

ORIGINAL

In The Supreme Court of Ohio

State of Ohio, :  
Appellee, :  
-vs- : Case No. 2012-1274  
Bennie Adams, :  
Appellant. : **This Is A Capital Case**

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On Appeal From The Seventh District Court of Appeals  
Case No. 08 MA 246

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Merit Brief of Appellant Bennie Adams

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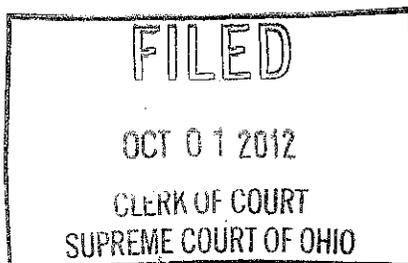
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## Statement of the Case and Facts

### **I. The offense and investigation: there is reasonable doubt that Adams' committed aggravated murder with capital specifications.**

In December of 1985, Bennie Adams lived in the downstairs apartment of a duplex in Youngstown, Ohio. Tr. 117. He lived there with his girlfriend, Adena Fidelia, whose father was a Youngstown police officer. Tr. 153. A Youngstown State University student, Gina Tenney, lived in the upstairs apartment. Tr. 115.

On December 25, 1985, there was an attempted breaking and entering of Tenney's apartment. Tr. 146. There were footprints in the snow leading to the address of a Mr. Tragessor. Tr. 182-83, 238. Because Adams' lived in the same duplex, he also became an early suspect. Tr. 149-51. The case was investigated, and remained open, with neither Adams nor Mr. Tragessor being ruled out as a suspect, (Tr. 147, 238) when on December 29, 1985, Gina Tenney's body was found in the Mahoning River. Tr. 184, 188; State's Ex. 63. She had ostensibly been strangled and put in the river sometime in the preceding hours. State's Ex. 63.

Upon finding Tenney's body, that same day, investigating officers went to the duplex to gain access to her apartment. Because Tenney's apartment door was locked, they knocked on Adams' apartment door under the guise that they merely wanted to use the telephone to call the landlord of the duplex. Tr. 148. Adams acquiesced to their requests. At that point, the investigating officers then started questioning Adams. Tr. 149. After denying that anyone else was in the apartment, the officers heard a noise and found Adams' friend, Horace Landers, in a back bedroom. Tr. 149, 193-94. When Landers heard the officers arrive, he hid in the back bedroom because he had a warrant out for his arrest. Tr. 149-50, 195.

Also found in the back bedroom was a television that belonged to Tenney (Tr. 158), along with Tenney's ATM card, which was found in Adams' jacket. Tr. 151. Adams was then

arrested and charged with receiving stolen property for having Tenney's ATM card. Tr. 198. Landers was arrested and charged with receiving stolen property for having Tenney's television. Tr. 198.

Following Adams' arrest, an autopsy was performed on Tenney on December 31, 1985. State's Ex. 63. The autopsy took place in a hospital setting by a Dr. Rona<sup>1</sup>, who from the autopsy report was a hospital based pathologist, not a forensic pathologist. Tr. 440. The Mahoning County Coroner, Dr. Nathan Belinky, who was then deceased by the time of Adams' trial, was known to sign-off on autopsies without actually conducting them or even being in attendance. 6/13/08 pretrial Tr. 4. There were additionally eight other doctors listed as "pathologists" on the autopsy report. State's Ex. 63. It is also clear from the autopsy report that at least two Youngstown Police attended the autopsy and took photographs of the victim. *Id.*

The finding from the autopsy was that Tenney had died of traumatic asphyxiation. *Id.* There is no indication in the report that there were injuries to the external or internal genitalia. *Id.* In addition, nothing suggested that there were ligatures on her wrists. *Id.*

Following Tenney's death, there was a crime scene investigation. Both Adams and Landers were initially suspects, and both were questioned as to their whereabouts on December 29, 1985. However, investigators then almost immediately set their sights on Adams and tested the semen found in Tenney's underwear against him. Four percent of the African American population, including Adams, had the blood type that matched the specimen from the victim. Tr. 557-58. Based upon that test, Landers was ruled out as a suspect, even though the State has claimed that their theory of this case is that more than one individual may have committed this

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<sup>1</sup> In the Court of Appeals, counsel mistakenly believed that Dr. Nathan Belinky had conducted the autopsy in this case. Upon further inspection of the autopsy report, it was determined that, in fact, a Dr. Rona conducted the autopsy. State's Ex. 63.

crime. Tr. 241; 4/25/08 pretrial, Tr. 38. Subsequent to this investigation, Landers died in 1988. 7/13/08 pretrial Tr. 144.

Based upon these test results, Lead Detective William Blanchard requested that the Grand Jury return an indictment against Adams for Aggravated Murder, rape, aggravated robbery, aggravated burglary, kidnapping, as well as receiving stolen property. However, because the evidence against Adams was weak, the Grand Jury would only indict Adams with receiving stolen property. Tr. 235. In fact, the elected Mahoning County Prosecutor at the time, Gary Van Brocklin, refused to indict Adams for any other charge. 7/17/2008 pretrial Tr. 157, 194-99. Detective Blanchard then took the case to the Trumbull County Prosecutor to inquire whether that prosecutor would indict this case. *Id* at 161; Tr. 236-37. The Trumbull County Prosecutor would also not prosecute the case. Tr. 237.

The case against Adams then went cold for twenty-two years. Tr. 173.

## **II. Adams' time spent in prison and on parole: He became a "changed man".**

In the meantime, Adams was picked-up on an unrelated rape that happened within four months of the current case in 1985. 9/5/08 pretrial, Tr. 108. He was convicted and served eighteen years in prison. While in prison, Adams excelled and became a model inmate. Mit. Tr. 67-106. Jack Mumma, an adjunct professor at Marion Correctional Institution had Adams' as a student for nine quarters. Mit. Tr. 72. He described Adams as an "excellent student, one of the best ones I ever encountered." *Id.* at 73. He concluded his testimony with "I'd have [Adams] over to my house. He is my friend. I'd want him living next door to me." *Id.* at 79. Dr. Patricia Olsen similarly described Adams as "absolutely invaluable" to the college program at the prison. *Id.* at 92.

Adams was paroled in 2004, and moved back to Youngstown to live with his daughter, his grandchildren, and Lowrine Charlton, his daughter's mother. He was a caring father and grandfather. Trusha Charlton, Adams' only daughter, explained how her father assisted her in buying a house and that he was helpful with her kids and gave them worldly advice, particularly her son, Antwoin. Mit. Tr. 120, 122. Adams also sought work and obtained a job at Astro Shapes, where he was an exemplary employee. Mit. Tr. 40, 129.

After three years of freedom and no problems whatsoever with the criminal justice system, Adams was arrested for the purpose of obtaining a new sample of his DNA. 7/17/08 pretrial, Tr. 165-66. The Ohio Attorney General at the time, Marc Dann, had told investigative offices in Ohio to submit DNA samples from any cold cases to his office for new testing. Tr. 173. The cold case was re-opened when Adams' DNA was found to be consistent with the DNA found in Tenney's underwear in 1985. Tr. 235, 587; 7/17/08 pretrial, Tr.167.

**III. Adams' trial: confrontation clause issues as well as ineffective assistance of counsel rendered the trial unfair.**

Following these DNA tests, Adams was indicted twenty-two years after the crime for the Aggravated Murder of Tenney. The trial court ruled that the other charges—rape, kidnapping, aggravated robbery and aggravated burglary—could not be pursued due to the statute of limitations. The trial court ruled, however, that those crimes could be pursued as capital specifications, or aggravating circumstances, thus making the Aggravated Murder charge a capital offense. 7/28/08 Judgment Entry.

Adams pled not guilty to the charges and asserted his right to a trial by jury. Attorneys Louis DeFabio and Anthony Meranto were appointed to represent Adams. This was Attorney Meranto's first death penalty case. 4/25/08 pretrial Tr. 7. Attorneys DeFabio and Meranto were representing no fewer than 6 other defendants in capital murder trials contemporaneously with

this trial. 2/28/08 pretrial Tr. 6-7. Attorneys DeFabio and Meranto hired Christopher Pagan, an attorney from Hamilton County, Ohio, to perform the mitigation investigation for Adams' case. 5/2/08 pretrial, Tr. 20-21. In the end, Adams went to trial with two technically qualified, but over-worked, attorneys and a mitigation specialist who lived across the State. 2/28/08 pretrial Tr. 6-7.

Adams' trial counsel filed several motions challenging Adams' right to a speedy trial as well as the undue delay in bringing Adams to trial on these charges. In denying Adam's motion for speedy trial, it is uncontroverted that the trial court did not put its findings of fact regarding its denial of trial counsel's motion for discharge based upon speedy trial on the record. *State v. Adams*, No. 08 MA 246, 2011 Ohio 5361 \*136 (7th Dist. Ct. App. October 14, 2011). Trial counsel failed to object to this glaring omission.

During pre-trial conferences, two important issues were decided. First, because Dr. Nathan Belinky was deceased, it was decided that the Trumbull County Coroner, Dr. Humphrey Germaniuk, would testify in place of Dr. Rona, who actually conducted the autopsy, or one of the other eight pathologists named in the autopsy report with respect to the autopsy and report. 9/19/08 pretrial, Tr. 118. The State even contacted Dr. Rona, yet still chose to go with Dr. Germaniuk. Although Dr. Rona had no memory of conducting the autopsy, he was alive and apparently available. 8/13/08 pretrial, Tr. 12; 9/5/08 pretrial, Tr. 23.

Second, it was decided that no mention of Adams' previous conviction of rape would be allowed throughout this trial. The trial court ruled that it would necessarily be "way too prejudicial to be admitted." 9/19/08 pretrial Tr. 117.

In addition, at the September 19, 2008, hearing to determine whether State's witnesses would be allowed to testify at trial about the victim's fear and apprehension of Adams, the trial

court assumed responsibility for questioning the witnesses and assisted the State. Adams' trial counsel failed to object to this improper overstepping by the trial court.

As an example, when delving into the issues of whether the victim was in fear of Adams, the trial court stated:

THE COURT: I said I want them to come in and I'm going to ask that question [about apprehension] myself.

\*\*\*

THE COURT: I'm going to explore it because I'm the one that must be satisfied. ... But as to the apprehension, I'm asking the question. I'm the one who has to be satisfied to let it come in at trial.

(9/19/2008 pretrial hearing at p. 74).

The trial court even took over the questioning on the issue of excited utterances.

THE COURT: I thought I was the one who \*\*\* said I will ask those questions [about excited utterances].

*Id.* at 83.

The trial court finally stated how he was going to proceed with the pretrial hearing when he said:

THE COURT: I'm going to do it all.

*Id.* at 91.

The trial then commenced on October 6, 2008. During voir dire, the prosecution excused at least three African-American jurors from serving on Adams' venire; the prosecution offered race-neutral reasons for each of those excusals. Voir Dire Tr. 759, 763; Voir Dire Tr. 443. However, after challenging the excusal of those jurors pursuant to *Batson*, trial counsel failed to object when the trial court accepted the race-neutral reasons allocated by the prosecution. *Id.*

After the conclusion of voir dire, the trial began. Throughout the trial, the trial court repeatedly admonished the jurors to refrain from discussing the case with family, friends, or amongst themselves. *See e.g.*, Tr. 20-21. In addition, the trial court reminded the jurors

repeatedly to refrain from watching any news programs and/or reading any news articles concerning this case. *Id.*

The State called 19 witnesses. The State presented testimony from Tenney's friends to establish that she was afraid of Adams. Defense counsel generally cross-examined these witnesses concerning the discrepancies between their original statements to the police and their current testimony.

The State then presented testimony from Detective Blanchard, the lead detective in the investigation of Tenney's death. During his testimony, Blanchard was specifically asked whether or not he could recall any further conversations with Adams' girlfriend; the detective replied, "not about this case." Tr. 221. Trial counsel did not object. Several pages later, the defense requested a mistrial based upon this comment in conjunction with others. Tr. 229. One of those comments that trial counsel referenced in their motion for mistrial was that the detective stated that he had testified previously "at suppression hearing, yes." Tr. 192. The motion was overruled. Tr. 230.

At another point of Detective Blanchard's testimony, the prosecutor asked why the detective believed that Adams was a suspect in the initial burglary attempt at the victim's apartment. The detective responded, "From what the victim told me that she was having problems. . . ." The defense objected, and the court sustained the objection. Tr. 243. However, the prosecutor continued with his questioning, "So from what she had told you?" and "Without saying what she said?" Tr. 243-44. Trial counsel did not object to these final statements.

The State next presented testimony from various people including an employee from the bank to testify about the usage of Tenney's ATM card on the night she went missing. Testimony was then presented from two people, John and Sandra Allie, who were at the ATM machine

around the time when Tenney's ATM card was used. The Allie's viewed the person at the ATM briefly, and at night. Tr. 291, 329. The suspect was also wearing a hood and scarf, obscuring most of his face. Tr. 295, 331. Neither of the Allies identified Adams in the line-up they were shown. Tr. 42, 299. Mrs. Allie actually identified Horace Landers, but that later changed and she claimed that she really meant to identify Adams. Tr. 42, 325.

The State subsequently presented testimony from Dr. Germaniuk, the Trumbull County Coroner. None of the other available pathologists (at least one—Dr. Rona—was known to be alive and available), who were present and participating in the autopsy, testified. State's Ex. 63; 8/13/08 pretrial, Tr. 12; 9/5/08 pretrial, Tr. 23. Defense counsel failed to object to either Dr. Germaniuk's testimony or the admission of the autopsy report as evidence against Adams. They similarly failed to file any opposition to the State's motion titled "State's Notice of Discovery (Coroner update)", which was filed on September 29, 2008, in the trial court.

The trial court ruled that Dr. Germaniuk could testify but that he was to solely present the autopsy and the findings made in 1985, without forming his own conclusions. 9/19/08 pretrial, Tr. 118-19; Tr. 408, 421, 426-27, 436, 438, 440. However, although Dr. Germaniuk did rely on the ultimate findings of the autopsy and report, he also disagreed with several findings of the Mahoning County Coroner's Office and testified as such. Specifically, he disagreed with the cause of death found in 1985. He testified that the cause of death was listed in the report as suffocation due to traumatic asphyxiation. Tr. 408. Dr. Germaniuk testified that "Basically I probably would have determined the cause of death, after reviewing all the materials, as simply asphyxia." *Id.*

Dr. Germaniuk then criticized the original autopsy with respect to the documentation of superficial wounds. He testified that "the way to really tell if they're superficial or not you make

an incision and see how superficial they really are. . . . That was not done in the case so I have to go with what they say as far as superficial.” Tr. 421.

Dr. Germaniuk then took issue with the procedure for determining the time of death in the original autopsy report. He testified that “I think they list her time of death based on vitreous, V-I-T-R-E-O-U-S, vitreous potassium at approximately 11:15 p.m.” Tr. 425. However, Dr. Germaniuk testified that “[vitreous humor] is not a reliable and accurate method” to determine cause of death. Tr. 426-27. “Currently, vitreous potassium is not used in determining a time of death.” Tr. 428. Use of this method in 1985 was “not reliable.” Tr. 440. Instead, based on the volume of the material in Gina Tenney’s stomach and when she last consumed food according to testimony, Dr. Germaniuk placed her death between 5:00 and 10:30 p.m., with death actually occurring “probably somewhere in the middle of that time.” Tr. 435-36.

Dr. Germaniuk further criticized the original autopsy because Dr. Belinky did not look for evidence of sexual trauma or assault. Tr. 436, 438. Again, Dr. Germaniuk speculated about that because he could not know whether the coroner looked for such evidence and did not find any.

Dr. Germaniuk then took the liberty of criticizing the Mahoning County Coroner’s office as a whole when he stated, “ If you take a look at the, quote, unquote, attending physician is a coroner. What are his qualifications in forensic pathology? None. He won a popularity contest. There’s no formal training or education in forensic pathology. Let’s take a look at the folks that did the autopsy. Under doctors you have the entire department listed and you have the person who is doing the autopsy who is probably a trainee with, again, no formal training in forensic pathology.” Tr. 440.

The State next presented the testimony of Brenda Gerardi with the Bureau of Criminal Investigation and Identification. Gerardi testified about the vaginal swabs and semen found in the victim's underwear. She testified that Adams could not be excluded as the source of the semen. Tr. 587. Defense counsel failed to have this evidence independently tested; in fact, defense counsel failed to challenge the DNA evidence at all.

Defense counsel only called one witness. They recalled State's witness Detective Blanchard to testify in the defense case-in-chief. Tr. 610. They questioned Detective Blanchard about the line-up where the Allie's failed to identify Adams.

In the end, the jury returned a verdict against Adams of guilty of Aggravated Murder and the accompanying capital specifications. That guilty verdict meant that a mitigation phase would take place, a mitigation phase that trial counsel were ill-prepared to handle.

#### **IV. The mitigation phase.**

The mitigation phase of Adams' trial began on October 28, 2008. Christopher Pagan, the defense mitigation specialist in this case, had collected Adams' employment records, so those were submitted to the jury without further explanation. Defense Ex. 1. Other than those records, six lay witnesses testified. Even though the use of a psychologist is standard, if not expected, in capital cases, such as Adams', no psychologist was utilized. ABA Guidelines for the Appointment and Performance of Counsel in Death Cases 4.1 (A) p. 28 (2003) ("The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.") Following this mitigation phase testimony, which was superficial at best, the jury recommended a sentence of death. The trial court adopted this recommendation and sentenced Adams to death.

**V. The direct appeal: appellate counsel were constitutionally ineffective.**

Attorneys John Juhasz and Lynn Maro were appointed to represent Adams' on his direct appeal to the Seventh District Court of Appeals. They filed a brief totaling five-hundred and twenty-eight pages in length. On October 14, 2011, that court affirmed Adams' convictions and sentence. *State v. Adams*, No. 08 MA 246, 2011 Ohio 5361 (7th Dist. Ct. App. October 14, 2011). That same court denied Adams' Application for Re-opening, which was filed on January 12, 2012. *State v. Adams*, No. 08 MA 246, 2012 Ohio 2719 (7th Dist. Ct. App. June 13, 2012).

Attorneys Juhasz and Maro continue to represent Adams on the appeal of his direct appeal to this Court. See Case No. 2011-1978. Contrary to the Court of Appeals opinion, regardless of the length of their brief to that court, appellate counsel failed to raise several meritorious claims on Appellant Adams' behalf. See Ex. A-C, attached to Adams' Application to Re-open in the Court of Appeals. Both attorneys Juhasz and Maro have signed affidavits acknowledging this deficiency. Ex. B, C. Had Appellant Adams' direct appeal counsel presented the three Propositions of Law included herein, the outcome of his appeal would have been different. This Court should reverse and remand this case to the Seventh District Court of Appeals with instructions that it must re-open Adams' direct appeal to fully consider the issues briefed herein. *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992) and App. R. 26(B).

## Argument

### PROPOSITION OF LAW NO. 1

**THE UNITED STATES SUPREME COURT DECISIONS IN *MELENDEZ-DIAZ*, *BULLCOMING*, AND *WILLIAMS* CONCLUSIVELY ESTABLISH THAT BOTH THE AUTOPSY REPORT AS WELL AS THE TESTIMONY OF DR. HUMPHREY GERMANIUK IN THIS CASE WAS ADMITTED IN VIOLATION OF THE CONFRONTATION CLAUSE.**

#### **I. Introduction.**

The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on a criminal appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). See, e.g., *Matire v. Wainwright*, 811 F.2d 1430 (11th Cir. 1987); *Peoples v. Bowen*, 791 F.2d 861 (11th Cir. 1986). Appellate counsel must act as advocates and support the cause of the client to the best of their ability. See, e.g., *Anders v. California*, 386 U.S. 738 (1967); *Penson v. Ohio*, 488 U.S. 75 (1988). Here, appellate counsel did the opposite. One of the strongest issues in Adams' case, and an issue of import to this Court, is being raised herein. This issue was not strategically bypassed; it was forgone solely due to the ineffective assistance of Adams' appellate counsel. As such, because appellate counsel were ineffective when they failed to raise this Proposition of Law in Adams' direct appeal, this Court should reverse and remand this case with instructions that the Seventh District Court of Appeals re-open Adams' direct appeal and consider this claim in its entirety.

#### **II. Relevant Case Law: Ineffective Assistance of Appellate Counsel.**

"A criminal appellant is constitutionally entitled to the effective assistance of counsel in his direct appeal." *Franklin v. Anderson*, 434 F.3d 412, 429 (6th Cir. 2006). In determining whether a defendant-appellant has received ineffective assistance of appellate counsel, the two-pronged analysis from *Strickland v. Washington*, 466 U.S. 668, 687 (1984) should be applied:

conduct that fell below an objective standard of reasonableness and a reasonable probability the result would have been different. *See State v. Were*, 120 Ohio St. 3d 85, 896 N.E.2d 699 (2008). Thus, the applicant must prove that counsel was deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal. *Id.* at 88, 896 N.E.2d at 702, citing *State v. Sheppard*, 91 Ohio St. 3d 329, 330, 744 N.E.2d 770 (2001). In seeking reopening, the appellant bears the burden of demonstrating that there is a “genuine issue” as to whether he has a “colorable claim” of ineffective assistance of appellate counsel. *Id.*, citing *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

The Sixth Circuit in *Mapes v. Coyle*, 171 F.3d 408, 427-28 (6th Cir 1999), listed several factors to consider when adjudicating an IAAC claim, saying “this list is not exhaustive, and neither must it produce a correct ‘score.’” This list includes inquiries such as the strength of an omitted issue, whether “clearly stronger” issues were passed by for weaker issues, and whether omitted issues were preserved at trial. *Id.* at 427-28. Other factors include inquiries into appellate counsel’s strategy and discussions with the client. *Id.*

“In addition to the *Mapes* factors, [A reviewing] court may also consider prevailing norms of practice as reflected in American Bar Association standards and the like.” *Franklin*, 434 F.3d at 429 (internal citations omitted). According to those norms, “Counsel who decide to assert a particular legal claim should present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client’s case and the applicable law in the particular jurisdiction.” ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.8(B)(1), p. 88 (2003). Here, Adams’ appellate counsel were ineffective when they failed to raise this compelling Proposition of Law.

### III. Appellate Counsel were ineffective.

As will be seen in the following pages and through the Brief of Amicus Curiae filed simultaneously with this brief, this bypassed issue—that Adams’ constitutional right to confront those witnesses against him was violated—was, in fact, one of the strongest issues in Adams’ case. Foregoing it was not strategic. See Ex. B, C. In fact, appellate counsel has admitted this fact: “I believe the issues now being raised as part of the Application to Re-open are meritorious and deserve review by this Court. Had I contemplated these issues at the time of my filing, I would have raised them.” *Id.*

The Court of Appeals found that “Appellant’s attorneys filed a five hundred twenty-eight page brief in this court, the longest brief encountered by this court and, according to our review of extensions granted by the Ohio Supreme Court in capital cases, possibly by that court as well.” *State v. Adams*, No. 08 MA 246, 2012 Ohio 2719, ¶3 (7th Dist. Ct. App. June 13, 2012). However, it is quality, not quantity, that matters when considering what claims are best to raise on appeal. As that court then acknowledged:

Most cases present only one, two, or three significant questions. . . . Usually, . . . if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones. R. Stern, *Appellate Practice in the United States* 266 (1981).

*Id.* at ¶12 (citing *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). Here, this bypassed issue should have been included as one of those few issues that presented a significant question in this case.

In fact, this Court has acknowledged the importance of this issue when it *sua sponte* requested supplemental briefing on this exact point in *State v. Craig*, Case No. 2006-1806. See 9/27/10 Docket Entry, Case. 2006-1806. Adams’ Appellate counsel, whose brief was pending in

the Court of Appeals when this Court requested that briefing in *Craig*, were ineffective for failing to acknowledge what this Court clearly perceived—that a compelling issue existed here, particularly in light of the U.S. Supreme Court decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009). Counsel should have raised this issue at least at that point, citing to *Crawford* and *Melendez-Diaz* as support. Counsel could have then supplemented their issue with *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709 (2011) (this decision came out while the appeal was pending) as clear support for this violation of Adams’ right to confrontation. As will be laid out below as well as in the Brief of Amicus Curiae, forgoing this issue on appeal prejudiced Adams as well—as it was a strong claim that presented a winning appellate issue. *See Strickland*, 466 U.S. at 687.

**IV. Adams’ constitutional rights were violated when Dr. Germaniuk was allowed to testify at Adams’ trial and when the autopsy report was admitted as evidence against him at trial.**

The autopsy of Gina Tenney was performed on December 31, 1985. The autopsy was conducted by a Dr. Rona.<sup>2</sup> State’s Ex. 63; Tr. 440. The State contacted Dr. Rona prior to trial, and Dr. Rona was alive and ostensibly available. 8/13/08 pretrial, Tr. 12; 9/5/08 pretrial, Tr. 23. Yet, instead of calling the doctor who did the autopsy, the State chose to have Dr. Germaniuk testify as to the autopsy report and the cause of death. The State’s apparent reasoning was two-fold: 1) the Mahoning County Coroner, Dr. Nathan Belinky, had passed away in the interim and 2) Dr. Rona, the one who actually performed the autopsy, had no memory of the autopsy, so he could be of no use. *Id.* That reasoning, however, was flawed and was not the standard to be

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<sup>2</sup> Counsel raised in the Court of Appeals that a Dr. Nathan Belinky had conducted the autopsy in this case. Upon further inspection of the autopsy report though, it was determined that, in fact, a Dr. Rona conducted the autopsy. State’s Ex. 63 (Dr. Rona listed as “prosecutor” on report). It appears that Dr. Belinky then merely signed-off on the autopsy, as he was known to do. 6/13/08 pretrial Tr. 4.

employed. Although Dr. Rona had no independent memory of conducting the autopsy, he, not Dr. Belinky, was the one who, in fact, conducted the autopsy in this case. Absent Dr. Rona's unavailability (not Dr. Belinky's) and a previous opportunity to cross-examine Dr. Rona regarding this autopsy and his techniques utilized, Adams' constitutional right to confrontation could not be fulfilled. See *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004). The State's nonchalant attitude towards Adams' absolute right to confront those witnesses against him cannot be tolerated, particularly in a capital case such as this.

**A. The autopsy report should not have been admitted as evidence against Adams.**

**1. Relevant Case Law.**

The Sixth Amendment's Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The "constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of. . . ." *Mattox v. United States*, 156 U.S. 237, 244 (1895). As the Supreme Court stated, "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford*, 541 U.S. at 68-69. Here, Adams' rights were violated. Contrary to this Court's reasoning in *State v. Craig*, 110 Ohio St. 3d 306, 853 N.E.2d 621 (2006) [hereinafter referred to as *Craig I*], according to the recent United States Supreme Court case law, an autopsy report is not a business record and is testimonial in nature. As such, absent confrontation, it should not be admissible as evidence against a criminal defendant. *Crawford*, 541 U.S. at 68-69.

Following the Supreme Court's decision in *Crawford*, this Court decided *Craig I*. In *Craig I*, this Court found that pursuant to *Crawford*, "business records are 'by their nature,' not testimonial"; this Court then concluded that autopsy reports were, in fact, business records. *Id.* at 321. The lower court relied on this decision in denying relief to Adams in the instant case. *Adams*, 2012 Ohio 2719. However, this Court is now reconsidering *Craig I* in Case No. 2006-1806 [hereinafter referred to as *Craig II*], in light of subsequent case law handed down from the United States Supreme Court. This case presents the same question and should be considered along with *Craig II*. See *Craig II*, Case No. 2006-1806.<sup>3</sup>

Following this Court's decision in *Craig I*, the Supreme Court decided three separate cases, which bear on this issue. In *Melendez-Diaz*, the Supreme Court explained and defined its decision in *Crawford v. Washington* when it stated that "[a]bsent a showing that the analysts [who conducted the autopsy] were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "be confronted with" the [medical examiner] at trial." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009) (citing *Crawford*, 541 U.S. at 59); see also *State v. Crager*, 123 Ohio St. 3d 1210, 914 N.E.2d 1055 (2009). The Supreme Court then clarified its decision in *Crawford v. Washington* once again in *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709 (2011). The Court found that "surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial and the accused had an opportunity, pretrial, to cross-examine that particular scientist." *Id.* at 2710.

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<sup>3</sup> Along with this merit brief, a Brief of Amicus Curiae is being filed, which addresses several additional reasons why this Court's decision is *Craig I* must be revisited. Adams relies on that brief, in its entirety, and fully incorporates it by reference herein.

In addition, in *Melendez-Diaz*, the Supreme Court further rejected the use of reports in lieu of live testimony, holding they were “functionally identical to live, in-court testimony” and at trial, their purpose was the same as a witness. 557 U.S. at 310. Prepared solely for use at trial, the statements were testimonial and their authors were witnesses. As a result, before a report is admissible, the defendant must be able to cross-examine the person who prepared the report. *Id.*

The most recent decision in *Williams v. Illinois*, 132 S. Ct. 2221 (2012) addressed this issue once again. In *Williams*, the prosecution’s expert, Sandra Lambatos, received a report before trial prepared by Cellmark Diagnostics Laboratory. That report reflected the fact that Cellmark technicians had received material from a vaginal swab taken from the crime victim, had identified semen in that material, and had derived a profile of the male DNA that the semen contained. Lambatos then entered that profile into an Illinois State Police Crime Laboratory computerized database, which contained, among many other DNA profiles, a profile derived by the crime laboratory from Williams’ blood (taken at an earlier time). The computer she was using showed that the two profiles matched. Lambatos then confirmed the match. Lambatos testified at trial to her own findings as well as those of Cellmark Laboratories. *Id.* at 2245.

A plurality of the Court determined, in an extremely fractured opinion, that Lambatos’ testimony of the Cellmark expert’s findings did not violate the confrontation clause. Important to the Court in its findings though was the fact that “[T]he Cellmark report itself was neither admitted into evidence nor shown to the factfinder. Lambatos did not quote or read from the report; nor did she identify it as the source of any of the opinions she expressed.” *Id.* at 2230. The *Williams* Court distinguished *Melendez-Diaz* and *Bullcoming* from *Williams*, by noting that the reports in those two cases had been admitted into evidence to prove the truth of the matter presented and in *Williams* the report had not. *Id.* at 2223. Further, the Court noted that

“Lambatos did not testify to the truth of any other matter concerning Cellmark. She made no other reference to the Cellmark report, which was not admitted into evidence and was not seen by the trier of fact. Nor did she testify to anything that was done at the Cellmark lab, and she did not vouch for the quality of Cellmark’s work.” *Id.* at 2235.

Justice Thomas, in his concurring opinion, offered another rationale as to why the report in question in *Williams* differed from the report in *Melendez-Diaz* and *Bullcoming*. He found that “[t]he Cellmark report lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statement accurately reflect the DNA testing process used or the results obtained.” *Id.* at 2260.

**2. Admission of the autopsy report violated Adams’ Sixth Amendment right to confrontation.**

The above decisions should guide this Court in finding that Adams’ right to confrontation was violated. Like the reports at issue in *Melendez-Diaz* and *Bullcoming*, and unlike the report at issue *Williams*, the autopsy report here was prepared for use at trial, was not prepared as a routine business record, was a certified record, and was admitted for the truth of the matter asserted. As such, in light of the above cases, Adams’ Sixth Amendment right to confrontation was violated.

Following the Supreme Court’s decision in *Crawford*, *Melendez-Diaz*, and *Bullcoming*, courts across the country have determined that autopsy reports are testimonial and subject to confrontation. *See e.g. United States v. Ignasiak*, 667 F.3d 1217, 1232 (11th Cir. 2012) (Because they are “made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial”, autopsy reports are testimonial.) In *Ignasiak*, that court noted several reasons why autopsies are testimonial in nature, including the fact that “[m]edical examiners are not mere scribes reporting machine generated raw-data. *See*

*Bullcoming*, 131 S. Ct. at 2714 (rejecting argument that laboratory testing analyst is mere “scrivener” simply transcribing machine-generated results and therefore not the “true accuser” for Confrontation Clause purposes (citations omitted))” and that “the observational data and conclusions contained in the autopsy reports are the product of the skill, methodology, and judgment of the highly trained examiners who actually performed the autopsy.” *Id.*; see also *Commonwealth v. Avila*, 912 N.E.2d 1014, 1029-1030 (Mass. 2009) (medical examiner who did not perform victim’s autopsy is not permitted, under the Confrontation Clause, to testify about underlying factual findings of unavailable medical examiner as contained in autopsy report); *State v. Locklear*, 363 N.C. 438, 681 S.E.2d 293, 304-05 (N.C. 2009) (an autopsy report is testimonial and therefore inadmissible under *Melendez-Diaz* and *Crawford* absent a showing that forensic analyst was unavailable to testify and defendant had prior opportunity to cross-examine); See *Wood v. State*, 299 S.W.3d 200, 208-10 (3rd Tex. Ct. App. 2009), *review denied*, 2010 Tex. Crim. App. LEXIS 115 (Mar. 24, 2010) (under *Melendez-Diaz*, autopsy reports themselves are testimonial and subject to the Confrontation Clause); *Gilstrap v. State*, 2011 Tex. App. LEXIS 181, 3-4 (Tex. App. San Antonio Jan. 12, 2011) (same); see also *State v. Smith*, 898 So. 2d 907, 915-17 (Ala. Crim. App. 2004) (the autopsy report is testimonial when cause of death was “a crucial element of the charge” “alleged in the indictment”); *Cuesta-Rodriguez v. State*, 241 P.3d 214, 228 (Okla. Crim. App. 2010) (“the circumstances surrounding Fisher’s death warranted the suspicion that her death was a criminal homicide. Under these circumstances, therefore, it is reasonable to assume that Dr. Jordan understood that the report containing his findings and opinions would be used in a criminal prosecution. Dr. Jordan’s autopsy report was a testimonial statement.”); *State v. Jaramillo*, 272 P.3d 682, 686 (New Mexico Ct. App. 2011) (an autopsy report submitted into evidence was considered **testimonial** when done in support of a

law enforcement homicide investigation); *State v. Davidson*, 242 S.W.3d 409, 417 (Mo. App. E.D. 2007) (“the business-records exception to the hearsay rule does not overcome the Confrontation Clause right.”).

In addition, although an open question, the United States Supreme Court itself has hinted that autopsy reports may be testimonial. In *Melendez-Diaz*, the Court specifically noted, “Some forensic analyses, such as *autopsies* and breathalyzer tests, cannot be repeated”, thus Confrontation is the best way to challenge or verify the results in those instances. 557 U.S. at 317-18, fn.5 (emphasis added).

Autopsy reports are a far cry from the laboratory test at issue in *Williams*. When the death is ruled a homicide, an autopsy report cannot be a business record because it is specifically prepared for future use in litigation. In fact, the legislature, throughout the Ohio Revised Code, recognizes this fact. Not only must the autopsy report be delivered promptly to the prosecuting attorney of the county upon completion of the report (O.R.C. § 313.09), but where the victim dies as a result of “criminal or other violent means . . . [the] law enforcement agency who obtains knowledge thereof arising from the person’s duties, shall immediately notify the office of the coroner of the known facts concerning the time, place, manner, and circumstances of the death....” O.R.C. § 313.12. And, “All dead bodies in the custody of the coroner shall be held until such time as the coroner, after consultation with the prosecuting attorney, or with the police department . . . or with the sheriff, has decided that it is no longer necessary.” O.R.C. § 313.15 *see also* §§ 313.123, 313.13, 313.19.

Moreover, the Ohio Revised Code specifically recognizes the particular importance that a coroner and the autopsy report play in criminal prosecutions and to protect the public from criminal activity:

An autopsy is a compelling public necessity if it is necessary to the conduct of an investigation by law enforcement officials of a homicide or suspected homicide, or any other criminal investigation, or is necessary to establish the cause of the deceased person's death for the purpose of protecting against an immediate and substantial threat to the public health....

*Id.* at § 313.131.

County coroners also see themselves as an integral part of the criminal justice system. The Mahoning County Coroner's website specifically describes the county coroner as "an important part of the criminal and civil justice system." See Mahoning County Website at <http://www.mahoningcountyoh.gov/DepartmentsAgencies/Departments/Coroner/tabid/759/Default.aspx>. The website goes on to detail that "The Coroner works with law enforcement agencies, attorneys, insurance companies, and the public in preparing cases for criminal or civil trial." *Id.* Other county coroner's utilize similar descriptions. See e.g. Trumbull County Coroner's Website at <http://www.coroner.co.trumbull.oh.us/index.htm>; Fulton County Coroner's Website at <http://www.fultoncountyoh.com/index.aspx?nid=209>; Hamilton County Coroner's website at <http://www.hamilton-co.org/coroner/FAQ.HTM>; Butler County Coroner's Website at <http://www.butlercountycoroner.org/index.cfm?page=faqs#performed>.

Further, the Cellmark report, as discussed above from Justice Thomas' concurrence in *Williams*, certified nothing and was not utilized as evidence against the defendant. *Williams*, 132 S. Ct. at 2260. In stark contrast, the autopsy report here was both an exhibit admitted into evidence against Adams' (State's Ex. 63) and was a certified document as is required. As an exhibit, the report was obviously offered for the truth of the matter asserted—to prove the cause and death of Gina Tenney. In addition, based upon the Coroner's investigation and/or examination, the Coroner must certify the findings on the cause and manner of death in the

Certificate of Death, which is then filed with the division of vital statistics for the county. O.R.C. § 313.19. This requirement was complied with here.

In addition, the *Williams*' plurality also noted that even if the Cellmark lab report had been introduced for its truth, the evidence was not "testimonial." It reasoned, first, that the Cellmark report "plainly was not prepared for the primary purpose of accusing a targeted individual." *Williams*, 132 S. Ct. at 2223.<sup>4</sup> The autopsy at issue here is completely inapposite. By definition, an autopsy report reports on a death, and often, as here, there was little to no doubt that it would be utilized in litigation in a homicide prosecution. First, Tenney's body was delivered to the coroner's office by the Youngstown police, who discovered and removed her body from the Mahoning River. Tr. 184, 188. Additionally, at least two Youngstown Police Officers attended and took photographs of the victim during the autopsy. State's Ex. 63. Last, and of particular importance, is the fact that Adams was a suspect, was already in custody, and had already been interrogated at the time the autopsy was performed in this case. Tr. 149-51. Adams was already a known, targeted individual, even as the autopsy was progressing. Even more than most cases, it was apparent here that a prosecution *against Adams* was a very likely possibility.

Autopsy reports are not mundane business records, prepared in the regular line of day-to-day business. Instead, they are "functionally identical to live, in-court testimony" and at trial, their purpose is the same as a witness. *Melendez-Diaz*, 557 U.S. at 310. Prepared for use at trial, the statements and conclusions in that report are testimonial. *Id.* Especially in a case like this

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<sup>4</sup> Adams fervently believes that the primary purpose test, as noted by the *Williams*' plurality, did not garner enough votes and has no constitutional underpinnings worthy of weight and effect, however Adams also believes that if applied, the autopsy report in this case is still testimonial. See Brief of Amicus Curiae for further argument as to why the primary purpose is inapplicable to this case.

where it was blatantly obvious that the finalized report would be utilized in a criminal prosecution and where the autopsy would had been completed assuming that reality, a criminal defendant must have the opportunity to confront the conclusions as put forward in that report. Absent that protection, “it could be conceivable that the State could prove some offenses without the necessity of calling any witnesses at all”, and that is constitutionally unacceptable. *State v. Smith*, 898 So. 2d 907, 917 (Ala. Crim. App. 2004). The State of Ohio should join the ranks of states across the nation that have already determined that autopsy reports are testimonial.

**B. Dr. Germaniuk’s testimony also should not have been admitted as evidence against Adams.**

For many of the same reasons that the autopsy report should not have been admitted as evidence against Adams, Dr. Germaniuk’s testimony also violated Adams’ Sixth Amendment right to confrontation. Here, Dr. Germaniuk testified about the autopsy and findings, even though he was not the pathologist who conducted the autopsy. Tr. 402-03; State’s Ex. 63. Although Dr. Germaniuk disagreed with some of the findings of the Mahoning County Coroner’s Office, throughout his testimony, he found himself relying on the findings of that office and the final report that was ultimately entered into evidence. *See e.g.* Tr. 408, 423, 424, 425. Because Adams had a right to confront the pathologist who actually conducted the autopsy in this case, none of the testimony should have been presented against Adams. *Crawford*, 541 U.S. at 68-69.

Most important to this issue is the fact that Dr. Rona, the pathologist who conducted the autopsy in this case, was alive and available to testify instead of Dr. Germaniuk. Further, the State offered no valid basis in the record as to why Dr. Rona was not utilized. 8/13/08 pretrial, Tr. 12; 9/5/08 pretrial, Tr. 23. Dr. Germaniuk was obviously not relying on anything that he observed first-hand. Instead, he relied on the autopsy report, which he did not prepare, and which was also improperly admitted.

Moreover, as the *Williams* plurality pointed out, “Lambatos did not testify to the truth of any other matter concerning Cellmark. She made no other reference to the Cellmark report, which was not admitted into evidence and was not seen by the trier of fact.” 132 S. Ct. at 2235. On the contrary, the entire point of Dr. Germaniuk’s testimony was to prove the truth of the matter asserted—the cause and manner of death of Gina Tenney. Dr. Germaniuk testified concerning the time of the injuries, the time of death, and the factors that influenced those findings and the manner and cause of death, all based upon the conduct and findings of Dr. Rona. Tr. 396-437.

The State may argue that Dr. Germaniuk’s off-the-report testimony, which criticized Dr. Belinky, the Mahoning County Coroner, and some of the practices utilized during the autopsy cures any confrontation problem here, as Adams was able to cross-examine Dr. Germaniuk. However, this reasoning is incorrect and cannot cure the constitutional violation that occurred. First, although Dr. Germaniuk mildly changed what he perceived to be the cause of death and criticized the office and how it operated, he nonetheless relied on the conclusions as stated in the autopsy report. State’s Ex. 63; *See e.g.* Tr. 408, 423, 424, 425. In addition, the fact that Dr. Germaniuk was able to speculate as to how the autopsy was or was not performed correctly only further deepens the problem—instead of the report being admitted as one truth against Adams, two truths were admitted without confrontation: 1) the autopsy report and the cause of death and 2) the ruminations and findings of Dr. Germaniuk, who relied on the autopsy report but then speculated as to his own conclusions, absent first-hand knowledge of the actual autopsy and/or practice utilized.

Especially in a case like this where it was apparent from the get-go that this was a homicide investigation, the forensic pathologist was on notice that the finalized report would

likely be utilized in a criminal prosecution. The pathologist performing the autopsy, here Dr. Rona, did not merely prepare a report as a routinely performed test; instead Dr. Rona was a highly skilled and trained medical specialist whose observations and conclusions, combined with those of the investigating officers, were put into a finalized report. Indeed, “medical examiners are not mere scribes reporting machine generated raw-data.” See *Bullcoming*, 131 S. Ct. at 2714. “The observational data and conclusions contained in the autopsy reports are the product of the skill, methodology, and judgment of the highly trained examiners who actually performed the autopsy.” *United States v. Ignasiak*, 667 F.3d 1217, 1232 (11th Cir. 2012). Therefore, the criminal defendant must have the right to confront the person who actually performed that autopsy. *Id.*

The prejudice is also apparent—absent this report and the attending testimony of Dr. Germaniuk proving that Adams killed Tenney would have been practically impossible. It was required that Adams have had the opportunity to cross-examine the author of the autopsy report. The findings in that report went unchallenged. Adams’ right to confrontation was violated, and he was prejudiced.

## **V. Conclusion.**

Dr. Germaniuk’s testimony, as well as the admission of the 1985 autopsy report as evidence against Adams, was a windfall for the state, to the prejudice of Adams. This is a clear violation of the holdings in *Crawford* and its progeny, and highlights the violation of Adams’ Sixth Amendment right of confrontation. Appellate counsel were clearly ineffective when they failed to raise this critical issue in Adams’ case. See Ex. A-C; *Melendez-Diaz*, 557 U.S. at 310. This Court should reverse and remand this case with instructions that the Seventh District Court of Appeals re-open Adams’ direct appeal and consider this claim in its entirety.

## PROPOSITION OF LAW. 2

### **AN APPELLANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IS VIOLATED WHEN COUNSEL'S PERFORMANCE IS DEFICIENT AND THE APPELLANT IS PREJUDICED. U.S. CONST. AMENDS. VI AND XIV, OHIO CONST. ART. I, § 10.**

Both Adams' trial counsel as well as appellate counsel were ineffective, to Adams' prejudice. Trial counsel provided ineffective assistance in numerous ways during his capital trial. As such, his rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Ohio Constitution were violated. Then, appellate counsel provided inadequate assistance, compounding the constitutional violations of Adams' rights. This Court should reverse and remand this case to the Seventh District Court of Appeals to consider this claim in its entirety.

#### **I. Omissions by appellate counsel**

Adams' appellate counsel provided inadequate assistance. *See* Ex. A-C. Relevant issues were not raised by counsel on appeal, to Adams' prejudice. Adams was guaranteed effective assistance of counsel on his appeal as of right in accordance with the Due Process Clause of the Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. 387 (1985).<sup>5</sup> Adams was denied this guarantee when his counsel failed to raise the following instances of the ineffectiveness of trial counsel.

#### **II. Relevant Case Law: Ineffective assistance of trial counsel**

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). Where the procedure for sentencing in a capital case is similar to a trial, like Ohio's,

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<sup>5</sup> See Proposition of Law No. 1, Section II for further relevant case law. This section is fully incorporated by reference herein.

“counsel’s role in the proceeding is comparable to counsel’s role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision.” *Id.* at 687.

An ineffective assistance of counsel claim has two components: deficient performance and prejudice. *Id.* Regarding deficient performance, “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Id.* at 688. Courts consistently recognize that the prevailing professional norms of representation in death penalty cases are outlined in the Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. *See Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir. 2003).

To demonstrate prejudice, a defendant must “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The reasonable probability standard is lower than but-for causation or a showing that it’s more-likely-than-not that counsel’s error affected the outcome of the trial. *Id.* at 693 (“[W]e believe that a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.”) The prejudice prong is satisfied if “there is a reasonable probability that at least one juror would have struck a different balance.” *Wiggins*, 539 U.S. at 537.

In addition to finding prejudice from individual deficiencies, the cumulative impact of counsel’s errors and omissions must be assessed as well. *See State v. DeMarco*, 31 Ohio St. 3d 191, 509 N.E.2d 1256 (1987); *Harris By & Through Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995).

**A. Omitted claims of ineffective assistance of trial counsel on appeal.**

**1. Trial counsel were ineffective for failing to object to the trial court's questioning of State's witnesses.**

At the September 19, 2008, hearing to determine whether State's witnesses would be allowed to testify at trial about the victim's fear and apprehension of Adams, the trial court assumed responsibility for questioning the witnesses and assisted the State. Adams' trial counsel failed to object to this improper and prejudicial overstepping by the trial court.

As an example, when inquiring into the issues of whether the victim was in fear of Adams, the trial court stated:

THE COURT: I said I want them to come in and I'm going to ask that question [about apprehension] myself.

\*\*\*

THE COURT: I'm going to explore it because I'm the one that must be satisfied. ... But as to the apprehension, I'm asking the question. I'm the one who has to be satisfied to let it come in at trial.

(9/19/2008 pretrial hearing at p. 74).

The trial court even took over the questioning on the issue of excited utterances.

THE COURT: I thought I was the one who \*\*\* said I will ask those questions [about excited utterances].

*Id.* at 83.

The trial court finally stated how he was going to proceed with the pretrial hearing when he said:

THE COURT: I'm going to do it all.

*Id.* at 91.

The Court of Appeals erred in finding that the trial court's questions merely "facilitated the process and focused the inquiry." 2012 Ohio 2719 at ¶ 33. The role the trial court assumed was clearly over-reaching and, contrary to the Court of Appeals "thorough analysis," not

impartial. *Id.* at ¶ 30-31. The trial court was no longer requiring the state to prove the essential facts necessary for their witnesses to be able to testify about the victim's state of mind. The trial court was functioning as the prosecution in this proceeding. Adams' trial counsel should have objected to the trial court's actions. Adams was prejudiced as a result of this ineffectiveness because his rights to a fair trial and tribunal were violated. *See Strickland*, 466 U.S. 668. Direct appeal counsel raised the issue of the trial court's improper questioning of the state's witnesses in Assignment of Error No. 6, but prejudicially failed to raise the issue of trial counsel's ineffectiveness with this issue.

**2. Trial counsel were ineffective for failing to object to several prejudicial comments uttered by the prosecution during Adams' trial.**

When trial counsel asked Detective Blanchard whether or not he could recall any further conversations with Adams' girlfriend, the detective replied, "not about this case." Tr. 221. Trial counsel did not object. Several pages later, the defense requested a mistrial based upon this comment in conjunction with others. Tr. 229. One of those comments that trial counsel referenced in their motion for mistrial was that the detective stated that he had testified previously "at suppression hearing, yes." Tr. 192. The motion was overruled. Tr. 230.

At another point of Detective Blanchard's testimony, the prosecutor asked why the detective believed that Adams was a suspect in the initial burglary attempt at the victim's apartment. The detective responded, "From what the victim told me that she was having problems. . . ." The defense objected, and the court sustained the objection. Tr. 243. However, the prosecutor continued with his questioning, "So from what she had told you?" and "Without saying what she said?" Tr. 243-44. Trial counsel did not object to these final statements.

The Court of Appeals erred in denying relief on this claim. That court ruled that none of these statements was prejudicial or "a purposeful attempt to prejudice the jury." *Id.* at ¶ 46-47.

That is incorrect because all of the statements complained about reinforced and compounded the notion that Appellant was guilty. The prejudice of these statements clearly outweighed any probative value they may have had. That court also noted the length of the direct appeal brief and that ineffective assistance of counsel was asserted in some of the grounds for relief. *Id.* at ¶ 49. However, the length of a brief is not determinative of its quality. In this case, Appellate counsel prejudicially failed to raise this issue of trial counsel's ineffectiveness. Trial counsel failed their client when they did not object to these prejudicial comments. This is particularly noteworthy because counsel then relied on some of these comments in making a motion for mistrial. These failures prejudiced Adams. *See Strickland*, 466 U.S. 668.

**3. Trial counsel were ineffective for failing to object to the trial court's failure to put on the record its factual findings regarding the denial of the motion for speedy trial.**

It is uncontroverted that the trial court did not put its findings of fact regarding its denial of trial counsel's motion for discharge based upon speedy trial on the record. *Adams*, 2011 Ohio 5361 at \*136. Trial counsel prejudicially failed their client when they failed to object, either prior to or during trial, to the trial court's omission of these findings of fact. *Strickland*, 466 U.S. 668. Adams was denied his rights to the effective assistance of counsel and a fair trial in violation of the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, §§ 1, 2, 5, 9, 10, 16 and 20 to the Ohio Constitution. Appellate counsel raised the issue of the trial court's failure to place these findings on the record in Assignment of Error No. 12, but prejudicially failed to raise the issue of trial counsel's ineffectiveness. The Court of Appeals erred in finding that there was no prejudice in this denial of effective assistance of counsel.

**4. Following making a *Batson* challenge, trial counsel were ineffective for failing to object to the excusal of Jurors 11 and 31.<sup>6</sup>**

Trial counsel were ineffective by failing to object to the excusal of jurors 11 and 31 following the trial court finding no *Batson v. Kentucky*, 476 U.S. 79 (1986). Trial counsel should have objected to the trial court's rulings. *State v. Were*, 118 Ohio St. 3d 448, 458, 890 N.E.2d 263, 279 (2008) ("Were's counsel objected to the state's peremptory challenge of both jurors as a *Batson* violation."); *Strickland*, 466 U.S. 668.

Prospective juror 11 stated that she knew the State did not have to prove a person's motive and would take into consideration all of the facts and evidence. Tr. 107. She said that she would pay attention and listen to both sides. Tr. 124. She watched courtroom shows on television, has a daughter, and did not know anyone who has been a victim of a sexual assault. Tr. 656. Nothing she stated gave rise to a legitimate race-neutral explanation for the prosecution wanting her removed from the jury. In fact, her statements about knowing that the State did not have to prove motive contradicts the prosecution's explanation for the challenge—that the juror was disappointed that the State did not have to prove motive. Tr. 759. Trial counsel were ineffective for failing to object to the excusal of juror 11 when the *Batson* challenge failed before the trial court.

Prospective juror 31 stated that her view on the death penalty was mixed but there were cases where the death penalty was appropriate. Tr. 192. She stated that she had no problem following the law. Tr. 212. Juror 31 said that she could sign a death verdict. Tr. 233. Despite Juror 31's hesitation about the death penalty, the trial judge denied the prosecution's challenge for cause of her. Tr. 239.

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<sup>6</sup> Because it was discovered after filing the Application to Re-open in the Court of Appeals that Juror 301 was actually an alternate juror, counsel withdraws any error as to Juror 301 at this time.

Juror 31 later said that has five kids, how she would determine whether one of them was not telling her the truth, that she would not automatically give police officers more credibility than other witnesses but decide for herself whether to give a witness's testimony more weight than another. Tr. 640-42. Prospective juror 31 also stated that she did not know anyone who had been a victim of a sexual assault but did have a nephew who had been killed. Tr. 661. Juror 31 stated that she understood what prior calculation and design meant. Tr. 672. The prosecution tried to remove juror 31 for cause again but the trial judge denied that motion, stating that the juror "did real well today." Tr. 752. The prosecution then exercised a peremptory challenge against juror 31. The race-neutral reason stated by the prosecution was that the juror was confused and had a nephew who had been killed. Tr. 762. The trial judge accepted this explanation and excused the juror. Tr. 763. This was despite the court explicitly finding two separate times that she could be a fair juror. Tr. 753. Trial counsel were ineffective for failing to object to the excusal of juror 31 based on the prosecution's flawed race-neutral reasoning.

Adams was prejudiced and denied his rights to the effective assistance of counsel and a fair trial with a fair jury in violation of the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, §§ 1, 2, 5, 9, 10, 16 and 20 to the Ohio Constitution. *State v. Jackson*, 64 Ohio St. 2d 107, 111, 413 N.E.2d 819, 822-823 (1980). Appellate counsel raised the issue of the trial court's failure to place these findings on the record in Assignment of Error No. 17, but prejudicially failed to raise the issue of trial counsel's ineffectiveness. The Court of Appeals erred in finding this claim lacked merit. Adams set forth meritorious arguments that should have been raised on direct appeal.

**5. Trial counsel were ineffective for failing to present the testimony of a psychologist during the mitigation phase of Adams' trial.**

Adams' trial counsel did not offer any expert psychological testimony during his sentencing. It was crucial for a proper mitigation presentation for counsel to explain Adams' psychological make-up and how he had changed over the twenty-two years since committing this crime. Counsel were ineffective because there is a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." *State v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974). Because of this failure, jurors were unable to consider all relevant mitigation evidence.

The Court of Appeals reasoned that this was an issue for the post-conviction petition. *Adams*, 2012 Ohio 2719 at ¶ 66. However, the fact that expert psychological evidence was not presented is apparent from the record. The witnesses who testified at the mitigation phase could not provide expert assistance to the jury to explain how Adams' personality and maturity made him a changed person from the time of the crime to the trial.

If counsel had presented proper expert testimony, there is a reasonable probability that one juror would have changed his or her mind about the death penalty. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003); *State v. Brooks*, 75 Ohio St. 3d 148, 161, 661 N.E.2d 1030, 1041-42 (1996). Moreover, Adams' jury handed down a death sentence without considering all relevant mitigation evidence in violation of his Eighth Amendment rights. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

**6. Trial counsel were ineffective for failing to object to Dr. Germaniuk's testimony and the admission of the autopsy report. *Strickland v. Washington*, 466 U.S. 668 (1984).**

The autopsy of the victim, Gina Tenney, was performed on December 31, 1985, by a Dr. Rona. State's Ex. 63; Tr. 440. The State put on the record that they contacted Dr. Rona at the

time of trial yet decided to have Dr. Germaniuk testify instead. 8/13/08 pretrial, Tr. 12; 9/5/08 pretrial, Tr. 23. In order for Dr. Germaniuk to testify, the State was required to establish both that Dr. Rona was unavailable and that Adams had a previous opportunity to cross-examine him. *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004). Neither requirement was met. See Proposition of Law No. 1. Dr. Germaniuk's testimony concerning an autopsy that he did not conduct especially in light of the fact that the pathologist that did conduct the autopsy was ostensibly available, was a clear violation of Adams' right of confrontation.

Trial counsel failed to object to Dr. Germaniuk's testimony. The Sixth Amendment's Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Melendez-Diaz*, 557 U.S. at 310, the Supreme Court explained and defined its decision in *Crawford v. Washington* when it stated that "[a]bsent a showing that the analysts [who conducted the autopsy] were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "be confronted with" the [medical examiner] at trial." (citing *Crawford v. Washington*, 541 U.S. 36, 59 (2004)); *see also State v. Crager*, 123 Ohio St. 3d 1210, 914 N.E.2d 1055 (2009). The Supreme Court then clarified its decision in *Crawford v. Washington* once again in *Bullcoming*, 131 S. Ct. at 2709. The Court found that "surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial and the accused had an opportunity, pretrial, to cross-examine that particular scientist." *Id.* at 2710.

In addition, in *Melendez-Diaz*, the Supreme Court further rejected the use of reports in lieu of live testimony, holding they were "functionally identical to live, in-court testimony" and at trial, their purpose was the same as a witness. 557 U.S. at 310. Prepared solely for use at trial,

the statements were testimonial and their authors were witnesses. As a result, before a report is admissible, the defendant must be able to cross-examine the person who prepared the report, absent prior cross-examination and a showing of unavailability. *Id.*

Here, trial counsels' performance was unreasonable when measured against "prevailing professional norms." *Strickland*, 466 U.S. at 688. Counsel failed to object to Dr. Germaniuk's testimony. Counsel similarly failed to object to the admission of the autopsy report as evidence against Adams. No reasonable trial strategy would allow unsupported evidence to be admitted uncontested.

Dr. Belinky, the elected Mahoning County Coroner, was in fact deceased at the time of trial; however Dr. Rona, who actually conducted the autopsy, would have been available to testify. 8/13/08 pre-trial Tr. 12; 9/5/08 pre-trial Tr. 23. Especially in light of the availability of this witness, counsels' failure to object to both the admissibility of Dr. Germaniuk's testimony as well as to the admission of the autopsy report was unreasonable.

As to the autopsy report, absent objection, there was no way to confront the author of the report. In light of the decision in *Melendez-Diaz*, the situation at bar is parallel to a situation where counsel unreasonably chooses not to cross-examine a testimonial witness. 557 U.S. at 310; Ex 19. Ineffective assistance of counsel has been previously found in cases where counsel's cross-examination was lacking. *Higgins v. Renico*, 470 F.3d 624, 633 (6th Cir. 2006). Counsel's failure to object to the admission of this hearsay evidence was not a reasonable professional decision.

In addition, counsel had no means of challenging the conclusions of Dr. Belinky and/or Dr. Rona, as well as the other doctor(s) that authored the autopsy report in this case. Counsels'

failure to object to both Dr. Germaniuk's testimony as well as the admission of the autopsy report prejudiced Petitioner Adams. *See* Proposition of Law No. 1.

### **III. Conclusion.**

Appellate counsel were clearly ineffective when they failed to raise these instances of ineffective assistance of trial counsel in Adams' case. *See* Ex. A-C. This Court should reverse and remand this case with instructions that the Seventh District Court of Appeals re-open Adams' direct appeal and consider this claim in its entirety.

### PROPOSITION OF LAW NO. 3

#### **A CAPITAL DEFENDANT'S CONSTITUTIONAL RIGHT TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS IS VIOLATED WHEN A STATE FAILS TO INTRODUCE SUFFICIENT EVIDENCE TO WARRANT A CONVICTION OF BOTH AGGRAVATED MURDER AND CAPITAL SPECIFICATIONS.**

##### **I. Introduction.**

The State failed to produce sufficient evidence demonstrating that Adams committed aggravated murder or committed or attempted to commit aggravated burglary, aggravated robbery, rape and kidnapping. *See, e.g.* Tr. 662-63, 684, 687, 690, 715-19, 722-25. Appellate counsel were ineffective for failing to raise the lack of the State's evidence against Adams in the first appeal as of right. They were particularly ineffective in this instance because they raised other errors, which clearly went to the sufficiency of evidence against Adams, yet failed to raise this meritorious claim.<sup>7</sup> *See also* Ex. A-C. This Court should reverse and remand this case to the Seventh District Court of Appeals to consider this claim in its entirety.

##### **I. Omissions by appellate counsel**

Adams' appellate counsel provided inadequate assistance. Relevant issues, including the sufficiency of the State's evidence, were not raised by counsel on appeal, to Adams' prejudice. Adams was guaranteed effective assistance of counsel on his appeal as of right in accordance with the Due Process Clause of the Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. 387 (1985).<sup>8</sup> He was denied this guarantee when his counsel failed to raise the following issue.

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<sup>7</sup> For some arguments as to the lack of evidence against Adams', see issues that were raised by appellate counsel in *State v. Adams*, Case No. 2011-1978, Propositions of Law 1, 3, and 5.

<sup>8</sup> See Proposition of Law No. 1, Section II for further relevant case law. This section is fully incorporated by reference herein

## II. Relevant Case Law.

“A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the state has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St. 3d 380, 390, 678 N.E.2d 541, 548 (1997). On review for sufficiency, courts are to assess not whether the State's evidence is to be believed, but whether, if believed the evidence against the defendant would support a conviction. *Id.* The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (*see also State v. Jenks*, 61 Ohio St. 3d 259-60, 574 N.E.2d 492, 504 (1991)). In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* 78 Ohio St. 3d at 386, 678 N.E.2d at 546.

A conviction based on legally insufficient evidence constitutes a denial of due process of law. *Id.* (*citing Tibbs v. Florida*, 457 U.S. 31, 41 (1982)). In *In re Winship*, the Supreme Court in accordance with the Fourteenth Amendment’s guarantee of due process held that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” 397 U.S. 358, 364 (1970).

## III. Adams’ convictions are based upon insufficient evidence.

The State’s evidence against Adams was insufficient to prove his guilt beyond a reasonable doubt. Adams was indicted with (and convicted of) Tenney’s murder based mostly on one piece of evidence—the State presented evidence that Adams’ DNA was found in Tenney’s underwear. Tr. 235, 587; 7/17/08 pretrial, Tr.167. However, in addition to Adams’

DNA, Tenney's boyfriend's, Mark Passarello, DNA was found as well on her underwear. Tr. 590. Besides Passarello, there is another strong additional suspect—Horace Landers, who was found by Detective Blanchard hiding in the back bedroom of Adams' apartment because he had a warrant out for his arrest. Tr. 149-50, 193-95. Landers was initially a suspect and was questioned as to his whereabouts on December 29, 1985. Landers was eventually ruled out as a suspect, even though the State has claimed that their theory of this case is that more than one individual may have committed this crime. Tr. 241; 4/25/08 pretrial, Tr. 38. Subsequent to this investigation, Landers died in 1988. 7/13/08 pretrial Tr. 144.

As argued above, this case was about one thing—the DNA evidence. However, because the vaginal swab was twenty-three years old, and because there is a natural degradation process, there very well may have been other contributors to the tested sample from Tenney's underwear. Tr. 589. As Brenda Gerardi, the BCI analyst who tested the DNA samples, admitted: due to degradation she was unable to pick up a DNA sample everywhere: "I did not pick up DNA profile at that particular location because it was slightly degraded and then we do have that one additional peak, is what we call it, at one location allowing me to know that there was possibly another individual but not enough to make an actual comparison." Tr. 593. This other individual, possibly Horace Landers, could have been the true killer.

In addition, the State in its effort to prove aggravated murder, attempted to show evidence of rape and kidnapping. However, in the autopsy report there is no evidence of any injuries to the external or internal genitalia, which usually is an identifier of rape. See State's Ex. 63. And despite the State's allegation of kidnapping, nothing suggested that there were ligatures on Tenney's wrists. *Id.*

The State also presented insufficient eyewitness evidence. The State presented the testimony of John and Sandra Allie, who were at the ATM machine around the time when Tenney's ATM card was used. The Allie's viewed the person at the ATM briefly, and at night. Tr. 291, 329. The suspect was also wearing a hood and scarf, obscuring most of his face. Tr. 295, 331. Neither of the Allies identified Adams in the line-up they were shown. Tr. 42, 299. Mrs. Allie actually identified Horace Landers, but later changed and claimed that she really meant to identify Adams. Tr. 42, 325.

Appellate courts are vested with the responsibility to review the sufficiency of the evidence because jurors sometimes do not base their verdicts on the evidence. This is particularly true when a characteristic of the offense, the defendant or other circumstances surrounding the offense are likely to inflame the passions or prejudices of the jury. In such cases, jurors sometimes allow speculation to take the place of logic. Appellate courts have the responsibility to logically and dispassionately determine if this occurred. This analysis requires some subjective evaluation of the logical connections between the pieces of circumstantial evidence and/or the lack thereof.

Here, the State failed to present sufficient evidence to prove that Adams beyond a reasonable doubt was responsible for the aggravated murder of Tenney. Other than Adams' DNA found in Tenney's underwear and on a vaginal swab, there is very little evidence that Adams' murdered, raped, or kidnapped Tenney. The autopsy report fails to show any sign of rape or kidnapping, alternate suspects exist, and eyewitness testimony from Mr. and Mrs. Allie was questionable, at best. Even if this Court views the evidence in a light most favorable to the State, no rational fact finder could have found beyond a reasonable doubt that Adams was guilty of

aggravated murder as well as the attending capital specifications. The conviction was therefore not supported by sufficient evidence. *See Thompkins*, 78 Ohio St. 3d at 390.

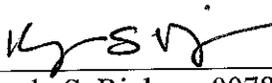
#### **IV. Conclusion**

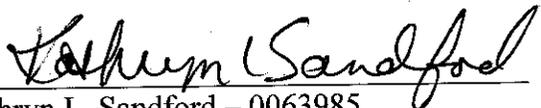
The State's case was insufficient as to the aggravated murder charge and specifications. Resultantly, Adams' convictions, as well as his death sentence, violate his rights to substantive and procedural due process. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16. Appellate counsel were ineffective by failing to raise an insufficiency of the evidence Assignment of Error in Adams' first appeal as of right. *Strickland*, 466 U.S. 668. This Court should reverse and remand this case with instructions that the Seventh District Court of Appeals re-open Adams' direct appeal and consider this claim in its entirety.

### Conclusion

Appellant Bennie Adams has shown that there are genuine issues regarding whether he was deprived of effective assistance of counsel on direct appeal. Adams requests that this Court reverse and remand this case to the Seventh District Court of Appeals with instructions that his Application for Reopening be granted. App. R. 26(B) and *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

Respectfully submitted,

By:   
\_\_\_\_\_  
Kimberly S. Rigby - 0078245  
Assistant State Public Defender  
**Counsel of Record**

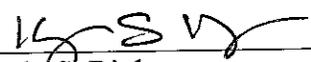
By:   
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Counsel for Appellant

**Certificate Of Service**

I hereby certify that a true copy of the foregoing Merit Brief of Appellant Bennie Adams was forwarded by regular U.S. Mail to Paul Gains and Ralph Rivera, Mahoning County Prosecutor's Office, 21 W. Boardman St., 6th Floor, Youngstown, OH 44503 on this 1st day of October, 2012.

By:   
\_\_\_\_\_  
Kimberly S. Rigby  
Assistant State Public Defender  
Counsel for Appellant

In The Supreme Court of Ohio

State of Ohio,

:

Appellee,

:

-vs-

:

Case No. 2012-1274

Bennie Adams,

:

Appellant.

:

**This Is A Capital Case**

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On Appeal From The Seventh District Court of Appeals  
Case No. 08 MA 246

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Appendix to Merit Brief of Appellant Bennie Adams

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Counsel for Appellant

In The Supreme Court of Ohio

State of Ohio, :

Appellee, :

-vs- :

Case No.: 12-1274

Bennie Adams, :

Appellant. :

**This Is A Capital Case**

On Appeal From The Seventh District Court of Appeals  
Case No. 08 MA 246

Appellant Adams' Notice Of Appeal

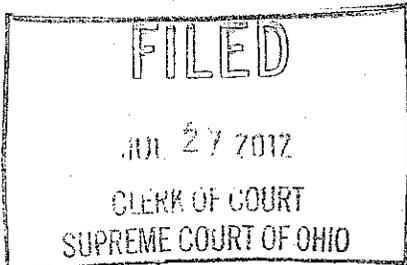
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Counsel for Appellant



In The Supreme Court of Ohio

State of Ohio, :  
Appellee, :  
-vs- : Case No.:  
Bennie Adams, :  
Appellant. : **This Is A Capital Case**

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On Appeal From The Seventh District Court of Appeals  
Case No. 08 MA 246

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Appellant Adams' Notice Of Appeal

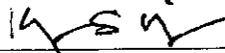
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Appellant Bennie Adams hereby gives notice that he is pursuing his appeal as of right from the denial of his Application for Reopening in the 7<sup>th</sup> District Court of Appeals. The appeal raises substantial constitutional issues relating to the ineffective assistance of appellate counsel pursuant to State v. Murnahan, 63 Ohio St. 3d 60 (1992). S.Ct. Prac. R. 2.1(A)(1).

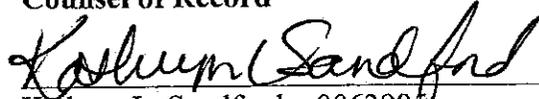
The Opinion and Judgment Entry was file-stamped on June 13, 2012. See Opinion and Judgment Entry attached. The appellant is under a sentence of death and the date of the offense was December 29, 1985.

A praecipe to the Mahoning County Court Reporter has not been filed because the record was filed in this Court on December 14, 2011, with the direct appeal, case no. 2011-1978.

Respectfully submitted,



Kimberly S. Rigby - 0078245  
Assistant State Public Defender  
**Counsel of Record**



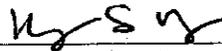
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Counsel for Appellant

Certificate Of Service

I hereby certify that a true copy of the foregoing Appellant Adams' Notice Of Appeal was forwarded by regular U.S. Mail to Paul Gains and Ralph Rivera, Mahoning County Prosecutor's Office, 21 W. Boardman St., 6th Floor, Youngstown, OH 44503 on this 27<sup>th</sup> day of July, 2012.



Kimberly S. Rigby  
Assistant State Public Defender

Counsel for Appellant

STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 246
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	<u>OPINION</u>
	)	<u>AND</u>
BENNIE ADAMS,	)	<u>JUDGMENT ENTRY</u>
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Application for Reopening.

JUDGMENT: Application for Reopening Denied.

APPEARANCES:  
For Plaintiff-Appellee:

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For Defendant-Appellant:

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Ohio State Public Defender  
Attorney Kimberly Rigby  
Attorney Kathryn Sanford  
Assistant Ohio State Public Defenders  
250 East Broad Street,, Suite 1400  
Columbus, Ohio 43215

JUDGES:  
Hon. Joseph J. Vukovich  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite

Dated: June 13, 2012

PER CURIAM:

¶{1} Defendant-appellant Bennie Lee Adams has filed an application to reopen his appeal. He raises seven issues that he contends his prior appellate counsel should have raised in the direct appeal of his conviction and death sentence. For the following reasons, this application for reopening is denied and the request for appointment of counsel is therefore also denied.

#### STATEMENT OF THE CASE

¶{2} In the fall of 2008, appellant was sentenced to death for the aggravated murder of Gina Tenney which occurred at the end of 1985. As the crime was committed prior to January 1, 1995, the direct appeal proceeded through this court as opposed to proceeding directly to the Ohio Supreme Court. See Ohio Const. Schedule §12; R.C. 2929.05.

¶{3} Appellant's attorneys filed a five hundred twenty-eight page brief in this court, the longest brief encountered by this court and, according to our review of extensions granted by the Ohio Supreme Court in capital cases, possibly by that court as well. On October 14, 2011, we affirmed appellant's conviction and death sentence in a ninety-five page opinion. See *State v. Adams*, 7th Dist. No. 08MA246, 2011-Ohio-5361. Appellant's appeal to the Ohio Supreme Court is pending.

¶{4} On January 12, 2012, the Ohio Public Defender's Office filed in this court a timely application to reopen appellant's appeal under App.R. 26(B). They asked to be appointed as his counsel for purposes of filing the application to reopen and thereafter if reopening is permitted. Attached to the application for reopening are the affidavits of the attorneys who represented appellant in his direct appeal to this court and who are currently representing him in the Ohio Supreme Court. They claim that they did not notice the issues now raised, that they would have raised them in their appellate brief had they thought of them, and that they believe the issues now raised are meritorious and deserve review by this court.

#### REOPENING

¶{5} Pursuant to App.R. 26(B), a defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence based on a claim of ineffective assistance of counsel. App.R. 26(B)(1). The defendant must set forth one or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits or that were considered on an

incomplete record due to appellate counsel's deficient performance. App.R. 26(B)(2)(c).

¶{6} An application for reopening shall be granted if there is a genuine issue as to whether the defendant was deprived of the effective assistance of counsel on appeal. App.R. 26(B)(5). If the court grants the application, it shall appoint counsel to represent the defendant if he is indigent and not currently represented. App.R. 26(B)(6)(a). If the application is granted, the case shall proceed as on an initial appeal except that the court may limit its review to arguments not previously considered, and the briefs on reopening shall address the claim that prior appellate counsel rendered deficient performance which prejudiced the defendant. App.R. 26(B)(7).

¶{7} Thus, in determining whether a defendant-appellant has received ineffective assistance of appellate counsel, we apply the two-pronged analysis from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): conduct that fell below an objective standard of reasonableness and a reasonable probability the results would have been different. See *State v. Were*, 120 Ohio St.3d 85, 2008-Ohio-5277, 896 N.E.2d 699, ¶ 10-11. Thus, the applicant must prove that counsel was deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal. *Id.* at ¶ 11, citing *State v. Sheppard*, 91 Ohio St.3d 329, 330, 744 N.E.2d 770 (2001). In seeking reopening, the appellant bears the burden of demonstrating that there is a "genuine issue" as to whether he has a "colorable claim" of ineffective assistance of appellate counsel. *Id.*, citing *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

¶{8} Notably, appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶ 7, citing *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). The United States Supreme Court in *Jones* explained:

¶{9} "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Justice Jackson, after observing appellate advocates for many years, stated:

¶{10} “One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one.... [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.’ Jackson, *Advocacy Before the Supreme Court*, 25 *Temple L.Q.* 115, 119 (1951).

¶{11} “Justice Jackson's observation echoes the advice of countless advocates before him and since. An authoritative work on appellate practice observes:

¶{12} “Most cases present only one, two, or three significant questions.... Usually, ... if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones.’ R. Stern, *Appellate Practice in the United States* 266 (1981).” Jones, 463 U.S. at 751-752.

#### ISSUE ONE

¶{13} Appellant sets forth seven issues that he believes should have been raised in the original appeal, the first of which relates to testimony derived from an autopsy performed on December 31, 1985 by the Mahoning County Coroner. By the time of the 2008 trial, that coroner was deceased. The state filed a notice of discovery containing a coroner update and disclosing that Dr. Germaniuk, a forensic pathologist, would testify at trial. He had watched the video of the autopsy, reviewed the photographs, and the written material. Appellant contends:

¶{14} “The trial court violated Adam’s Sixth Amendment right to confront the witnesses against him when it allowed Dr. Germaniuk to testify concerning an autopsy conducted twenty-three years prior by a different coroner and when it allowed the autopsy report to be admitted into evidence; trial counsel were likewise ineffective to Adams’ prejudice when they failed to object to the admission of Dr. Germaniuk’s testimony as well as to the admission of the autopsy report.”

¶{15} In attempting to demonstrate prejudice from the admission of the pathologist’s testimony, appellant complains that the pathologist both adopted and criticized the coroner’s report. Appellant notes that the pathologist testified that he

would have characterized the cause of death as asphyxia instead of the phrase used by the coroner, "suffocation due to traumatic asphyxiation." (Tr. 408). The pathologist opined that the coroner should not have labeled certain wounds as superficial unless an incision was made to ensure how superficial they were. (Tr. 421). The coroner had used vitreous potassium to determine that time of death was 11:15 p.m., but the pathologist disclosed that this method is no longer reliable. (Tr. 426-428). He testified that he would have based his determination on the volume of food in the stomach compared to when she last ate and that he would have placed her death between 5:00 and 10:30 p.m. with death occurring "probably somewhere in the middle of that time." (Tr. 435-436). Finally, the pathologist stated that the coroner had no qualifications in forensic pathology but merely won a popularity contest. (Tr. 440).

¶{16} Appellant concludes that trial counsel was ineffective for failing to object to the admission of the autopsy report in the absence of the coroner's testimony as it was generated for the purpose of proving a fact at trial and for failing to object to the testimony of the forensic pathologist as he did not perform the autopsy. For purposes of reopening, appellant urges that appellate counsel should have raised this ineffectiveness of trial counsel and should have cited in support: *Melendez-Diaz v. Massachusetts*, \_\_ U.S. \_\_, 129 S.Ct. 2527, 2539-2540, 174 L.E.2d 314 (2009) and *Bullcoming v. New Mexico*, \_\_ U.S. \_\_, 131 S.Ct. 2705, 2709-2710, 180 L.Ed.2d 610 (2011).

¶{17} A testimonial statement is one with a primary purpose of establishing or proving past events potentially relevant to a later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). A business or public record is generally admissible absent confrontation as it was created for the administration of the entity's affairs and not for the purpose of establishing some fact at trial. *Melendez*, 129 S.Ct. at 2539-2540.

¶{18} In *Melendez*, the United States Supreme Court held that a forensic laboratory report made at police request stating that a seized substance was cocaine is testimonial evidence under the Confrontation Clause. *Melendez*, 129 S.Ct. at 2532. Thus, applying the general rule, such evidence was found inadmissible unless the witness who made the statement is unavailable and the defendant had a prior opportunity to confront that witness. *Id.* (refusing to create a forensic evidence

exception), applying *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

¶{19} In *Bullcoming*, the state introduced a forensic laboratory report certifying the gas chromatograph results of the defendant's blood alcohol level. *Bullcoming*, 131 S.Ct. at 2709. The state did not call the analyst who signed the certification as he was on unpaid leave. Instead, the state called a different analyst who did not participate or observe the test but who was familiar with the testing used at the laboratory. The defense objected, and the state argued it was a business record. The United States Supreme Court held that the analyst's testimony was inadmissible surrogate testimony without observation and also found the certification inadmissible as testimonial evidence made for the purpose of proving a particular fact at a criminal trial. *Id.* at 2713 (certified question), 2714-2717. The Court thus concluded that the defendant had the right to be confronted with the analyst who made the certification unless that analyst was unavailable at trial and the defendant had the pretrial opportunity to cross-examine that particular analyst. *Id.* at 2716-2717.

¶{20} Notably, neither of these cases existed at the time of appellant's trial. Rather, what did exist was recent precedent in Ohio allowing into evidence both the autopsy report and the testimony of a different expert about the autopsy. That is, the Ohio Supreme Court specifically concluded that an autopsy report is non-testimonial evidence under *Crawford*, as it is not solely made at the behest of police in order to convict the particular defendant. *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, ¶¶ 80-82, 88, citing R.C. 313.10 (certified records of a coroner are public records and shall be received as evidence in any criminal or civil court) and Evid.R. 803(6) (business record). In so stating, the Court specified: "An autopsy report, prepared by a medical examiner and documenting objective findings, is the 'quintessential business record.'" *Id.* at ¶ 82, citing *Rollins v. State*, 161 Md. App. 34, 81, 866 A.2d 926 (2005).

¶{21} The *Craig* Court also held that a current medical examiner can give expert testimony about autopsy findings, test results, and opinion on cause of death even though a now-retired coroner performed the autopsy. *Id.* at ¶ 79, cert. denied by *Craig v. Ohio*, 549 U.S. 1255, 127 S.Ct. 1374, 167 L.E.2d 164 (2007). Following *Craig*, this court found it permissible to admit an autopsy report prepared by the Cuyahoga County Coroner's Office where no one from that office testified and to admit

the testimony of the Columbiana County Coroner about the report and other aspects of the case. *State v. Mitchell*, 7th Dist. No. 05CO63, 2008-Ohio-1525, ¶ 104.

¶{22} This was the controlling law at the time of appellant's trial. Thus, there was no reason for defense counsel to object to the testimony of the pathologist or the admission of the autopsy report on these Confrontation Clause grounds. It would follow that appellate counsel was not ineffective for failing to raise ineffective assistance of trial counsel on this issue.

¶{23} In anticipation of this position, appellant urges that trial counsel should have objected based upon the 2004 *Crawford* decision. However, the Ohio Supreme Court's 2006 *Craig* decision found that *Crawford* did not bar autopsy reports in the absence of the drafter and did not bar a different expert from testifying on his opinion regarding the autopsy results. *Craig*, 110 Ohio St.3d306 at ¶ 81-88. As such, this would not have been a valid argument.

¶{24} We do note that *Craig*, a capital case, is back before the Ohio Supreme Court. Even though it is back after a prior remand for resentencing on the non-capital offenses, the Court ordered the parties to brief two issues: (1) whether the introduction of the autopsy report violated the right to confrontation under *Melendez* and (2) whether a medical examiner who did not conduct the autopsy properly testified as to cause of death in view of *Melendez*. *State v. Craig*, 126 Ohio St.3d 1573, 2010-Ohio-4539, 934 N.E.2d 347.

¶{25} The *Craig* Court stayed the briefing pending the United States Supreme Court decision in *Bullcoming*. When *Bullcoming* was released, the *Craig* Court stayed its briefing pending the United States Supreme Court decision in *Williams v. Illinois*, U.S. Sup.Ct. Case No. 10-8505, a case for which certiorari was granted in August of 2011. The issue in *Williams* deals with whether a state evidence rule allowing an expert to testify about DNA results performed by a non-testifying analyst violates the Confrontation Clause when there was no opportunity to confront the actual analyst. Thus, although the topics of autopsy reports and expert testimony on cause of death appear to be distinguishable topics from those involved in *Melendez*, *Bullcoming*, and *Williams*,<sup>1</sup> the Ohio Supreme Court apparently finds those cases relevant to its

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<sup>1</sup>*State v. Zimmerman*, 8th Dist. No. 96210, 2011-Ohio-6156 (autopsy report non-testimonial even under new United States Supreme Court cases); *State v. Monroe*, 8th Dist. No. 94768, 2011-Ohio-

decision in stayed *Craig* case where it may reconsider its prior autopsy and expert testimony holding.

¶{26} In any event, as aforementioned, the 2006 *Craig* decision and the 2008 *Mitchell* decision represented the controlling law at the time of appellant's trial in 2008. This being the case, there was no reason for defense counsel to object to the testimony of the pathologist or the presentation of the autopsy report on these Confrontation Clause grounds. It would follow that appellate counsel was not ineffective for failing to raise ineffective assistance of trial counsel on this issue. (In addition, the 2006 *Craig* decision was still controlling law on the specific topic of autopsy reports and coroner testimony at the time of appellant's appeal.) As there was no deficient performance by counsel, the issue of prejudice is moot. Reopening on this claim is denied.

#### ISSUE TWO

¶{27} The second argument appellant believes appellate counsel should have made is:

¶{28} "Trial counsel were ineffective for failing to object to the trial court's questioning of State's witnesses."

¶{29} The court held a motion in limine hearing regarding the introduction of testimony of the victim's fear or apprehension of appellant. In the sixth assignment of error in appellant's direct appeal, appellate counsel argued that the trial court's neutrality was in question because the court asked questions at the hearing rather than requiring the prosecutor to elicit the responses necessary to determine whether witnesses should be permitted to testify as to the victim's fear of appellant. It was argued that the trial judge should have refrained from taking the role of the advocate in order to avoid the appearance of impartiality.

¶{30} In addressing this argument, this court initially noted that appellant failed to object to the trial court's questions. *State v. Adams*, 7th Dist. No. 08MA246, 2011-Ohio-5361, ¶ 291. In his reopening application, appellant now argues that appellate counsel should have raised ineffective assistance of trial counsel, instead of just error of the trial court, in order to preserve this issue for appellate review. However, after

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3045 (*Melendez* does not conflict with *Craig*); *State v. Hardin*, 4th Dist. No. 10CA803, 2010-Ohio-6304 (same).

noting in a single sentence that appellant did not object, we then set forth the following thorough analysis of the issue:

¶{31} “Additionally, the trial court ‘may interrogate witnesses, in an impartial manner, whether called by itself or a party.’ Evid.R. 614(B). ‘A trial judge has a duty to see that truth is developed and therefore should not hesitate to pose a proper, pertinent, and evenhanded question when justice so requires.’ *In the Matter of Gray* (Apr. 20, 2000), 8th Dist. Nos. 75984, 75985. A trial court’s questioning of a witness is not deemed partial for purposes of Evid.R. 614(B) merely because the evidence elicited during the interrogation was damaging to one of the parties. *Id.* Rather, it is presumed that the trial court acted impartially in questioning a witness as to a material fact or to develop the truth. *Id.* See, also, *Jenkins v. Clark* (1982), 7 Ohio App.3d 93, 98. Moreover, leading questions are acceptable. *Id.* at 97.

¶{32} “In fact, an appellate court’s concern with trial court questioning essentially revolves around the effect of the court’s involvement on a jury. *State ex rel. Wise v. Chand* (1970), 21 Ohio St.2d 113, 119. In a bench trial or a motion hearing, these concerns are not raised. See *Gray*, 8th Dist. Nos. 75984, 75985.

¶{33} “Here, the court was attempting to ascertain preliminary issues outside the presence of the jury regarding whether there was a foundation for certain testimony. The court’s involvement in the questioning of the witnesses did not project the appearance of impartiality. The leading nature of certain questions facilitated the process and focused the inquiry to those issues the court believed were relevant at that point in time. Consequently, this argument is without merit.” *Adams*, 7th Dist. No. 08MA246 at ¶ 291-293.

¶{34} As can be seen, we ruled on the merits of the issue regardless of the fact that trial counsel did not raise the issue to the trial court at the motion in limine hearing. Hence, it is irrelevant that appellate counsel did not specifically raise ineffective assistance of trial counsel in assignment of error number six. This issue does not present a valid claim for reopening.

### ISSUE THREE

¶{35} The third argument appellant believes his appellate counsel should have presented is:

¶{36} "Trial counsel were ineffective for failing to object to several prejudicial comments uttered by the prosecution during Adams' trial."

¶{37} Appellant first refers to two statements by a detective. First, defense counsel asked the detective if he testified already in the case, to which the detective responded, "I have." (Tr. 191). Counsel then asked, "Back in July, once in September?" The detective responded, "At suppression hearings, yes." (Tr. 192). The second statement appellant refers to involves the detective replying, in response to defense counsel's question about whether he could recall other conversations with appellant's girlfriend, "Not about this case." (Tr. 221).

¶{38} Appellant points out that, based upon these statements, trial counsel asked for a mistrial, which the trial court overruled. (Tr. 229). Appellant complains that although trial counsel asked for a mistrial based partly on these statements, counsel failed to object to these statements at the time they were made. Appellant believes this is an instance of ineffective assistance of trial counsel that should have been raised by appellate counsel in the direct appeal.

¶{39} The effect of these statements was already raised by appellate counsel in assignment of error number nine. In overruling that assignment, we did note that defense counsel neither objected to the "[n]ot about this case comment" nor the suppression hearing reference and that defense counsel was the one who brought up the existence of past testimony in the case. *State v. Adams*, 7th Dist. No. 08MA246, 2011-Ohio-5361, ¶ 322, 324.

¶{40} Still, our analysis was not based upon waiver. Rather, as to the reference to a suppression hearing, we held that this disclosure did not deprive appellant of a fair trial. *Id.* at ¶324. We pointed out that most murder cases involve suppression hearings. We also noted that there was no implication that evidence had been suppressed from the jury's viewing. *Id.* We concluded that prejudice was not apparent.

¶{41} As to the "[n]ot about this case" comment, we stated:

¶{42} "In any event, it was merely a statement of fact. It does not refer to [the] prior rape, kidnapping, and robbery case [for which appellant went to prison]. It does not even refer to the girlfriend being questioned about appellant. As the state points out, it could merely mean that they spoke about general life topics (her father was an active police officer at the time)." *Id.* at ¶ 322.

¶{43} Thus, we addressed these issues on the merits even though they had not been objected to as soon as they were made but rather were raised thereafter in a mistrial motion. As such, reopening on this matter is unnecessary.

¶{44} Appellant's reopening application then states that the prosecutor asked the detective why he believed appellant was a suspect in a burglary attempt at the victim's apartment to which the detective replied, "From what the victim told me that she was having problems --." At that point, the defense objected, and the court sustained the objection. (Tr. 243). The prosecutor continued, "So from what she had told you?" and "Without stating what she said?" (Tr. 243-244).

¶{45} In the direct appeal, appellate counsel argued in the ninth assignment of error that this was a deliberate attempt to prejudice the jury. Appellant now contends that appellate counsel should also have argued that trial counsel was ineffective for failing to object to these final two statements of the prosecutor.

¶{46} The "without stating what she said" comment is merely a caution about why the objection had been sustained and warning for the detective not to go into what the victim reported. There is nothing improper or prejudicial about this.

¶{47} The question, "So from what she had told you?" appears merely to be an attempt to get back on track. There is no indication that it was a purposeful attempt to prejudice the jury. Out-of-court statements are often admitted to explain the actions of police officers in an investigation. See *State v. Thomas*, 61 Ohio St.2d 223, 232, 400 N.E.2d 401 (1980); *State v. Blevins*, 36 Ohio App.3d 147, 149, 521 N.E.2d 1105 (10th Dist.1987). The item contested here is not even a statement of the victim but an explanation that the victim's report caused the officer to conclude that appellant was a suspect in the previous attempted entry into her apartment.

¶{48} Moreover, as we opined in addressing the detective's statement, the statement was not so prejudicial as to require a mistrial. *Adams*, 7th Dist. No. 08MA246 at ¶ 326. We also pointed out that the jury already knew that the victim was "having problems" with appellant. *Id.* A connection had already been made between his watching and calling her and the recent break-in at her apartment. (Tr. 96-102, 109, 183, 368-387). It had also been explained why it seemed the potential intruder had come from inside the apartment building. (Tr. 109-110). The state's reiteration of a few words of the detective's statement, "From what she told you," does not push the effect of the detective's statement into the realm of outcome determination.

¶(49) It must also be remembered that trial counsel, after having an objection sustained, may have purposely refrained from objecting to the prosecutor's brief and partial recap in order to avoid drawing more attention to it. Finally, as set forth supra, appellate counsel is not ineffective for failing to raise every possible issue. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶ 7, citing *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). These appellate attorneys, in a five hundred twenty-eight page brief, raised multiple issues including ineffective trial counsel on various grounds and the effect of the detective's statement outlined above.

#### ISSUE NUMBER FOUR

¶(50) The fourth issue appellant believes appellate counsel should have proposed is:

¶(51) "Trial counsel were ineffective for failing to object to the trial court's failure to put on the record its factual findings regarding the denial of the motion for speedy trial."

¶(52) Appellant acknowledges that his appellate counsel raised an issue concerning the trial court's failure to state its factual findings where Crim.R. 12(F) states that the court shall state its essential findings on the record if factual issues are involved in determining a motion. See *Adams*, 7th Dist. No. 08MA246 at ¶ 133. This court explained that a trial court has no duty to state its essential findings unless the defendant requested them. *Id.*, citing *State v. Eley*, 77 Ohio St.3d 174, 179, 672 N.E.2d 640 (1996). We pointed out that appellant argued that he invoked the duty preemptively where his motion to dismiss asked the court to provide findings if it denied his motion. *Id.* We concluded that he should have raised the matter to the trial court at a time when the court could have corrected it. *Id.* at ¶ 135-136. Thus, appellant's reopening application now contends that trial counsel was ineffective for failing to raise the lack of findings prior to trial and that appellate counsel was ineffective for failing to specify that this constituted ineffective assistance of trial counsel.

¶(53) However, this court also stated that even if a trial court commits error in failing to provide findings in support of its denial of a speedy trial motion, there must be prejudice in order to reverse. *Id.* at ¶ 135, citing *State v. Sapp*, 105 Ohio St.3d 104, 2002-Ohio-7008, 822 N.E.2d 1239, ¶ 96 (if the record is sufficient to allow full review of

the motion, there is no prejudice in the failure to state findings of fact under Crim.R. 12). See also *State v. Brown*, 64 Ohio St.3d 476, 481-482, 597 N.E.2d 97 (1992) (where defendant did not ask for findings and record supports decision, reversal for failure to make findings is improper); *State v. Benner*, 40 Ohio St.3d 301, 317-318, 533 N.E.2d 701 (1988). We stated that although the trial court's judgment entry did not contain findings on this issue, the trial court did emphasize on the record at the speedy trial hearing that appellant was not charged with receiving stolen property in the pending case, a key factor in the speedy trial analysis. *Adams*, 7th Dist. No. 08MA246 at ¶ 136, citing Hrg. Tr. 112-113.

¶{54} In any event, we concluded that there was no indication of prejudice in the lacking factual findings because the record was sufficient to allow our review of the issue as could be seen by our analysis of the speedy trial issues in paragraphs 113 through 132 of the opinion. *Id.* Thus, even if ineffective trial counsel had been raised within appellant's twelfth assignment of error, this court made it clear that the defense suffered no prejudice on this matter. Accordingly, reopening is not proper on this topic.

#### ISSUE FIVE

¶{55} The fifth issue which appellant claims that appellate counsel should have raised is:

¶{56} "Following making a Batson challenge, trial counsel were ineffective for failing to object to the excusal of Jurors 11, 31, and 301."

¶{57} This argument is without merit. As we stated in our prior opinion in addressing assignment of error number seventeen, defense counsel raised *Batson* regarding Jurors 11 and 31. *Id.* at ¶ 257, 260, addressing *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69. Appellate counsel argued that the trial court's decision regarding the application of *Batson* was erroneous. We did not find waiver by failing to object to the trial court's decision after it was made.<sup>2</sup> Rather, we reviewed these contentions in full. Regarding Juror Number 31, we held:

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<sup>2</sup>As is quoted *infra*, we did note that the defense did not dispute certain statements of the prosecutor about Juror 11. *Id.* at ¶ 261. This was not a suggestion of waiver; it just meant that the defense must have agreed that she did seem to not listen to some of the state's comments and that she did seem disappointed. These are not items that can be seen on the bare record, and there is no indication of ineffectiveness for failing to argue that the state's rationale is factually incorrect.

¶{58} “The trial court's decision was based on the prosecutor's credibility and its own determination of reasonableness. See *Batson*, 476 U.S. at 98; *Frazier*, 115 Ohio St.3d 139 at ¶ 64; *Bryan*, 101 Ohio St.3d 272 at ¶ 110. The court was in the best position to evaluate the statements of the prosecutor and also those made by the juror during voir dire. The state provided multiple race-neutral reasons. It was not clearly erroneous for the trial court to have found that those reasons were not pretextual and that the prosecutor's decision was not the result of purposeful discrimination. A prospective juror's equivocal answers or expressions of uncertainty about impartiality or matters pertinent to the case are sufficiently race-neutral reasons for exercising a peremptory challenge. See, e.g., *State v. Were*, 118 Ohio St.3d 448, 2008–Ohio–2762, ¶ 65 (prospective juror had uncertain position on the death penalty); *State v. Franklin*, 7th Dist. No. 06–MA–79, 2008–Ohio–2264, ¶ 70–92 (prospective juror's attentiveness and understanding of burden of proof was uncertain). As such, this argument is overruled.” *Id.* at ¶ 258.

¶{59} Concerning Juror Number 11, we opined:

¶{60} “Feeling that a juror was inattentive is a race-neutral reason. The court was present and occupied the best position to judge this. Notably, the defense, upon whom the burden of persuasion remained, did not dispute the statement. See *Rice*, 546 U.S. at 338. A belief that the juror showed disdain for the state's position is also a valid explanation. See, e.g., *State v. Person*, 174 Ohio App.3d 287, 2007–Ohio–6869, ¶ 33 (state believed that prospective juror made a disdainful facial expression during the State's questions). A belief that a juror was too focused on a non-element such as motive is also valid concern for a prosecutor. The mere fact that she watches court shows may not be a strong reason in itself, but it was accompanied by other valid concerns. For all of these reasons, it cannot be said that the trial court was clearly erroneous in deciding that the state's reasons were not pretextual. See *Frazier*, 115 Ohio St.3d 139 at ¶ 64; *Bryan*, 101 Ohio St.3d 272 at ¶ 110.” *Id.* at ¶ 262.

¶{61} Finally, as for appellant's perception that Juror Number 301 was excused, we repeat: “the state never did end up exercising a peremptory challenge on Juror Number 301. In fact, this juror sat as an alternate. (Tr. 765). Thus, this argument is without merit.” *Id.* at ¶ 263. And, as the state points out, *Batson* applies to peremptory challenges not challenges for cause, which the state lost in any event. See *State v. Lewis*, 7th Dist. No. 03MA36, 2005-Ohio-2690, ¶ 60, citing *State v.*

*Herring*, 94 Ohio St.3d 246, 256; (Tr. 443.) For all of these reasons, this argument is without merit.

#### ISSUE SIX

¶{62} The sixth issue appellant urges should have been raised by appellate counsel is:

¶{63} "Trial counsel were ineffective for failing to present the testimony of a psychologist during the mitigation phase of Adams' trial."

¶{64} Appellant states that it was crucial to explain to the jury how his psychological make-up had changed over the two decades since the crime was committed. Thus, he claims ineffective assistance of trial counsel in failing to offer expert psychological testimony at sentencing in mitigation. He states that if the jury had this evidence, there is a reasonable probability that one juror would not have voted for death.

¶{65} There is no per se rule that every capital defense team must present the testimony of a psychologist in mitigation. As we noted in our prior opinion, R.C. 2929.03(D)(1) states that once a defendant requests a mental examination, he has no control over whether the jury views it. *Adams*, 7th Dist. No. 08MA246 at ¶ 386. Thus, in a direct appeal, it is typically considered a trial tactic whether the defense chooses to expose the defendant to the risk of potentially incriminating investigations. *Id.* See also *Wiggins v. Smith*, 539 U.S. 510, 521-522, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 277-278.

¶{66} That appellant could have obtained favorable expert evidence is not a question that can be addressed in this direct appeal. We cannot assume that a psychologist who interviewed appellant would have presented mitigating evidence. See *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 2011-Ohio-4515, 952 N.E.2d 1152, ¶ 130.

¶{67} The potential availability of favorable expert testimony is not just speculative but would also be a matter outside of the record. New matter de hors the record is not reviewable in a direct appeal. *State v. Hartman*, 93 Ohio.St.3d 274, 299, 754 N.E.2d 1150 (2001) (if establishing ineffective assistance of counsel requires proof outside the record, then such claim is not appropriately considered on direct appeal); *State v. Ishmail*, 54 Ohio St.2d 402, 406, 377 N.E.2d 500 (1978) (the

appellate court is limited to what transpired as reflected by the record on direct appeal and cannot rely upon evidence de hors the record). And, without such evidence, there is no way to show ineffective assistance of counsel on the mitigation claim. See *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 105, citing *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 350.

¶{68} Consequently, there is not a genuine issue of ineffective assistance of appellate counsel for failing to raise ineffective assistance of trial counsel on this matter in the direct appeal. See *State v. Herring*, 94 Ohio St.3d 246, 262, 762 N.E.2d 940 (2002) (direct appeal on failure to fully investigate mitigation). Cf. *State v. Herring*, 7th Dist. No. 03MA12, 2004-Ohio-5357, at ¶ 104 (the post-conviction presentation of evidence of what a mitigation expert could have presented). Reopening is not required on this argument.

#### ISSUE SEVEN

¶{69} The final issue raised in appellant's reopening application contends:

¶{70} "The state failed to introduce sufficient evidence of the aggravated murder charge and specifications, thus depriving Adams of substantive and procedural due process."

¶{71} Appellant argues that the state failed to produce sufficient evidence that he committed aggravated murder or the specification of committing or attempting to commit aggravated burglary, aggravated robbery, rape, or kidnapping. He points out that Horace Landers was found in the bedroom containing the victim's stolen television and was originally identified by the woman waiting for the ATM at the bank. He concludes that appellate counsel were ineffective for failing to raise insufficiency of the evidence to this court.

¶{72} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the verdict thereafter. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In essence, sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements proven beyond a reasonable doubt. *Smith*, 80 Ohio St.3d at 113.

Circumstantial evidence has the same probative value as direct evidence. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). See also *Adams*, 7th Dist. No. 08MA246 at ¶ 101.

¶{73} In this capital case, we independently reviewed the record to determine whether the evidence supported the finding that the aggravating circumstance was established beyond a reasonable doubt. *Adams*, 7th Dist. No. 08MA246 at ¶ 352, citing R.C. 2929.05(A); R.C. 2929.04(B). See also *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 286. As we stated in the original appeal, the aggravating circumstance is that the offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated robbery, or aggravated burglary, and that appellant was the principal offender in the commission of the aggravated murder. *Adams*, 7th Dist. No. 08MA246 at ¶ 353, citing R.C. 2929.04(A)(7).

¶{74} We stated: "There is evidence that appellant killed the victim while or after raping her, kidnapping her, robbing her and burglarizing her residence. A rational juror could also find that appellant was the principal offender." *Id.* at ¶ 353. In ensuring that the elements were proven beyond a reasonable doubt, we then proceeded to review the most pertinent evidence:

¶{75} "Specifically, appellant was the victim's downstairs neighbor, who often watched her and called her late at night. She feared him. She changed her number soon after the calls began. He once slipped an odd card under her door. Her ATM card was found in his pocket the morning her body was found. There was credible evidence that he used the victim's car and ATM card the night of her murder. Her car was then parked back in front of their apartment. Her keys were found in his bathroom garbage can. Her potholder was found in his apartment. The potholder contained red head and pubic hair consistent with that of the victim; it also contained hair from an African-American. Her stolen television was discovered in appellant's room with his fingerprints on it. Semen discovered in the victim's vagina was found to match appellant's DNA.<sup>3</sup> As the victim knew appellant, a juror could conclude that to rape her would require him to kill her. Ligature marks on her neck and wrists establish that a

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<sup>3</sup>Furthermore, after holding that it was not unconstitutional to apply new precedent on circumstantial evidence, we reviewed "the quantum of evidence presented against him at trial" and added the observation: "[i]t was established that the victim would not willingly have had intercourse with appellant." *Id.* at ¶ 103.

cord was used, showing the death was not an accidental result of the other felonies. *Id.* at ¶ 354.

¶{76} We concluded that “the evidence supports the jury’s finding that the aggravating circumstance was established beyond a reasonable doubt.” *Id.* at ¶ 355. In addressing a lesser included offense issue, our opinion reiterated:

¶{77} “Here, the victim was appellant’s neighbor, who knew him well and could easily identify him after a rape or robbery. The victim had bruises on her face suggesting suffocation and ligature marks around her neck suggesting she was also strangled with a cord. Appellant was found in possession of many stolen objects that belonged to the victim such as her television, car keys, bank card, and potholder (with head and pubic hair attached that was consistent with that of the victim). He drove her car to a bank and used her bank card. The car was then brought back to their apartment. In the trunk was a telephone cord said to be consistent with the ligature marks on the victim’s neck and wrists. The victim had repeatedly rebuffed appellant’s attempts to express interest in her life. She feared appellant. Appellant’s semen was found in the victim’s vagina.” *Id.* at ¶ 333.

¶{78} From this, we concluded: “That he killed her purposely while committing, attempting to commit, or fleeing immediately after committing a rape, a robbery, a burglary, and a kidnapping is clearly established by the evidence.” *Id.* at ¶ 334. We elsewhere observed:

¶{79} “He essentially stalked his young neighbor until he eventually forced his way into her apartment, hit her, raped her, strangled her with a cord, tied her wrists, suffocated her, stole her car, dumped her body in the river, tried to get money from her bank account, returned to her apartment to steal her television, and cleaned up trace evidence with her potholder. After considering all of the evidence presented throughout the case, the imposition of the death penalty here is proportionate to that imposed in other similar cases.” *Id.* at ¶ 366.

¶{80} As such, this court has analyzed the issue of sufficiency and found that a rational juror could find that appellant not only committed aggravated murder but also was the principal offender and that he purposely killed her while committing, attempting to commit, or was fleeing immediately after committing one or all of the offenses within the specification. Thus, appellate counsel could have separately argued sufficiency; however, as they knew we were essentially obligated to review it in

any event, it was not ineffective to fail to extend the five hundred twenty-eight page appellate brief to include this issue.

¶{81} For all of these reasons, reopening is denied.

APPOINTMENT OF COUNSEL FOR PURPOSES  
OF APPLICATION TO REOPEN

¶{82} The office of the public defender filed this application to reopen on behalf of appellant after filing a notice of appearance. They seek retroactive appointment for the purpose of filing the application.

¶{83} As appellant points out, there are examples of the Ohio Supreme Court appointing counsel for purposes of filing the application for reopening. See, e.g., *State v. Turner*, 114 Ohio St.3d 1494, 2007-Ohio-4092, 871 N.E.2d 1195; *State v. Jackson*, 108 Ohio St.3d 1477, 2006-Ohio-788, 842 N.E.2d 1055. The rule applicable to reopenings in the Supreme Court is worded the same as App.R. 26(B)(6)(a). See S.Ct. Prac. R. 11.6(F)(1).

¶{84} Under App.R. 26(B), the appellate court need only appoint counsel to an indigent defendant if reopening is permitted and the case is then to proceed as if on initial appeal. App.R. 26(B)(6)(a). A defendant, even a capital one, has no right to counsel in order to file the application to reopen itself. *State v. Keith*, 119 Ohio St.3d 161, 2008-Ohio-3866, 892 N.E.2d 912, ¶ 7.

¶{85} As we are denying the application to reopen, we shall not be appointing counsel to proceed on reopening, and we decline to retroactively appoint the Public Defender's Office for purposes of the application they filed on appellant's behalf.

Vukovich, J., concurs.  
Donofrio, J., concurs.  
Waite, P.J., concurs.

## **ARTICLE I, SECTION 1, OHIO CONSTITUTION**

### **§ 1 RIGHT TO FREEDOM AND PROTECTION OF PROPERTY.**

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

## **SECTION 2, ARTICLE I, OHIO CONSTITUTION**

### **§ 2 RIGHT TO ALTER, REFORM, OR ABOLISH GOVERNMENT, AND REPEAL SPECIAL PRIVILEGES.**

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

**SECTION 5, ARTICLE I, OHIO CONSTITUTION**

**§ 5 TRIAL BY JURY; REFORM IN CIVIL JURY SYSTEM.**

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

## **SECTION 9, ARTICLE I, OHIO CONSTITUTION**

### **§ 9 BAILABLE OFFENSES; OF BAIL, FINE, AND PUNISHMENT.**

All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great and a person who is charged with a felony where the proof is evident or the presumption great and who poses a potential serious physical danger to a victim of the offense, to a witness to the offense, or to any other person or to the community. Excessive bail shall not be required; excessive fines shall not be imposed; and cruel and unusual punishments shall not be inflicted.

## SECTION 10, ARTICLE I, OHIO CONSTITUTION

### § 10 TRIAL OF ACCUSED PERSONS AND THEIR RIGHTS; DEPOSITIONS BY STATE AND COMMENT ON FAILURE TO TESTIFY IN CRIMINAL CASES.

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

**SECTION 16, ARTICLE I, OHIO CONSTITUTION**

**§ 16 REDRESS IN COURTS.**

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

**SECTION 20, ARTICLE I, OHIO CONSTITUTION**

**§ 20 POWERS RESERVED TO THE PEOPLE.**

This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people.

## **AMENDMENT VI, UNITED STATES CONSTITUTION**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

**AMENDMENT VIII, UNITED STATES CONSTITUTION**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## AMENDMENT XIV, UNITED STATES CONSTITUTION

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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TITLE 3. COUNTIES  
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*ORC Ann. 313.09 (2012)*

§ 313.09. Records

The coroner shall keep a complete record of and shall fill in the cause of death on the death certificate, in all cases coming under his jurisdiction. All records shall be kept in the office of the coroner, but, if no such office is maintained, then such records shall be kept in the office of the clerk of the court of common pleas. Such records shall be properly indexed, and shall state the name, if known, of every deceased person as described in *section 313.12 of the Revised Code*, the place where the body was found, date of death, cause of death, and all other available information. The report of the coroner and the detailed findings of the autopsy shall be attached to the report of each case. The coroner shall promptly deliver, to the prosecuting attorney of the county in which such death occurred, copies of all necessary records relating to every death in which, in the judgment of the coroner or prosecuting attorney, further investigation is advisable. The sheriff of the county, the police of the city, the constable of the township, or marshal of the village in which the death occurred may be requested to furnish more information or make further investigation when requested by the coroner or his deputy. The prosecuting attorney may obtain copies of records and such other information as is necessary from the office of the coroner. All records of the coroner are the property of the county.

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*ORC Ann. 313.12 (2012)*

§ 313.12. Notice to coroner of violent, suspicious, unusual or sudden death or any death of a mentally retarded or developmentally disabled person

(A) When any person dies as a result of criminal or other violent means, by casualty, by suicide, or in any suspicious or unusual manner, when any person, including a child under two years of age, dies suddenly when in apparent good health, or when any mentally retarded person or developmentally disabled person dies regardless of the circumstances, the physician called in attendance, or any member of an ambulance service, emergency squad, or law enforcement agency who obtains knowledge thereof arising from the person's duties, shall immediately notify the office of the coroner of the known facts concerning the time, place, manner, and circumstances of the death, and any other information that is required pursuant to *sections 313.01 to 313.22 of the Revised Code*. In such cases, if a request is made for cremation, the funeral director called in attendance shall immediately notify the coroner.

(B) As used in this section, "mentally retarded person" and "developmentally disabled person" have the same meanings as in *section 5123.01 of the Revised Code*.

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*ORC Ann. 313.123 (2012)*

§ 313.123. Autopsy defined; disposal of medical waste; autopsy contrary to decedent's religious beliefs; retention of DNA specimens; immunity of employee

(A) (1) As used in this chapter, "autopsy" means the external and internal examination of the body of a deceased person, including, but not limited to, gross visual inspection and dissection of the body and its internal organs, photographic or narrative documentation of findings, microscopic, radiological, toxicological, chemical, or other laboratory analyses performed in the discretion of the examining individual upon tissues, organs, blood, other bodily fluids, gases, or any other specimens and the retention for diagnostic and documentary purposes of tissues, organs, blood, other bodily fluids, gases, or any other specimens as the examining individual considers necessary to establish and defend against challenges to the cause and manner of death of the deceased person.

(2) As used in this section, "DNA specimen" has the same meaning as in *section 109.573 [109.57.3] of the Revised Code*.

(B) (1) Except as otherwise provided in division (B)(2) of this section, retained tissues, organs, blood, other bodily fluids, gases, or any other specimens from an autopsy are medical waste and shall be disposed of in accordance with applicable federal and state laws, including any protocol rules adopted under *section 313.122 [313.12.2] of the Revised Code*.

(2) If an autopsy is performed on a deceased person and pursuant to *section 313.131 [313.13.1] of the Revised Code* the coroner has reason to believe that the autopsy is contrary to the deceased person's religious beliefs, the coroner shall not remove any specimens, including, but not limited to, tissues, organs, blood, or other bodily fluids, from the body of the deceased person unless removing those specimens from the body of the deceased person is a compelling public necessity. Except as otherwise provided in division (B)(3) of this section, if the coroner removes any specimens from the body of the deceased person, the coroner shall return the specimens, as soon as is practicable, to the person who has the right to the disposition of the body.

(3) The coroner may retain a DNA specimen for diagnostic, evidentiary, or confirmatory purposes.

(C) A cause of action shall not lie against any employee of a coroner's office for requesting, ordering, or performing an autopsy in good faith under the authority of this chapter.

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*ORC Ann. 313.13 (2012)*

§ 313.13. Autopsy; blood test of decedent killed in motor vehicle accident

(A) The coroner, any deputy coroner, an investigator appointed pursuant to *section 313.05 of the Revised Code*, or any other person the coroner designates as having the authority to act under this section may go to the dead body and take charge of it. Whether and when an autopsy is performed shall be determined under *sections 313.121 [313.12.1] and 313.131 [313.13.1] of the Revised Code*. If an autopsy is performed by the coroner, deputy coroner, or pathologists, a detailed description of the observations written during the progress of such autopsy, or as soon after such autopsy as reasonably possible, and the conclusions drawn from the observations shall be filed in the office of the coroner.

(B) If the office of the coroner is notified that a person who was the operator of a motor vehicle that was involved in an accident or crash was killed in the accident or crash or died as a result of injuries suffered in it, the coroner, deputy coroner, or pathologist shall go to the dead body and take charge of it and administer a chemical test to the blood of the deceased person to determine the alcohol, drug, or alcohol and drug content of the blood. This division does not authorize the coroner, deputy coroner, or pathologist to perform an autopsy, and does not affect and shall not be construed as affecting the provisions of *section 313.131 [313.13.1] of the Revised Code* that govern the determination of whether and when an autopsy is to be performed.

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*ORC Ann. 313.131 (2012)*

§ 313.131. Procedure when autopsy is contrary to decedent's religious belief

(A) As used in this section:

(1) "Friend" means any person who maintained regular contact with the deceased person, and who was familiar with the deceased person's activities, health, and religious beliefs at the time of the deceased person's death, any person who assumes custody of the body for burial, and any person authorized by written instrument, executed by the deceased person to make burial arrangements.

(2) "Relative" means any of the following persons: the deceased person's surviving spouse, children, parents, or siblings.

(B) The coroner, deputy coroner, or pathologist shall perform an autopsy if, in the opinion of the coroner, or, in his absence, in the opinion of the deputy coroner, an autopsy is necessary, except for certain circumstances provided for in this section where a relative or friend of the deceased person informs the coroner that an autopsy is contrary to the deceased person's religious beliefs, or the coroner otherwise has reason to believe that an autopsy is contrary to the deceased person's religious beliefs. The coroner has such reason to believe an autopsy is contrary to the deceased person's religious beliefs if a document signed by the deceased and stating an objection to an autopsy is found on the deceased's person or in his effects. For the purposes of this division, a person is a relative or friend of the deceased person if the person presents an affidavit stating that he is a relative or friend as defined in division (A) of this section.

(C) (1) Except as provided in division (F) of this section, if a relative or friend of the deceased person informs the coroner that an autopsy is contrary to the deceased person's religious beliefs, or the coroner otherwise has reason to believe that an autopsy is contrary to the deceased person's religious beliefs, and the coroner concludes the autopsy is a compelling public necessity, no autopsy shall be performed for forty-eight hours after the coroner takes charge of the deceased person. An autopsy is a compelling public necessity if it is necessary to the conduct of an investigation by law enforcement officials of a homicide or suspected homicide, or any other criminal investigation, or is

necessary to establish the cause of the deceased person's death for the purpose of protecting against an immediate and substantial threat to the public health. During the forty-eight hour period, the objecting relative or friend may file suit to enjoin the autopsy, and shall give notice of any such filing to the coroner. The coroner may seek an order waiving the forty-eight hour waiting period. If the coroner seeks such an order, the court shall give notice of the coroner's motion, by telephone if necessary, to the objecting relative or friend, or, if none objected, to all of the deceased person's relatives whose addresses or telephone numbers can be obtained through the exercise of reasonable diligence. The court may grant the coroner's motion if the court determines that no friend or relative of the deceased person objects to the autopsy or if the court is satisfied that any objections of a friend or relative have been heard, and if it also determines that the delay may prejudice the accuracy of the autopsy, or if law enforcement officials are investigating the deceased person's death as a homicide and suspect the objecting party committed the homicide or aided or abetted in the homicide. If no friend or relative files suit within the forty-eight hour period, the coroner may proceed with the autopsy.

(2) The court shall hear a petition to enjoin an autopsy within forty-eight hours after the filing of the petition. The Rules of Civil Procedure shall govern all aspects of the proceedings, except as otherwise provided in division (C)(2) of this section. The court is not bound by the Rules of Evidence in the conduct of the hearing. The court shall order the autopsy if the court finds that under the circumstances the coroner has demonstrated a need for the autopsy. If the court enjoins the autopsy, the coroner shall immediately proceed under *section 313.14 of the Revised Code*.

(D) (1) If a relative or friend of the decedent informs the coroner that an autopsy is contrary to the deceased person's religious beliefs, or the coroner otherwise has reason to believe that an autopsy is contrary to the deceased person's religious beliefs, and the coroner concludes the autopsy is necessary, but not a compelling public necessity, the coroner may file a petition in a court of common pleas seeking a declaratory judgment authorizing the autopsy. Upon the filing of the petition, the court shall schedule a hearing on the petition, and shall issue a summons to the objecting relative or friend, or, if none objected, to all of the deceased person's relatives whose addresses can be obtained through the exercise of reasonable diligence. The court shall hold the hearing no later than forty-eight hours after the filing of the petition. The court shall conduct the hearing in the manner provided in division (C)(2) of this section.

(2) Each person claiming to be a relative or friend of the deceased person shall immediately upon receipt of the summons file an affidavit with the court stating the facts upon which the claim is based. If the court finds that any person is falsely representing himself as a relative or friend of the deceased person, the court shall dismiss the person from the action. If after dismissal no objecting party remains, and the coroner does not have reason to believe that an autopsy is contrary to the deceased person's religious beliefs, the court shall dismiss the action and the coroner may proceed with the autopsy. The court shall order the autopsy after hearing the petition if the court finds that under the circumstances the coroner has demonstrated a need for the autopsy. The court shall waive the payment of all court costs in the action. If the petition is denied, the coroner shall immediately proceed under *section 313.14 of the Revised Code*.

Any autopsy performed pursuant to a court order granting an autopsy shall be performed using the least intrusive procedure.

(E) For purposes of divisions (B), (C)(1), and (D)(1) of this section, any time the friends or relatives of a deceased person disagree about whether an autopsy is contrary to the deceased person's

religious beliefs, the coroner shall consider only the information provided to him by the person of highest priority, as determined by which is listed first among the following:

- (1) The deceased person's surviving spouse;
- (2) An adult son or daughter of the deceased person;
- (3) Either parent of the deceased person;
- (4) An adult brother or sister of the deceased person;
- (5) The guardian of the person of the deceased person at the time of death;
- (6) A person other than those listed in divisions (E)(1) to (5) of this section who is a friend as defined in division (A)[(1)] of this section.

If two or more persons of equal priority disagree about whether an autopsy is contrary to the deceased person's religious beliefs, and those persons are also of the highest priority among those who provide the coroner with information the coroner has reason to believe that an autopsy is contrary to the deceased person's religious beliefs.

(F) (1) Divisions (C)(1) and (2) of this section do not apply in any case involving aggravated murder, suspected aggravated murder, murder, suspected murder, manslaughter offenses, or suspected manslaughter offenses.

(2) This section does not prohibit the coroner, deputy coroner, or pathologist from administering a chemical test to the blood of a deceased person to determine the alcohol, drug, or alcohol and drug content of the blood, when required by division (B) of *section 313.13 of the Revised Code*, and does not limit the coroner, deputy coroner, or pathologist in the performance of his duties in administering a chemical test under that division.

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*ORC Ann. 313.15 (2012)*

§ 313.15. Determination of responsibility for death

All dead bodies in the custody of the coroner shall be held until such time as the coroner, after consultation with the prosecuting attorney, or with the police department of a municipal corporation, if the death occurred in a municipal corporation, or with the sheriff, has decided that it is no longer necessary to hold such body to enable him to decide on a diagnosis giving a reasonable and true cause of death, or to decide that such body is no longer necessary to assist any of such officials in his duties.

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Current through Legislation passed by the 129th Ohio General Assembly  
and filed with the Secretary of State through File 143  
\*\*\* Annotations current through August 6, 2012 \*\*\*

TITLE 3. COUNTIES  
CHAPTER 313. CORONER

**Go to the Ohio Code Archive Directory**

*ORC Ann. 313.19 (2012)*

§ 313.19. Coroner's verdict the legally accepted cause of death

The cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's verdict and in the death certificate filed with the division of vital statistics, shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause of death, unless the court of common pleas of the county in which the death occurred, after a hearing, directs the coroner to change his decision as to such cause and manner and mode of death.

OHIO RULES OF COURT SERVICE  
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\*\*\* Rules current through rule amendments received through August 28, 2012 \*\*\*  
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Ohio Rules Of Appellate Procedure  
Title III. General provisions

*Ohio App. Rule 26 (2012)*

Review Court Orders which may amend this Rule.

**Rule 26. Application for reconsideration; Application for en banc consideration; Application for reopening.**

**(A) Application for reconsideration and en banc consideration.**

**(1) Reconsideration.**

(a) Application for reconsideration of any cause or motion submitted on appeal shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing as required by *App.R. 30(A)*.

(b) Parties opposing the application shall answer in writing within ten days of service of the application. The party making the application may file a reply brief within seven days of service of the answer brief in opposition. Copies of the application, answer brief in opposition, and reply brief shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(c) The application for reconsideration shall be considered by the panel that issued the original decision.

**(2) En banc consideration.**

(a) Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

(b) The en banc court may order en banc consideration sua sponte. A party may also make an application for en banc consideration. An application for en banc consideration must explain how

the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions.

(c) The rules applicable to applications for reconsideration set forth in division (A)(1) of this rule, including the timing requirements, govern applications for en banc consideration. Any sua sponte order designating a case for en banc consideration must be entered no later than ten days after the clerk has both mailed the judgment or order in question and made a note on the docket of the mailing as required by *App.R. 30(A)*. In addition, a party may file an application for en banc consideration, or the court may order it sua sponte, within ten days of the date the clerk has both mailed to the parties the judgment or order of the court ruling on a timely filed application for reconsideration under division (A)(1) of this rule if an intra-district conflict first arises as a result of that judgment or order and made a note on the docket of the mailing, as required by *App.R. 30(A)*. A party filing both an application for reconsideration and an application for en banc consideration simultaneously shall do so in a single document.

(d) The decision of the en banc court shall become the decision of the court. In the event a majority of the full-time judges of the appellate district is unable to concur in a decision, the decision of the original panel shall remain the decision in the case unless vacated under *App.R. 26(A)(2)(c)* and, if so vacated, shall be reentered.

(e) Other procedures governing the initiation, filing, briefing, rehearing, reconsideration, and determination of en banc proceedings may be prescribed by local rule or as otherwise ordered by the court.

### **(B) Application for reopening.**

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to *App.R. 9* and *10* shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.