegation of police impropriety." *Jones*, 635 F.3d at 1045-46 (quoting *United States v. Mancilas*, 580 F.2d 1301, 1309-10 (7th Cir. 1978), and *United States v. Lovelace*, 123 F.3d 650, 653 (7th Cir. 1997)). On the other hand, the danger of prejudice is significant with this evidence because "[a]llowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the sixth amendment and the hearsay rule." *Id.* at 1046 (quoting *United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004)); see also *United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1994) ("[T]he mere identification of a relevant non-hearsay use of such evidence is insufficient to justify its admission if the jury is likely to consider the statement for the truth of what was stated with significant resultant prejudice.").
16. For these reasons, the "course of investigation" exception has been described as "limited" because "only a small amount of information is legitimately needed in all but the rarest cases." *Jones*, 635 F.3d at 1047. It should only be applied to admit "those brief out-of-court statements that bridge gaps in the trial testimony that would otherwise substantially confuse or mislead the jury." *Id.* at 1046. For example, the exception would allow a DEA agent to testify that an informant had identified his cocaine supplies as "E" because otherwise, it would have been unclear why the agents had asked that informant to call "E." *Id.* at 1047 (citing *Eberhart*, 434 F.3d at 937, 939 & 940 n.1).

17. Appellate counsel failed to raise these issues in Mr. Johnson's direct appeal. Based on my evaluation of the record and understanding of the law, I believe the issues raised in this Application for Reopening are meritorious. Also, had appellate counsel raised these issues, each error would have been properly preserved for federal-court review.
18. Therefore, Mr. Johnson was detrimentally affected by the deficient performance of his former appellate counsel.

Further affiant sayeth naught.



KORT GATTERDAM
Counsel for Appellant

Sworn to and subscribed before me on this 11th day of April, 2012.



Notary Public



KARLA LEBEAU
NOTARY PUBLIC
STATE OF OHIO
Comm. Expires
July 10, 2015

1 IN THE COURT OF COMMON
2 PLEAS IN THE FIFTH DISTRICT
3 COURT OF APPEALS IN AND FOR
4 GUERNSEY COUNTY, OHIO.

5 CASE NO. 03 CR 116

6 STATE OF OHIO

7 PLAINTIFF,

8 VS.

9 MARVIN G. JOHNSON

10 DEFENDANT.

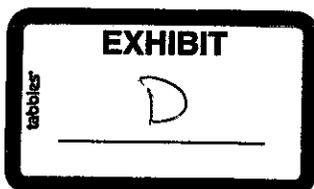
11 -----
12 Transcript of proceedings held on September 30,
13 November 26, December 15, 2003, January 13, 23, February 6,
14 11, 18, March 10, 30, April 26, May 3, 4, 5, 6, 7, 10, 11, 12,
15 13, 14, 17, 26, 28, June 1 & 4, 2004, before the Honorable
16 DAVID A. ELLWOOD, Judge.

17
18 APPEARANCES:

19 C. KEITH PLUMMER, P.A.
20 DANIEL G. PADDEN, A.P.A.
Prosecuting Attorney
139 W. 8th St.
21 Cambridge, OH 43725 For the Plaintiff,

22 JACK BLAKESLEE ANDREW WARHOLA
Attorney at Law Attorney at Law
23 421 West 126 S. 9th St
Caldwell, OH 43724 Cambridge, OH 43725
24 For the Defendant.

25 (Vol VIII of XIII, Pages 1516-1702)



RHONDA K. BONEY
Official Court Reporter
801 E. Wheeling Ave., Rm E
Cambridge, OH 43725

1 A. There is 1178 is the house I believe it's a vacant
2 house next to a parking lot right here which is what
3 Mickey instructed us to go to this parking lot. At
4 the back of the parking lot there was suppose to be
5 concrete steps. There's a park there, that's the
6 steps at the back of the parking lot. Then as you
7 went down the steps at the bottom of the steps if
8 you turned left he instructed to go to the bottom of
9 the steps turn left there was a bunch of weeds.

10 BY MR. PADDEN:

11 Q. This is where you actually went?

12 A. Yes.

13 Q. And you took these photographs as you're going
14 along?

15 A. Yes. There was a bridge. Mr. Alexander was
16 familiar with this bridge because just familiar with
17 Zanesville, I guess, but the park goes this way. He
18 said turn left go through these weeds look for a
19 culvert. He said it's a big concrete culvert.
20 Well, we located that probably 75 feet into the
21 weeds along the edge there.

22 Q. And that's shown in exhibit "DD-2"?

23 A. Yes. Then he said immediately after the culvert
24 look for a news stand. I'm not sure what the news
25 stand was but right here Times Recorder newspaper

RHONDA K. BONEY
Official Court Reporter
801 E. Wheeling Ave., Rm E
Cambridge, OH 43725

1 A. He indicated to me --

2 MR. BLAKESLEE: Objection. Hearsay.

3 MR. PLUMMER: I don't believe he's going to restate the
4 comments, Your Honor. I think he's going to give
5 general areas of the subject matter that was
6 discussed.

7 THE COURT: The objection is sustained in part and overruled
8 in part. He may not testify as to what Mickey
9 Alexander may have said. However, he may testify as
10 to what information was gained for his
11 investigation. You may continue in that manner.

12 A. He advised me of certain comments that Marvin had
13 made to him and also the possible location of
14 pertinent evidence.

15 BY MR. PLUMMER:

16 Q. After having this discussion on the 17th -- let me
17 ask you this. On the 17th do you know whether or
18 not Mickey Alexander and Marvin Johnson were cell
19 mates?

20 A. On the day of the 17th I don't believe they were.

21 Q. Did you ever make arrangements for -- you or any
22 other police officer in the Cambridge Police
23 Department make arrangements for Mickey Alexander to
24 be a cell mate of Marvin Johnson?

25 A. No, sir.

1 Guernsey County Jail?

2 A. Yes, he was.

3 Q. Had he ever been released from the Guernsey County
4 Jail from August 9, 2003, through August 19, 2003?

5 A. No, he was not.

6 Q. What came of that meeting?

7 A. He had relayed other information to me that I
8 believed was evidence of the crime. He still gave
9 no indication at this point where any evidence could
10 be located.

11 Q. Was at that point in time Mr. Alexander a cell mate
12 of Mr. Johnson?

13 A. Yes, he was.

14 Q. And did you direct anyone at the Sheriff's Office to
15 put Mr. Alexander in the same cell with Mr. Johnson?

16 A. No, sir.

17 Q. Did you ever ask Mr. Alexander to initiate any
18 conversation with this defendant, Mr. Johnson?

19 A. No, sir.

20 Q. Did Mr. Alexander come to you with this information
21 without first being prompted by -- without any
22 prompting by the Cambridge Police Department or any
23 other law enforcement officer to your knowledge?

24 A. Yes, sir.

25 Q. Two days later you then had another meeting with

1 Mr. Alexander on August 21, 2003, is that correct?

2 A. Yes, sir.

3 Q. And can you tell us the nature of that meeting?

4 A. Yes. Again, I was contacted by the Guernsey County
5 Jail that Mickey requested to speak with me once
6 again. This was the third and subsequently the
7 final meeting I had with Mickey.

8 Q. At the conclusion of that meeting with Mr. Alexander
9 did you believe that Mr. Alexander may be of
10 assistance in locating evidence that you thought to
11 be important in this investigation?

12 A. Yes, I did.

13 Q. And what evidence did you believe you may be able to
14 locate?

15 A. The missing money that was taken withdrawn from USA
16 Bank -- US Bank.

17 Q. We're talking about the money that is alleged
18 Mr. Johnson went to the bank with Ms. Bailey on the
19 15th after Daniel had been murdered and the money
20 was withdrawn from US Bank?

21 A. Yes, sir.

22 Q. The thousand dollars?

23 A. Yes.

24 Q. So based upon your conversation with Mr. Alexander
25 you felt that he may be of assistance in locating

1 that money?

2 A. Yes, sir.

3 Q. Can you tell us what you advised Mr. Alexander -- at
4 that point prior to going to Zanesville to look for
5 the money can you tell us what you advised
6 Mr. Alexander at that point and what arrangements
7 you made with him to have him assist you in locating
8 the money?

9 A. Yes. He advised that he had detailed --

10 MR. BLAKESLEE: Objection. It's hearsay.

11 THE COURT: Response?

12 MR. PLUMMER: It is hearsay, Your Honor. We'll rephrase.

13 THE COURT: Sustained. Objection sustained.

14 BY MR. PLUMMER:

15 Q. Had Mr. Alexander relayed to you where he thought
16 the money was?

17 A. Yes, he did.

18 Q. Again, had he been in jail ever since -- when you
19 talked to him and he gave you those directions on
20 August 21, 2003, had he been in jail the Guernsey
21 County Jail ever since August 9, 2003?

22 A. Yes.

23 Q. Did you have a discussion with Mr. Alexander
24 relating -- let me back up and ask this question.

25 Did you at that point want Mr. Alexander to go with

1 at the direction of Mickey Alexander.

2 Q. Was he telling you where to go?

3 A. Yes.

4 Q. He was giving you directions?

5 A. That is correct. He had us get off of State Street
6 exit. From there we made left onto State Street,
7 another left onto west Muskingum, I believe, and
8 then a right onto Ridge Avenue. Again, he takes us
9 down Ridge Avenue to an abandoned house. Adjacent
10 the abandoned house is a parking lot and beyond that
11 parking lot down over an embankment is a park grown
12 up. You can tell it hasn't been used in quite
13 awhile.

14 Q. Now, you were present in the courtroom when Officer
15 Choma testified regarding apprehending Mr. Johnson,
16 is that correct?

17 A. Yes.

18 Q. Is it in generally the same area that Officer Choma
19 indicated that the defendant was ultimately arrested
20 at?

21 A. Yes, it is.

22 Q. I'm going to show you some photographs in just a
23 moment. When you got to the general destination
24 were you aware of where Mr. Johnson had been
25 apprehended and arrested?

1 A. No, I did not.

2 Q. So you hadn't been over there on the 15th?

3 A. That is correct. I had not.

4 Q. So you were relying solely on the information that
5 Mr. Alexander was giving to you?

6 A. Yes, sir.

7 Q. Were you generally aware of where Mr. Johnson had
8 been apprehended?

9 A. Yes.

10 Q. But you had not been to the location?

11 A. That is correct.

12 Q. Detective Clark was with you as well?

13 A. Yes, he was.

14 Q. Had he been on that chase that occurred, that
15 pursuit that occurred, on the 15th?

16 A. No, he had not.

17 Q. So was to the best of your knowledge Detective Clark
18 relying also on the information supplied to you by
19 Mickey Alexander?

20 A. Yes.

21 Q. On the 15th Mickey Alexander was in jail?

22 A. Yes, he was.

23 Q. But yet he was giving you this information of where
24 this money was?

25 A. Correct.

1 Q. Showing you what's been marked for purposes of
2 identification as State's Exhibits "DD-1" through
3 "12" they're exhibits, for the record, which are
4 placed on both sides photographs which are taken on
5 both sides of the cardboard sheet, each side of the
6 cardboard sheet being a separate exhibit. I would
7 ask you, Detective Harbin, if you could to approach
8 the jury and describe to them if you are familiar
9 with these photographs and if so what they have to
10 do with you, Mr. Alexander and Detective Clark
11 finding the money in the \$940.00 in Zanesville,
12 Ohio.

13 THE COURT: He may approach the jury for the purposes of
14 describing what is in the photographs.

15 BY MR. PLUMMER:

16 Q. Showing you what's been marked for purposes of
17 identification as State's Exhibit "DD-1".

18 A. Yes. This is inside the wooded area extremely
19 thick. This is a news stand. It was one of the
20 objects that Mr. Alexander had told me that
21 Mr. Johnson had told him to look for in his way to
22 the money.

23 Q. "DD-2".

24 A. Yes, there's a concrete cement culvert extremely
25 large that is another item that before leaving

1 Cambridge Mr. Alexander told him to look for --
2 Mr. Johnson told Mr. Alexander to look for in his
3 route to the money.

4 Q. "DD-3".

5 A. At the top of these steps is the parking lot next to
6 the abandoned building. Those steps lead down into
7 the park area and at the bottom of the steps to the
8 left is where we entered the woods.

9 Q. "DD-4".

10 A. That is the actual parking lot and the steps would
11 be right over in this area.

12 Q. "DD-5".

13 A. This is the area directly left of the steps where we
14 entered the woods.

15 Q. "DD-6".

16 A. That is another close-up of the Times Recorder paper
17 box.

18 Q. "DD-7".

19 A. This is the abandoned house on Ridge Avenue just to
20 the right of that is the parking lot and the park.

21 Q. "DD-8".

22 A. That is just another angle of the same photo.

23 Q. "DD-9".

24 A. That is a picture of the money that was hidden
25 inside the tire.

1 Q. And who showed you where that was?

2 A. Mickey Alexander.

3 Q. The cell mate of this defendant?

4 A. Yes.

5 Q. "DD-10".

6 A. It is the close-up of the money and the money
7 envelope.

8 Q. "DD-11".

9 A. That is once we're back at the police department in
10 Cambridge the money was laid out and photographed.

11 Q. And how much was there?

12 A. \$940.00.

13 Q. In what denominations?

14 A. Eight \$100.00 bills and seven \$20.00 bills.

15 Q. And finally, "DD-12". It looks to be back in
16 Zanesville.

17 A. That's back in Zanesville leading down the steps.

18 Q. Detective, you may return to the witness stand. You
19 saw earlier Detective Clark identify the US Bank
20 envelope was that the same bank envelope at the
21 direction of Mickey Alexander you recovered in
22 Zanesville, Ohio, on August 21, 2003?

23 A. Yes, it was.

24 Q. Also on August 21, 2003, did you receive information
25 involving the location of a key that was in

1 sight view.

2 THE COURT: Continue, please.

3 A. This would have been a picture also of the kitchen
4 area from the opposite direction. It appears it's
5 almost directly in front of the sliding glass doors
6 looking towards the basement.

7 BY MR. WARHOLA:

8 Q. This would be the basement area here, right?

9 A. Yes, to your right.

10 Q. And on the floor area where you saw some smears of
11 blood or some blood?

12 A. Yes.

13 Q. Did you see any blood on the steps going down to the
14 basement?

15 A. No, sir.

16 MR. WARHOLA: Thank you. That's all I have.

17 THE COURT: That completes cross-examination, ladies and
18 gentlemen of the jury, of Detective Harbin on behalf
19 of Marvin Johnson.

20 Redirect examination, Mr. Plummer?

21 MR. PLUMMER: Yes, Your Honor.

22 THE COURT: You may inquire on redirect examination.

23 REDIRECT EXAMINATION

24 BY MR. PLUMMER:

25 Q. Do you know where Mickey Alexander is as we speak?

1 A. I believe he's in prison.

2 Q. To your knowledge was any accommodation given to him
3 or any consideration given to him for any statement
4 other than the defense suggesting he was given a
5 pack of cigarettes and \$50.00, any consideration
6 given to him for his testimony?

7 A. No, sir.

8 Q. Any leniency on his sentence?

9 A. No, sir.

10 Q. In fact, did I tell you that he would be given no
11 leniency?

12 MR. BLAKESLEE: Objection.

13 MR. PLUMMER: I'll rephrase.

14 THE COURT: Sustained.

15 BY MR. PLUMMER:

16 Q. Were you or were you not advised by the Guernsey
17 County Prosecutor's Office that --

18 MR. BLAKESLEE: I'm going to object. That's the same thing.
19 Can I cross-examine the Prosecutor now about his
20 statement?

21 MR. PLUMMER: I'm asking what his working knowledge was as to
22 any consideration given to Mr. Alexander.

23 MR. BLAKESLEE: If he has personal knowledge of anything.

24 THE COURT: You may ask the question do you have any
25 knowledge.