

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

PLAINTIFF-APPELLEE

-vs-

BENNIE L. ADAMS

DEFENDANT-APPELLANT

CASE NO.: 2012-1274

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

DEATH PENALTY CASE

APPELLEE-STATE OF OHIO'S ANSWER BRIEF

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Statements of the Case, Facts, and Introduction

I. Trial Phase.

A. State's Case-in-Chief.

1. Avalon Tenney.

Avalon Tenney, Gina Tenney's (victim) mother, testified that in 1985, her daughter was in her second year at Youngstown State University. (Trial Transcript, October 14, 2008, before the Honorable Timothy E. Franken, Vol. I, at 68-69.) Gina lived at 2234 Ohio Avenue on Youngstown's north side while she attended YSU. (Trial Tr., Vol. I, at 69.)

The last time that Mrs. Tenney spoke to her daughter, Gina told her that she was afraid of her downstairs neighbor—Defendant-Appellant Bennie Lee Adams. (Trial Tr., Vol. I, at 71.)

2. Michael Valentine.

On the morning of December 30, 1985, Michael Valentine was trapping for muskrats on the Mahoning River, near the West Avenue Bridge (fka the Water Street Bridge). (Trial Tr., Vol. I, at 74-75.) The bridge was in use then, but is now closed. (Trial Tr., Vol. I, at 76.)

Around 11:00 a.m. that morning, Mr. Valentine found a body floating in the river. (Trial Tr., Vol. I, at 76.) Mr. Valentine then ran and flagged someone down from the water department and had him call the police. (Trial Tr., Vol. I, at 77.) When the police arrived, Mr. Valentine showed the police the body, which was that of a female. (Trial Tr., Vol. I, at 77-78.)

Although it had snowed the night before, Mr. Valentine did not see any other footprints or tracks that morning, other than his own that he had made that morning and the day prior. (Trial Tr., Vol. I, at 78-79, 83.)

3. Penny Sergeff.

Penny Sergeff was best friends with Gina since junior high (8th grade). (Trial Tr., Vol. I, at 87-88.) After high school, Gina enrolled at YSU, while Ms. Sergeff attended art school in New Jersey. (Trial Tr., Vol. I, at 88.) In November of 1985, however, Ms. Sergeff moved to Youngstown to be closer to Gina. (Trial Tr., Vol. I, at 88.) Ms. Sergeff resided on Elm Street, near the YSU campus, about ten blocks from Gina. (Trial Tr., Vol. I, at 88.)

Ms. Sergeff explained that Gina's apartment building was converted from a residential house, so that the upstairs and downstairs apartments shared a common stairway. (Trial Tr., Vol. I, at 89.)

On Saturday, December 28, 1985, Ms. Sergeff stayed with Gina at her apartment, because Gina was afraid to be left alone there. (Trial Tr., Vol. I, at 89.) Between 7:00 and 8:00 p.m., the two sat in Gina's apartment and discussed Christmas. (Trial Tr., Vol. I, at 90.) A few hours later, Mark Passarello arrived. (Trial Tr., Vol. I, at 90.) Mark and Gina had recently ended their relationship, but wanted to be alone. (Trial Tr., Vol. I, at 90.) Mark then drove Ms. Sergeff back to her apartment. (Trial Tr., Vol. I, at 90.) After Ms. Sergeff left Gina's apartment that night, she never again saw Gina alive. (Trial Tr., Vol. I, at 91.)

Ms. Sergeff testified that Gina was afraid of Bennie Adams, who lived in the downstairs apartment. (Trial Tr., Vol. I, at 90-91.) Ms. Sergeff stated that every time

Gina and she would arrive at Gina's apartment, Defendant would look at them out his window, and try to talk to them as they walked up the stairs to the apartment. (Trial Tr., Vol. I, at 93.)

In her statement to police, Ms. Sergeff stated that Gina was afraid because she had a break-in. (Trial Tr., Vol. I, at 96-97.) Ms. Sergeff also described an incident where Defendant called Gina on the phone, and she became scared because she had not given her number to him. (Trial Tr., Vol. I, at 100.) Gina then changed her phone number because she was scared to answer it when it rang. (Trial Tr., Vol. I, at 91-92, 100.)

The night that someone tried to break into Gina's apartment, Gina was home. (Trial Tr., Vol. I, at 109.) Gina did not hear the outside door to the apartment building open, which usually makes a loud screeching noise when it is opened or shut. (Trial Tr., Vol. I, at 109.)

4. Mark Passarello.

Mark Passarello dated Gina Tenney in 1985. (Trial Tr., Vol. I, at 113.) Mark met Gina in the spring of 1985, as they were both involved in student government at YSU. (Trial Tr., Vol. I, at 113.) They began dating a month later. (Trial Tr., Vol. I, at 113-114.) Gina was a virgin when she started to date Mark, but the two eventually engaged in sexual intercourse during their relationship. (Trial Tr., Vol. I, at 116.) Though the two dated, Gina never allowed him to drive her vehicle (owned by her mother) or her ATM card. (Trial Tr., Vol. I, at 114-115.)

In the fall of 1985, Mark moved to Youngstown, and resided with Marvin Robinson. (Trial Tr., Vol. I, at 114.) Mark testified that he was aware that Defendant was the downstairs neighbor's boyfriend. (Trial Tr., Vol. I, at 117.)

Gina and Mark ended their relationship in the late fall of 1985. (Trial Tr., Vol. I, at 118.) After Christmas, on December 28, 1985, they, however, reconciled their relationship. (Trial Tr., Vol. I, at 119.) It was a day or two before she died. (Trial Tr., Vol. I, at 120.) Mark, Penny, and Gina were at Gina's apartment hanging out and talking. (Trial Tr., Vol. I, at 120.) Mark took Penny home and then came back to Gina's apartment. (Trial Tr., Vol. I, at 120.) Mark and Gina spoke about their relationship, after which Mark apologized for the things he did wrong. (Trial Tr., Vol. I, at 120-121.) Mark spent the night, and the two had sexual intercourse that night. (Trial Tr., Vol. I, at 121.)

Gina told Mark that night that she didn't feel secure in her apartment. (Trial Tr., Vol. I, at 124.)

The next day, on December 29, 1985, Mark left around 1:00 p.m. (Trial Tr., Vol. I, at 121.) Mark and Gina both left at the same time. (Trial Tr., Vol. I, at 121.) Mark went home, and Gina had plans to go somewhere. (Trial Tr., Vol. I, at 121.) Mark wasn't feeling good, so he stayed home and slept most of the day. (Trial Tr., Vol. I, at 122.)

On December 30, 1985, Mark learned that Gina had been murdered. (Trial Tr., Vol. I, at 122-123.)

5. **Jeff Thomas.**

Jeff Thomas worked with Gina at YSU as student assistants on campus. (Trial Tr., Vol. I, at 135.) Their job entailed assisting incoming freshmen and transfer students. (Trial Tr., Vol. I, at 136.)

On December 28, 1985, Jeff came across Gina at the Eastwood Mall in Niles, Ohio. (Trial Tr., Vol. I, at 137.) Gina had bought a ceramic owl for her mother for Christmas. (Trial Tr., Vol. I, at 137-138.) Later, Gina purchased a sweatshirt with Pebbles

Flintstone on it. (Trial Tr., Vol. I, at 138-139.) The two then made plans to get together the next day with their other co-workers (who had not gone home for the holidays) to see a movie and get some pizza. (Trial Tr., Vol. I, at 139.)

The next day, on December 29, 1985, Jeff met Gina at the movie theater for a 1:00 p.m. matinee to see 101 Dalmatians. (Trial Tr., Vol. I, at 139-140.) No one else showed up. (Trial Tr., Vol. I, at 140.) Gina was wearing blue jeans, a yellow blouse, the Flintstones sweatshirt, and a black and white checkered wool coat. (Trial Tr., Vol. I, at 140.)

After the movie, the two went to Pizza Hut. (Trial Tr., Vol. I, at 141.) During the conversation, Gina told Jeff that she was afraid of the man downstairs. (Trial Tr., Vol. I, at 142.) They left Pizza Hut around 5:00 p.m. (Trial Tr., Vol. I, at 143.)

6. Det. William Blanchard.

In 1985, Detective William Blanchard was assigned to investigate burglaries and crimes against property. (Trial Tr., Vol. I, at 145.)

Blanchard was assigned to investigate the break-in that occurred at Gina Tenney's apartment on December 25, 1985. (Trial Tr., Vol. I, at 146-147.) He spoke to Gina the next day on December 26, 1985. (Trial Tr., Vol. I, at 147.)

On December 30, 1985, Det. Blanchard was notified that Gina had been murdered, and was called out to her apartment to investigate. (Trial Tr., Vol. I, at 147.) Blanchard met Lieutenant David Campana and Detective Michael Landers at her apartment. (Trial Tr., Vol. I, at 148.) After knocking on the outer door, Defendant opened it and let them into the common area of the duplex. (Trial Tr., Vol. I, at 148.) They then knocked on Gina's apartment door, but no one answered. (Trial Tr., Vol. I, at 149.) They

then went down and used Defendant's phone to call the landlord so they could gain access to Gina's apartment. (Trial Tr., Vol. I, at 149.) Defendant indicated that he was alone in the apartment.

While in Defendant's apartment, Blanchard and Campana heard a noise from a back room. Defendant immediately stated, "I never said he wasn't here[.]" (Trial Tr., Vol. I, at 149.) They then found Horace Landers hiding behind a door. (Trial Tr., Vol. I, at 149-150.) Campana recognized Landers and knew that an active warrant had been issued for him. (Trial Tr., Vol. I, at 150.) Before the officers took Landers outside, Det. Blanchard picked up a coat that was on the ground to put on Landers because it was very cold outside and Landers did not have a shirt on. (Trial Tr., Vol. I, at 150.)

Before Blanchard put the coat on Landers, he searched it for weapons. (Trial Tr., Vol. I, at 150.) Inside the coat pocket, he found Gina Tenney's ATM card from Dollar Bank and Defendant's Mahoning County Department of Human Services card. (Trial Tr., Vol. I, at 151-152.) Blanchard ascertained that the jacket belonged to Defendant. (Trial Tr., Vol. I, at 150.) Both Defendant and Landers were arrested and transported to the County Jail. (Trial Tr., Vol. I, at 153.)

The officers then contacted Adena Fidelia, who Defendant's apartment was leased to, and asked her to come down to the apartment building. (Trial Tr., Vol. I, at 153.) When Ms. Fidelia arrived, she signed a consent form to search the apartment. (Trial Tr., Vol. I, at 154.)

In the bathroom of Defendant's apartment, officers found keys with the letter "G" on the keychain. (Trial Tr., Vol. I, at 155-156.) One key belonged to Gina Tenney's apartment and another to her vehicle. (Trial Tr., Vol. I, at 156.) In the downstairs kitchen,

in the trash can, a potholder with hairs and dirt on it was found and sent for testing. (Trial Tr., Vol. I, at 156-157.) The potholder matched another found in Gina Tenney's apartment. (Trial Tr., Vol. I, at 157.) A television found in Defendant's bedroom matched a box that was found in Gina Tenney's apartment. (Trial Tr., Vol. I, at 158-159.) Police also found an envelope in her apartment that was addressed "to a very sweet and confused young lady." (Trial Tr., Vol. I, at 214.) No card, however, was ever found. (Trial Tr., Vol. I, at 214.)

Horace Landers was later ruled out of being a suspect, because of the blood evidence that was later developed. (Trial Tr., Vol. II, at 241.) Horace Landers cooperated with police and gave them a statement. (Trial Tr., Vol. II, at 241.)

Defendant was arrested for receiving stolen property, but the grand jury did not indict him. (Trial Tr., Vol. II, at 235.)

7. Paula Ehrhart.

Paula Ehrhart was a regional audit manager with National City Bank, formally Dollar Bank. (Trial Tr., Vol. II, at 255.) Ehrhart explained that ATM machines in the 1980s required pin numbers. (Trial Tr., Vol. II, at 257.) Ehrhart then authenticated State's Exhibit No. 56, which was a report generated for transactions through the ATM machine on Belmont Avenue. (Trial Tr., Vol. II, at 257-258.)

The report showed that there were four failed attempts to withdraw money using Gina Tenney's ATM card at 9:21 p.m. through 9:34 p.m. on December 29, 1985. (Trial Tr., Vol. II, at 260-261.)

8. Officer Lou Ciavarella.

In 1985, Officer Lou Ciavarella was assigned to the Youngstown Police Department's Crime Lab. (Trial Tr., Vol. II, at 265-266.) Pursuant to the investigation into Gina Tenney's murder; Ciavarella processed two vehicles, including Gina Tenney's Red Chevy—plate number 765 HEC. (Trial Tr., Vol. II, at 267-268.) Ciavarella recovered blue tissue from Gina's trunk. (Trial Tr., Vol. II, at 269; State's Exhibit No. 44.) Also found in her truck was a telephone cord. (Trial Tr., Vol. II, at 271; State's Exhibit Nos. 32, 54. The telephone cord was not sent out to Ohio's Bureau of Criminal Identification and Investigation (BCI). (Trial Tr., Vol. II, at 286.) There were no fingerprints, however, lifted from Gina's vehicle. (Trial Tr., Vol. II, at 277-278.) The second vehicle that was processed was a 1979 Pontiac—plate number 222 BJX. (Trial Tr., Vol. II, at 284.) There was a fingerprint lifted from the Pontiac. (Trial Tr., Vol. II, at 284.)

9. John Allie.

On December 29, 1985, John Allie observed Defendant at the ATM machine in front of the Giant Eagle on Belmont Avenue. (Trial Tr., Vol. II, at 291.) The ATM machine was enclosed in a vestibule, so that it required a person to get out of his or her vehicle to use it. (Trial Tr., Vol. II, at 292.)

Upon arriving at the bank, Mr. Allie parked his vehicle in front of the door, so his wife could go in and use the ATM machine. (Trial Tr., Vol. II, at 292.) Mr. and Mrs. Allie waited in their vehicle for about fifteen minutes because someone (Defendant) was already using the machine. (Trial Tr., Vol. II, at 293.) Mr. Allie stated that it was light out

when he and his wife went to the bank, that is, it was not completely dark out yet. (Trial Tr., Vol. II, at 301-302.)

Mr. Allie testified that the person using the machine appeared as if he did not know how to use it: "He was punching in numbers, punching in numbers, didn't know how to get the computer to work. So we waited and waited and waited. And after a while he came out and my wife went in. But he didn't know what he was doing." (Trial Tr., Vol. II, at 294.)

When Defendant came out, he stood in front of the Allies' vehicle and waved to them. (Trial Tr., Vol. II, at 294.) Mr. Allie identified that person as being Defendant Bennie Adams, who was using Gina Tenney's ATM card at a machine that night. (Trial Tr., Vol. I, at 169-170.) Mr. Allie was familiar with Defendant, because he knew him from "around the neighborhood." (Trial Tr., Vol. II, at 290.)

Defendant appeared "pissed off" when he left the ATM machine, (Trial Tr., Vol. II, at 320.) and "shocked to see that there was someone outside." (Trial Tr., Vol. II, at 294.) Defendant then got into a vehicle and left. (Trial Tr., Vol. II, at 294-295.) Mr. Allie later identified Gina Tenney's vehicle as the vehicle that the person who was using her ATM card was driving. (Trial Tr., Vol. I, at 170, 217; Vol. II, at 296; State's Exhibit No. 29.)

Mr. Allie explained that when he went to the Youngstown police station, he did not want to identify anyone because he was scared. (Trial Tr., Vol. II, at 299.) Mr. Allie, however, called the police shortly thereafter to indicate that he could and did identify Defendant in the line-up. (Trial Tr., Vol. II, at 299.) At trial, however, Mr. Allie looked at

an identical photo line-up and identified Defendant from the group as the person he saw that night using Gina Tenney's ATM card. (Trial Tr., Vol. II, at 300.)

10. Sandra Allie.

On December 29, 1985, during the evening, Sandra Allie was with her husband at the ATM machine on Belmont Avenue. (Trial Tr., Vol. II, at 322.) Like her husband, she observed Defendant using the ATM machine for about fifteen minutes. (Trial Tr., Vol. II, at 330.) She stated that she was able to get a good look at him while she waited behind him at the ATM machine. (Trial Tr., Vol. II, at 333.)

A week later, Mrs. Allie went down to the police station to identify the person at the ATM machine, but "went to the extreme opposite and identified a short, light-skinned person[,]" because she was "terrified." (Trial Tr., Vol. II, at 325.) Sandra Allie had never seen the person at the ATM machine before. (Trial Tr., Vol. II, at 325.)

Mrs. Allie, like her husband, called the police shortly after leaving the Youngstown police station in 1986. At trial, Mrs. Allie confirmed the identification of Defendant from a photo line-up used in 1986. (Trial Tr., Vol. II, at 326-327.)

11. William Soccorsy.

William Soccorsy is a retired law enforcement officer for the State of Ohio. (Trial Tr., Vol. II, at 343.) Soccorsy assisted the Youngstown Police Department in investigating Gina Tenney's homicide. (Trial Tr., Vol. II, at 344.)

On December 30, 1985, Soccorsy interviewed Defendant at the city jail. (Trial Tr., Vol. II, at 345.) Defendant waived his *Miranda* rights, but he "denied committing any crime or having knowledge of any crime being committed." (Trial Tr., Vol. II, at 346.)

Defendant was again interviewed on January 2, 1986, two days later. (Trial Tr., Vol. II, at 346.) Again, he waived his *Miranda* rights, but now admitted that Gina Tenney's ATM card was found in his coat. (Trial Tr., Vol. II, at 347.) According to Defendant, he found her bank card on the top step near the porch on the morning of December 30, 1985. (Trial Tr., Vol. II, at 347.) Defendant claimed that he rang Gina's doorbell but no one answered. (Trial Tr., Vol. II, at 347.) He stated that he then put it in his pocket so he could give it to her later. (Trial Tr., Vol. II, at 348.)

12. Officer Anthony Marzullo.

Officer Anthony Marzullo is assigned to the Youngstown Police Department's Crime Lab. (Trial Tr., Vol. II, at 349.) Pursuant to the Gina Tenney investigation, Marzullo "assisted in transporting some evidence that my sergeant, the commander of the crime lab, and also recovered oral swabs off of one of the suspects and Gina's ex-boyfriend." (Trial Tr., Vol. II, at 351-353; State's Exhibit Nos. 53 (Defendant), 92 (Mark Passarello).)

13. Marvin Robinson.

Marvin Robinson lived on Fairgreen Avenue in Youngstown in 1985. (Trial Tr., Vol. II, at 359.) Marvin was Gina Tenney's best friend. (Trial Tr., Vol. II, at 359.) They met in 1984, as both were students at Youngstown State. (Trial Tr., Vol. II, at 360.)

In the fall of 1985, at Gina's request, Marvin moved in with Mark Passarello, so that Mark would have a place to stay and live in Youngstown. (Trial Tr., Vol. II, at 361.)

Marvin testified that Gina was very protective of her vehicle, and never let Marvin drive it. (Trial Tr., Vol. II, at 363.) Gina also never let Marvin use her ATM card. (Trial Tr., Vol. II, at 363.)

Marvin identified State's Exhibit Nos. 29 and 30 as being photographs of Gina's vehicle, which belonged to her parents. (Trial Tr., Vol. II, at 363.)

Marvin identified State's Exhibit No. 23 as being Gina's television. (Trial Tr., Vol. II, at 364-365.)

Marvin identified Defendant as the person who lived downstairs from Gina's apartment, and lived there with Adena. (Trial Tr., Vol. II, at 366-367.)

Marvin testified that Defendant began calling Gina in late October, after she had broken up with Mark. (Trial Tr., Vol. II, at 368.) Defendant asked if he could come upstairs. (Trial Tr., Vol. II, at 368.) Gina called Marvin and told him about the calls. She was "very upset," because they would frequently occur late at night. (Trial Tr., Vol. II, at 369-370.) The calls continued until Gina had her telephone number changed in November. (Trial Tr., Vol. II, at 370-371.) The calls made Gina fearful of Defendant. (Trial Tr., Vol. II, at 371.)

One day, Gina found a card that had been shoved underneath her apartment door. (Trial Tr., Vol. II, at 372.) It was addressed "to a very sweet and confused young lady[,]'" and signed "love, Bennie." (Trial Tr., Vol. II, at 372-373.) Marvin identified State's Exhibit No. 48 as the envelope that the card was in. (Trial Tr., Vol. II, at 373.) This occurred after Gina had changed her telephone number. (Trial Tr., Vol. II, at 374.)

At this time, her emotional state was more of annoyance and frustration from Defendant's actions. (Trial Tr., Vol. II, at 374.) Around Christmas, Gina's emotional state changed from frustration to fear. (Trial Tr., Vol. II, at 374.) Because of this, Marvin began staying over at her apartment, as she was afraid to be left alone. (Trial Tr., Vol. II, at 374-375.)

Around 1:00 a.m. on December 25, 1985, someone had opened Gina Tenney's apartment door. (Trial Tr., Vol. II, at 386.) Gina put a chair against the door, but later, the person returned and opened the door and walked into her apartment. (Trial Tr., Vol. II, at 387.) After the break-in on December 25, Gina was "very fearful" of Defendant. (Trial Tr., Vol. II, at 391.) Marvin stayed with Gina the next two nights. (Trial Tr., Vol. II, at 389.)

Marvin last spoke to Gina on December 28, 1985. (Trial Tr., Vol. II, at 375.)

14. Dr. Humphrey Germaniuk.

Dr. Humphrey Germaniuk was a forensic pathologist, employed with the Trumbull County Coroner's Office. (Trial Tr., Vol. II, at 397-398.) Dr. Germaniuk did not perform the autopsy on Gina Tenney. (Trial Tr., Vol. II, at 402.) Gina Tenney stood five feet, five inches, and weighed one-hundred and twenty pounds. (Trial Tr., Vol. II, at 407.)

Prior to his testimony, Dr. Germaniuk reviewed "a file including photographs as well as copies of evidence, the autopsy report, the microscopic reports, and that was basically it. There was a narrative from the scene investigators." (Trial Tr., Vol. II, at 403.) Dr. Germaniuk also reviewed the autopsy video before he testified. (Trial Tr., Vol. II, at 404; State's Exhibit No. 91.)

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

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

* * *

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

* * *

“There are five manners of death, natural, accident, homicide, suicide and undetermined.”

(Trial Tr., Vol. II, at 399-400.) Specific to Gina Tenney, she suffered a contusion to her upper right lip, and some abrasions or scrapes on the front part of her chin. (Trial Tr., Vol. II, at 406; State’s Exhibit Nos. 9, 10.) She also suffered abrasions to the left side of her chin; abrasions on her breast; and a faint line across her neck. (Trial Tr., Vol. II, at 406; State’s Exhibit No. 11.) Dr. Germaniuk observed a couple of irregularly scrapes or abrasions on her abdomen, faint bruising around her right wrist, scrapes to her abdomen, some scrapes on her breast, and on both the left and right wrists and forearms; two bands of contusion or bruising. (Trial Tr., Vol. II, at 406; State’s Exhibit Nos. 12, 13, 14.)

According to the death certificate, Gina Tenney’s immediate cause of death was suffocation due to traumatic asphyxiation. (Trial Tr., Vol. II, at 408.) Dr. Germaniuk, however, testified that he would have determined the cause of death to be asphyxia. (Trial Tr., Vol. II, at 408.) Dr. Germaniuk explained that if a person died from drowning, the body would take in an air and water mixture from breathing the water into their lungs, and would see a foam cone. (Trial Tr., Vol. II, at 410.) Here, there was no foam cone detected on Gina Tenney. (Trial Tr., Vol. II, at 411.)

“Asphyxiation is a very broad and general term which implies any process that prohibits the body from taking in oxygen and getting rid of carbon dioxide. And under asphyxia there are three broad categories.” (Trial Tr., Vol. II, at 411.)

“The first category is just known as entrapment. This is the classic case of Halloween or hide and seek where all the sudden you have two kids that are playing and they end up in a refrigerator that someone had thrown out. The doors lock and they can’t get out. They’re in there. They’re breathing and what happens? They consume all of the oxygen and die. So entrapment would be the first form of asphyxia.” (Trial Tr., Vol. II, at 411-412.)

“The second category is smothering. This deals with the external airways, when you either have a hand or pillow or some object across the nose and mouth prohibiting that individual from taking in air.” (Trial Tr., Vol. II, at 412.)

“The third category of asphyxia is choking. At a certain point I may be very, very hungry. I have taken excessive bites of steak, it gets stuck in my throat, I can’t breathe and so I block off my internal airways.” (Trial Tr., Vol. II, at 412.)

“The fourth category is mechanical asphyxia. If you take a look -- if four of you were to sit on my chest what happens? I can’t expand my lungs. And this we see very commonly in construction workers. This we see in people who are digging trenches and the wall of the trench collapses, half of their body is up but they really can’t breathe. We see this sometimes when people who are trying to repair their own cars, the jack fails, the car hits their chest, they can’t expand or contract their chest.” (Trial Tr., Vol. II, at 412-413.)

“The fifth category is mechanical asphyxia and smothering. What happens in those cases, if you take a look at skiers caught in an avalanche, you have hundreds of pounds, if not thousands of pounds, of snow and ice on your chest and you can’t expand

your chest. You have ice and snow covering your mouth and nose so you can't breathe.”
(Trial Tr., Vol. II, at 413.)

“The last category under suffocation, which would be number 1, last category being environmental and this occurs when the oxygen in the environment is displaced. If you take a look at tanker trucks that carry all sorts of stuff like coal and other gases and liquids, when those trucks empty they usually flush them out with nitrogen or another inert gas. And then they'll send a worker down to that truck, clean the rest of it out and 15 minutes go by and 20 minutes go by and the guy doesn't show up. He's dead at the bottom of the truck. Why? Because he's in an environment that doesn't contain oxygen. It is full of nitrogen or another gas.” (Trial Tr., Vol. II, at 413.) “That's the first category of suffocation.” (Trial Tr., Vol. II, at 414.)

The second category is strangulation. “Strangulation is basically divided up in four different categories. The first category is what is known as manual strangulation where someone takes their hands and basically throttles someone about their neck. And in strangulation we're dealing more with compression of the two arteries that carry blood to your brain. It doesn't take much pressure, about 10 pounds for each corroded artery. And you put your fingers here (indicating) and you can feel them. Once that is closed off we don't have much time before there's no blood flow to the brain. And when there's no blood flow to the brain there is no oxygen and you die. So the first category would be manual, where you have hands about someone's throat compressing the neck and blocking the blood flow.” (Trial Tr., Vol. II, at 414-415.)

“The second category of strangulation is ligature where you have a belt, the juror badges you’re wearing, you could use that to strangle someone, a neck tie, wires, rope, whatever.” (Trial Tr., Vol. II, at 415.)

“Third category is hanging, where it is the weight of the body that allows the blockage of the blood flow. Most of the hangings we see are suicidal.” (Trial Tr., Vol. II, at 415.)

The fourth category of strangulation is compression of the neck. “And sometimes we see this in police situations where an officer will attempt to apply a chokehold and you have a broad application of force that really doesn’t leave any marks. That’s based on circumstances to determine how that person dies. With a broad application of force, like an elbow or knee on someone’s neck, you can have lack of blood flow to the brain. That would be strangulation.” (Trial Tr., Vol. II, at 415-416.)

“[T]he last category of asphyxia would be chemical asphyxiants.” (Trial Tr., Vol. II, at 416.) “[C]hemical asphyxiants work on a molecular level. They bind with your red blood cells prohibiting them from delivering oxygen. And the two most common ones that we see would be carbon monoxide.” (Trial Tr., Vol. II, at 416.) Another is cyanide. (Trial Tr., Vol. II, at 416.)

Here, “we have evidence of smothering. You can take a look at the contusion on the lips. If you take a look at the marks about the chin, this is certainly consistent with a hand or an object placed over the face. We certainly have what appears to be ligature strangulation with that 7-inch band by quarter-inch band about the neck. With that we can exclude mechanical[.]” (Trial Tr., Vol. II, at 417.)

Dr. Germaniuk testified that he would simply draw right back to asphyxia because he does not know how much of that evidence played a role in Gina Tenney's death. He would drop back to a broad category of asphyxia. (Trial Tr., Vol. II, at 417.)

Dr. Germaniuk also observed blood spots in her eyes (whites of the eyes), (Trial Tr., Vol. II, at 418.) and ligature marks on her wrists that could have been caused from being bound or tied up. (Trial Tr., Vol. II, at 422.)

Dr. Germaniuk stated that the telephone cord recovered from Gina's vehicle could have caused the marks on her neck, and the bruises on her face could have been caused by someone hitting her in the face or trying to smother her. (Trial Tr., Vol. II, at 423-424.)

Concerning a sexual assault, Dr. Germaniuk stated that a sexual assault does not always produce injuries. (Trial Tr., Vol. II, at 436-437.)

Based on eyewitness testimony of when Gina last ate, somewhere between 4:30 and 5:00 p.m. would have been the earliest that she could have died. (Trial Tr., Vol. II, at 441-442.)

Dr. Germaniuk concluded that based on the evidence, the cause of death was likely a combination of smothering (asphyxia) and the ligature. (Trial Tr., Vol. II, at 445.) Dr. Germaniuk further concluded that Gina Tenney's death was a homicide. Trial Tr., Vol. II, at 446.)

15. Officer Joseph DeMatteo.

Officer Joseph DeMatteo was assigned to the Youngstown Police Department's Crime Lab in 1985, and on December 30, 1985, was called to the Mahoning River to investigate Gina Tenney's murder. (Trial Tr., Vol. III, at 448-449. State's Exhibit No. 69

is the technician report kept by DeMatteo during his investigation. Trial Tr., Vol. III, at 449-450.)

DeMatteo photographed the scene at the river (Trial Tr., Vol. III, at 450; State's Exhibit Nos. 2-6.); Gina Tenney's body at the city morgue (Trial Tr., Vol. III, at 451; State's Exhibit Nos. 7, 8, 9-14.); and Gina Tenney's apartment. (Trial Tr., Vol. III, at 455-456; State's Exhibit Nos. 15-32.) DeMatteo recovered several pieces of evidence, which included: Gina Tenney's clothes (Trial Tr., Vol. III, at 452-454; State's Exhibit Nos. 36-41.); Gina Tenney's ATM card (Trial Tr., Vol. III, at 456-457; State's Exhibit No. 42.); Gina Tenney's television found in Defendant's apartment (Trial Tr., Vol. III, at 458; State's Exhibit No. 89.); and a yellow potholder found in Defendant's apartment. (Trial Tr., Vol. III, at 457; State's Exhibit No. 47.) A matching yellow potholder was found in Gina Tenney's apartment on top of her refrigerator in the kitchen. (Trial Tr., Vol. III, at 457-458; State's Exhibit No. 46.)

On December 31, 1985, a blood sample, a saliva sample, and pubic hair samples were obtained from Horace Landers. (Trial Tr., Vol. III, at 461; State's Exhibit Nos. 76-78.) On July 13, 1986, the same samples were obtained from Mark Passarello. (Trial Tr., Vol. III, at 462-463; State's Exhibit Nos. 79, 80, 96.) And on December 31, 1985, the same samples were obtained from Defendant. (Trial Tr., Vol. III, at 463-464; State's Exhibit Nos. 74, 87, 95.)

DeMatteo further collected hair combings from Gina Tenney's body, obtained from Jack Kish, the pathologist assistant, on December 31, 1985. (Trial Tr., Vol. III, at 466-467; State's Exhibit No. 93.) Gina Tenney's fingerprints were taken during the autopsy. (Trial Tr., Vol. III, at 467-468; State's Exhibit No. 86.) And a rape kit was also

performed during the autopsy. (Trial Tr., Vol. III, at 468; State's Exhibit Nos. 49, 50, 52.) Blood was drawn from Gina Tenney's body during the autopsy. (Trial Tr., Vol. III, at 471; State's Exhibit Nos. 73, 73A.)

DeMatteo submitted the evidence to Ohio's BCI in Richfield, Ohio on January 13, 1986, and again on June 29, 2007. (Trial Tr., Vol. III, at 472-474, 476.)

16. Cheryl Mahan.

Cheryl Mahan worked as a consultant for the State's Fire Marshal's Office in the area of fingerprint identification. (Trial Tr., Vol. III, at 518.) Before that, she was employed with the Ohio Attorney General's Office, BCI, in the fingerprint department. (Trial Tr., Vol. III, at 519.) Before that, she was employed with the Federal Bureau of Investigation where she performed fingerprint analysis. (Trial Tr., Vol. III, at 519-520.)

Mahan explained that in fingerprint analysis, "you make a comparison with the fingerprint you compare -- a known print to an unknown. What you're actually comparing is the friction skin or the raised portion of the skin found on the palm sides of your hand to determine if they contain the same area and position." (Trial Tr., Vol. III, at 520.)

Mahan performed fingerprint analysis in regards to Gina Tenney's homicide. (Trial Tr., Vol. III, at 521-522; State's Exhibit No. 81.) Mahan examined and performed fingerprint analysis on several items submitted to BCI by the Youngstown Police Department. (Trial Tr., Vol. III, at 522.)

Mahan explained that a person's fingerprints are formed three months after conception and do not change unless they are purposely destroyed or surgically removed,

or until a body begins to decompose after death. (Trial Tr., Vol. III, at 526.) They are unique to each individual person. (Trial Tr., Vol. III, at 527.)

Mahan generated her report on January 28, 1986. (Trial Tr., Vol. III, at 528; State's Exhibit No. 60.) Mahan concluded that fingerprints taken from Gina Tenney's television found in Defendant's apartment resulted in identifying Defendant's fingerprints on that television. (Trial Tr., Vol. III, at 534-535; State's Exhibit No. 58.) Mahan, however, was unable to make any identification as to the fingerprints found on a Dollar Mover deposit envelope (Trial Tr., Vol. III, at 532; State's Exhibit No. 57.); the envelope (with a card) given to Gina Tenney recovered in Defendant's apartment (Trial Tr., Vol. III, at 532-533; State's Exhibit No. 48.); and the Miller High Life beer bottles found in Gina Tenney's apartment. (Trial Tr., Vol. III, at 533; State's Exhibit No. 59.)

Mahan explained that fingerprints are easily destroyed based upon the handling of the item containing the fingerprint, and can be easily rubbed off an item. (Trial Tr., Vol. III, at 531.)

17. Dale Laux.

Dale Laux was a forensic scientist, employed with Ohio's BCI, and assigned to the biology unit. (Trial Tr., Vol. III, at 547.) He was responsible for analyzing bodily fluids, such as blood, semen, and saliva. (Trial Tr., Vol. III, at 547.)

Laux performed blood type testing in regards to Gina Tenney's investigation. (Trial Tr., Vol. III, at 548-549; State's Exhibit Nos. 61, 81.) Laux analyzed blood sample submitted from Defendant, Gina Tenney, Mark Passarello, and Horace Landers. (Trial Tr., Vol. III, at 550.)

Dale Laux concluded that the blood type from semen found on the vaginal swabs taken during Gina Tenney's autopsy was a "B non-secretor." (Trial Tr., Vol. III, at 556.) Both Gina Tenney and Mark Passarello were "A secretors." (Trial Tr., Vol. III, at 556.) And Horace Landers was a "A non-secretor." (Trial Tr., Vol. III, at 557.) Of those samples submitted, only Defendant was a "B non-secretor." (Trial Tr., Vol. III, at 557.) The blood typing analysis is not an exact match, and means that Defendant could not be eliminated as a potential source of the semen found in Gina Tenney's vagina. (Trial Tr., Vol. III, at 557-558.) A "B non-secretor" is found in four percent of the African-American population. (Trial Tr., Vol. III, at 557-558.)

Laux also analyzed hair samples that were submitted. (Trial Tr., Vol. III, at 557-561.) Laux found "negro hair fragments, also Caucasian pubic and head hairs that were red in color," on the potholder found in Defendant's apartment. (Trial Tr., Vol. III, at 563; State's Exhibit No. 47.) Laux, however, was not able to do any comparisons with the negro hair fragments, because they were only fragments and too small. (Trial Tr., Vol. III, at 563.)

The Caucasian pubic and head hairs that were red in color were consistent with hair from Gina Tenney, but could have come from someone else. (Trial Tr., Vol. III, at 563, 568-569.)

18. Brenda Gerardi.

Brenda Gerardi was a forensic scientist, employed with Ohio's BCI, and assigned to the serology/DNA section. (Trial Tr., Vol. III, at 570.) Gerardi was responsible for analyzing "physical evidence for the identification of physiological fluids such as blood,

urine, feces, semen and saliva and the subsequent DNA analysis of those samples.” (Trial Tr., Vol. III, at 571.)

DNA analysis is useful, because “[a] DNA comparison begins with the extraction of the DNA material from the cells. Next is quantification. That allows me to know how much DNA I have extracted. Then is amplification, which is essentially a chemical Xeroxing process that allows me to make millions of copies of a target DNA. Lastly would be the data interpretation, at which time I compare the known sample to the unknown forensic samples to either include or exclude an individual.” (Trial Tr., Vol. III, at 571.)

The Youngstown Police Department submitted a vaginal swab, vaginal smear, underwear, and a blood standard from Gina Tenney; saliva and blood standards from Defendant; saliva and blood standards from Horace Landers; saliva and blood standards from Mark Passarello; piece of telephone cord; a rectal swab, vaginal swabs, and nail clippings from Gina Tenney; public and head hair clippings from Gina Tenney; a potholder; DNA standard from Horace Landers; hair samples; and pubic hair samples. (Trial Tr., Vol. III, at 575-576.)

Gerardi performed the DNA analysis of the items submitted. (Trial Tr., Vol. III, at 576; State’s Exhibit No. 62.) DNA analysis compares reference samples to the DNA at fifteen different DNA locations of a person’s genetic profile. You compare your reference sample to the DNA at each of these locations. You have to match at every location to be either included or excluded as a possible source of the DNA. (Trial Tr., Vol. III, at 582.)

“The locations are on the chromosome. So your genetic profile, like I said, was extracted from these chromosomes in any one of your cells of your body. So you have DNA in all these cells and we extract the DNA and we compare the known DNA to that forensic profile.” (Trial Tr., Vol. III, at 583.)

“Ninety-nine percent of your DNA is the same as the person sitting next to you. One percent of your DNA is unique to you.” (Trial Tr., Vol. III, at 583-584.)

Gerardi excluded “Horace Landers as being a source of any of the DNA, the forensic DNA profiles from the vaginal swabs,” and from the underwear belonging to Gina Tenney. (Trial Tr., Vol. III, at 586-587.) Likewise, Mark’s DNA profile was not detected on the vaginal profile. (Trial Tr., Vol. III, at 590.) Mark Passarello also could not be excluded as a contributor to the underwear sample. (Trial Tr., Vol. III, at 590.)

“Bennie Adams cannot be excluded as the source of the semen on the vaginal swab. Based on the national database provided by the Federal Bureau of Investigation, the expected frequency of occurrence of the partial DNA profile identified in the sperm fraction of the vaginal swab is 1 in 38, 730, 000, 000, 000 unrelated individuals.” (Trial Tr., Vol. III, at 587.)

No DNA foreign to Gina Tenney was detected on the anal smear. (Trial Tr., Vol. III, at 587.)

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

individuals.” (Trial Tr., Vol. III, at 587.) There are only 6.5 billion people in the world today. (Trial Tr., Vol. III, at 588.)

Because Gina Tenney’s samples were taken in 1985, it was common for degradation to occur. (Trial Tr., Vol. III, at 588.) “So there is natural degradation process that does take place. The sample may not have been moist or continued to just break down. So we did not pick up her type at every single one of the locations but it was enough of the profile to give us that interpretation information that we needed.” (Trial Tr., Vol. III, at 589.)

Degradation, however, does not change the DNA profile. (Trial Tr., Vol. III, at 589.) “[D]egradation is essentially the normal breakdown of the cellular material, exposing the DNA and allowing us not to be able to get a complete DNA profile from that sample.” (Trial Tr., Vol. III, at 592.)

The State rested. (Trial Tr., Vol. III, at 596.)

B. Defendant’s Case-in-Chief.

1. Det. William Blanchard.

Defendant called only one witness during his case-in-chief, Det. William Blanchard. Concerning the line-up shown to the Allies on January 8, 1986, Defendant was number 3 and Horace Landers was number 5. (Trial Tr., Vol. IV, at 610-611.)

Defendant stood six feet, two inches; while Horace Landers stood five feet, eight inches. (Trial Tr., Vol. IV, at 611.) Defendant has a dark complexion, while Horace Landers has a medium complexion. (Trial Tr., Vol. IV, at 610-612.)

Defendant rested.

C. Verdict.

Defendant was convicted of Aggravated Murder; and the Capital Specification, being the Principal Offender. (Trial Tr., Vol. IV, at 794; Verdict Form Nos. 1, 1A.) The jurors were polled and each agreed with the verdicts, including each alternate. (Trial Tr., Vol. IV, at 795-796, 803-809.)

II. Sentencing Phase.

During the sentencing (mitigation) phase, Defendant presented the testimony of six witnesses. (Sentencing Phase Transcript, October 28, 2008, before the Honorable Timothy E. Franken, at 33-122.) At the conclusion of the evidence, the jury recommended a sentence of death for Defendant. (Sent. Tr., at 189.) Thereafter, the trial court imposed a sentence of death upon Defendant. (Sent. Tr., at 193.) Defendant timely appealed to the Seventh District Court of Appeals.

III. Appellate Phase.

The Seventh District affirmed Defendant's conviction and death sentence. *See State v. Adams*, 7th Dist. No. 08 MA 246, 2011 Ohio 5361.

Defendant then timely appealed as of right to the Supreme Court of Ohio. *See State v. Adams*, Case No. 2011-1978. Defendant's appeal is currently pending before this Honorable Court, and awaits this Court's scheduling of oral argument.

On June 11, 2012, Defendant filed his Postconviction Petition pursuant to R.C. 2953.21. It is currently pending before the Honorable Lou A. D'Apolito in the Mahoning County Court of Common Pleas.

On January 12, 2012, Defendant filed an Application for Reopening pursuant to Appellate Rule 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60 (1992). The Seventh

District denied Defendant's application because Defendant failed to establish that appellate counsel was constitutionally ineffective. *See State v. Adams*, 7th Dist. 08 MA 246, 2012 Ohio 2719.

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

Law and Argument

On January 12, 2012, Defendant-Appellant Bennie L. Adams filed an Application for Reopening his Appeal pursuant to Appellate Rule 26(B). In support, a defendant must include “[o]ne 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.” App.R. 26(B)(2)(c); *see also Murnahan*, 63 Ohio St.3d at 60. “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.” (Emphasis added.) App.R. 26(B)(5).

To prove counsel was constitutionally ineffective, a defendant must show that (1) counsel’s performance was deficient, and (2) counsel’s deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668 (1984).

As for appellate counsel’s effectiveness, “appellate counsel *need not raise every possible issue* in order to render constitutionally effective assistance.” (Emphasis added.) *State v. Jones*, 7th Dist. No. 06 MA 17, 2008 Ohio 3352, ¶ 6, citing *State v. Tenace*, 109 Ohio St.3d 451, 452 (2006), citing *State v. Sanders*, 94 Ohio St.3d 150, 151-152 (2002). “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.” (Emphasis added.) *Jones*, *supra* at ¶ 6, quoting *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

- I. **Proposition of Law No. 1:** The United States Supreme Court Decisions in *Melendez-Diaz*, *Bullcoming v. New Mexico*, 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.

State's Response to Proposition of Law No. 1: Appellate Counsel's Failure to Argue that the Autopsy Report and Dr. Humphrey Germaniuk's Testimony Concerning Gina Tenney's Cause of Death Violated Defendant's Sixth Amendment Right to Confrontation Did Not Violate Defendant's Sixth Amendment Right to the Effective Assistance of Counsel.

As for Appellant's first proposition of law, he contends that appellate counsel should have argued that Dr. Humphrey Germaniuk's testimony and the admission of the autopsy report violated his Sixth Amendment right to confrontation, because he did not perform the autopsy on Gina Tenney. To the contrary, Dr. Belinky's autopsy report is a nontestimonial business record, and Dr. Germaniuk testified to his own expert opinions and conclusions regarding Gina Tenney's cause of death rather than simply passing along testimonial statements. Therefore, the autopsy report and Dr. Germaniuk's testimony did not violate Defendant's Sixth Amendment right to confrontation.

A. **THE U.S. SUPREME COURT HELD THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION APPLIES ONLY TO TESTIMONIAL HEARSAY.**

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." Sixth Amendment to the U.S. Constitution; see *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

In *Crawford v. Washington*, the United States Supreme Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not

appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). The subsequent case law attempts to define which statements are “testimonial” in a constitutional sense, because only these statements “cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause.” *Davis v. Washington*, 547 U.S. 813, 821 (2006), quoting *Crawford*, 541 U.S. at 51. And “[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.” *Davis*, 547 U.S. at 821.

The testimonial statements in *Crawford* that the Court narrowed in on were those “interrogations by law enforcement * * * solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator.” *Davis*, 547 U.S. at 826, quoting *Crawford*, 541 U.S. at 53.

1. **FOLLOWING CRAWFORD, U.S. AND OHIO LAW ESTABLISHES THAT A DEFENDANT’S RIGHT TO CONFRONTATION IS NOT VIOLATED WHEN A MEDICAL EXAMINER WHO DID NOT PERFORM THE AUTOPSY OPINES ON A DECEDENT’S CAUSE OF DEATH WHEN THE ORIGINAL EXAMINER IS UNAVAILABLE.**

a.) **Melendez-Diaz v. Massachusetts (2009).**

In *Melendez-Diaz*, the defendant was charged with distributing and trafficking in cocaine. *Melendez-Diaz v. Massachusetts*, 129 S. Ct 2527, 2530 (2009). At trial, the prosecution placed into evidence cocaine seized by police, and three “certificates of analysis” showing the results of the forensic analysis performed on the cocaine. *Id.* at 2531. The certificates reported the weight of the substance, and that the substance found

was cocaine. *Id.* The certificates were signed by the analysts, and sworn to before a notary public pursuant to state law. *Id.* at 2531, citing Mass. Gen. Laws, ch. 111, §13. The defendant objected to their admission into evidence without the analysts' testimony, because this deprived him the opportunity to cross-examination them. *Id.* The certificates were admitted and the defendant was convicted. *Id.*

The Court was faced with a simple and straight-forward issue—do the “certificates of analysis” fall into the “core class of testimonial statements” previously outlined in *Crawford*? The Court answered in the affirmative. *Id.* at 2532. The Court stated that while Massachusetts law defines them as “certificates,” they are nothing more than “affidavits.” *Id.*

The Court reasoned that “[t]he ‘certificates’ are functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’” *Id.*, quoting *Davis*, 547 U.S. at 830. “Here, moreover, not only were the affidavits ‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’ but under Massachusetts law the *sole purpose* of the affidavits was to provide ‘prima facie evidence of the composition, quality, and the net weight’ of the analyzed substance[.]” (Emphasis sic.) *Id.* at 2532. Internal citations omitted.

Thus, under *Crawford*, Melendez-Diaz was entitled to be confronted by the analysts at trial, unless they were “unavailable” and he had a prior opportunity to cross-examination them. *Id.* at 2532, citing *Crawford*, 541 U.S. at 54.

b.) *Bullcoming v. New Mexico (2011).*

Thereafter, the U.S. Court revisited the issue of testimonial hearsay in relation to laboratory test results in *Bullcoming v. New Mexico*. There, the defendant was charged and convicted of driving while intoxicated (DWI). *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2709 (2011). The crux of the state's case against the defendant was a forensic laboratory report certifying that his blood-alcohol concentration was well above the threshold required for an aggravated DWI. *Id.* At trial, the analyst who performed the testing did not testify, but instead, another analyst who was familiar with the laboratory's testing procedures testified. *Id.* The analyst had neither participated in nor observed the testing of the defendant's blood sample. *Id.*

The New Mexico Supreme Court concluded that the analysis was "testimonial," but the analyst's testimony satisfied the constitutional requirements. *Id.* at 2709-2710.

The U.S. Court granted certiorari to determine "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." *Id.* at 2710.

The Court held "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.*

While one may think that the Court's recent decisions in *Melendez-Diaz* and *Bullcoming* are determinative here, Justice Sotomayor's concurring opinion clearly concludes otherwise:

Second, *this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue.* Razatos conceded on cross-examination that he played no role in producing the BAC report and did not observe any portion of Curtis Caylor's conduct of the testing. App. 58. The court below also recognized Razatos' total lack of connection to the test at issue. 226 P.3d, at 6. It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results. We need not address what degree of involvement is sufficient because here Razatos had no involvement whatsoever in the relevant test and report.

(Emphasis added.) *Id.* at 2722 (Sotomayor, J., concurring in part). Thus, *Melendez-Diaz* and *Bullcoming* are both distinguishable from the facts here, because Dr. Germaniuk had "a personal, albeit limited, connection" to Gina Tenney's autopsy.

c.) *Williams v. Illinois (2012).*

Most recently, in *Williams v. Illinois*, the Court addressed whether a state rule of evidence allowing an expert to testify about DNA results that were performed by another analyst, absent a prior opportunity to cross-examine the analyst, violates the Confrontation Clause. *Williams v. Illinois*, 132 S.Ct. 2221 (2012). The Supreme Court of Illinois previously found that Williams's right to confrontation was not violated. *See People v. Williams*, 238 Ill.2d 125, 150-151 (2010).

In *Williams*, the victim's rape kit was sent to the Illinois State Police (ISP) Crime Lab for testing and analysis. *See id.* at 129. A state forensic biologist confirmed the presence of semen, then sealed the swabs and placed the evidence in a secure freezer. *See id.* at 130.

The defendant was later arrested on an unrelated matter, and the police obtained a blood sample through a court order. *See id.* Another forensic scientist extracted the defendant's DNA profile and entered it into the ISP Crime Lab database. *See id.* meanwhile, the samples from the victim's rape kit were sent to Cellmark Diagnostic Laboratory in Germantown, Maryland, for DNA analysis. *See id.* at 130-131. Cellmark returned the vaginal swabs and blood standard to the ISP Crime Lab after Cellmark derived a DNA profile for the person whose semen was recovered. *See id.* at 131.

According to ISP forensic biologist Sandra Lambatos, the DNA profile received from Cellmark matched the defendant's DNA profile from the blood sample in the ISP database. The victim identified the defendant in a line up, and he was then arrested. *See id.*

At trial, Lambatos explained polymerase chain reaction (PCR) testing, and stated that it is one of the most modern types of DNA testing available, and is generally accepted in the scientific community. *See id.* Lambatos further testified that it is a commonly accepted practice for one DNA expert to rely on the records of another DNA analyst to complete her work. *See id.* at 132.

Lambatos took the DNA profile from Cellmark and matched that to the defendant's DNA profile. *See id.* Lambatos testified that the DNA profile found in the semen from the vaginal swabs matched the defendant's DNA profile. *See id.* 132-133. In arriving at this conclusion, Lambatos stated that looked at Cellmark's report, and interpreted the data: "I did review their data, and I did make my own interpretations so I looked at what * * * they sent to me and did make my own determination, my own

opinion.” *Id.* at 133. Lambatos testified to her conclusion based upon information in Cellmark’s report, but the report itself was not introduced into evidence. *See id.*

The defendant was convicted after a bench trial of aggravated criminal sexual assault, aggravated kidnapping, and aggravated robbery. *See id.* at 134.

The Supreme Court of Illinois concluded that Williams’s right to confrontation was not violated by Lambatos’ testimony. *See id.* at 150-151.

The U.S. Supreme Court affirmed the Supreme Court of Illinois’ decision and agreed that Lambatos’ testimony did not violate the defendant’s rights to confrontation. *See Williams*, 132 S.Ct. at 2223. While a majority of the Court found that the testimony did not violate the defendant’s right to Confrontation, the Court was divided over its reasoning. *See Williams*, *supra*; *accord United States v. Garvey*, 688 F.3d 881 (7th Cir. 2012).

i.) **This Court Recently Declined the Opportunity to Address the Application of *Williams* to Ohio Law.**

In *State v. Lopez*, the Twelfth District Court of Appeals affirmed the defendant’s conviction for aggravated murder after addressing a similar confrontation argument that was presented in *Williams* and as Appellant asserts here. *See State v. Lopez*, 186 Ohio App.3d 328 (12th Dist. 2010). The defendant argued “that the trial court violated his right to confront witnesses against him by admitting laboratory analysis though the testimony of an analyst who did not perform the initial tests on Lopez’s samples.” *Id.* at 337.

In *Lopez*, the Twelfth District analyzed this argument under *Melendez-Diaz*. *See id.* at 337-338. At trial, the two analysts who performed the DNA testing on the gun used to kill the victim were unavailable because of out-of-state training and an emergency

surgery. *See id.* The state instead called another analyst from BCI to testify as to the DNA results. *See id.* at 338.

The analyst testified that he performed a technical review of the examinations that were conducted, and “went into great detail regarding the process of peer review and how fellow analysts examine the procedures performed during the original testing to verify the analyst’s work and to ensure that proper protocol was followed.” *Id.*

He explained that in a technical review, he would “essentially open the case file, see the terms of the testing, see what evidence [had been] tested, see if the testing was correct, check the reagents, check [the] chain of custody.” *See id.* He then testified “that he found no error in the testing and that he had come to the same conclusions as the analysts who had originally tested the samples.” *See id.*

The Twelfth District—after a thorough analysis and recognition that this Court had not addressed this specific issue—concluded that Lopez’s right to confrontation was not violated. *See id.* at 343.

Lopez filed a discretionary appeal that this Court originally accepted jurisdiction. *See State v. Lopez*, Case No. 2010-0659. This Court later stayed the case to await the U.S. Supreme Court’s decision in *Bullcoming*. After *Bullcoming* was decided, briefing continued. The case, however, was again stayed to await the Court’s decision in *Williams*. *See Lopez*, Case No. 2010-0659.

Following the U.S. Supreme Court’s decision in *Williams*, the State of Ohio filed a motion to dismiss as improvidently accepted on June 27, 2012. *See Lopez*, Case No. 2010-0659. The State argued that this Court should not resolve the issue before it: whether “the Confrontation Clause prohibits the state from introducing testimonial

statements of a nontestifying forensic analyst through the in-court testimony of a third party who did not perform or observe the laboratory analysis on which the statements are based.” The State argued that the issue could not be resolved because the Twelfth District concluded that even assuming that the defendant’s right to confrontation was violated, any error was harmless. *See Lopez*, 186 Ohio App.3d at 343.

On September 5, 2012, this Court granted the State’s motion and dismissed Lopez’s discretionary appeal. *See Lopez*, Case No. 2010-0659. A motion for reconsideration, however, is now pending before this Court. Thus, at this time, this Court is left only with the Twelfth District’s analysis, which is factually identical to *Williams*.

d.) **Dr. Germaniuk’s Testimony and the Admission of the Autopsy Report Did Not Violate Defendant’s Right to Confrontation; Because the Autopsy Report was Admissible as Nontestimonial Hearsay, and Dr. Germaniuk Offered His Own Opinion and Conclusion as to Gina Tenney’s Cause of Death, which Defendant Had Ample Opportunity to Cross-Examine Him.**

First, this Court properly concluded that an autopsy report is a nontestimonial business record, and the U.S. Supreme Court’s decisions in *Melendez-Diaz*, *Bullcoming*, and *Williams* did not undermine this Court’s previous analysis in *Craig*.

Two years before Defendant was tried and convicted of capital murder, this Court held that “autopsy records are admissible as nontestimonial business records.” *State v. Craig*, 110 Ohio St.3d 306, 322 (2006). This Court concluded that the “expert testimony about the autopsy findings, the test results, and her opinion about the cause of death did not violate Craig’s confrontation rights.” *Id.*

This Court, however, remanded the case to the trial court because the defendant was sentenced under Ohio law that was not yet in effect when the offenses were

committed. *Id.* at 327. The defendant pursued a second appeal after the trial court resentenced him. *See State v. Craig*, No. 2006-1806. After both parties filed their merit briefs, this Court sua sponte ordered the parties to file supplemental briefs to address two issues:

- 1.) Whether the introduction of the autopsy report completed on Roseanna Davenport violated Donald Craig's Sixth Amendment right to confrontation under *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009).
- 2.) Whether Dr. Kohler, a medical examiner who did not conduct the autopsy of Roseanna Davenport, properly testified as to Davenport's cause of death in view of *Melendez-Diaz v. Massachusetts*.

This Court later stayed briefing until the U.S. Supreme Court decided *Bullcoming v. New Mexico*, and again for *Williams v. Illinois*.¹

This Court's decision in *Craig*, however, remains controlling. This Court found that the medical examiner's testimony did not deny Craig his right to confrontation, even though the medical examiner did not perform the autopsy. *See Craig*, 110 Ohio St.3d at 320. This Court reasoned that the autopsy report was admissible pursuant to R.C. 313.10 (certified records of a coroner are public records and shall be received as evidence in any criminal court), and as a business record under Evidence Rule 803(6). *See id.* "An autopsy report, prepared by a medical examiner and documenting objective findings, is the 'quintessential business record.'" *Id.*, quoting *Rollins v. State*, 161 Md.App. 34, 81, 866 A.2d 926 (2005).

This Court properly reasoned that "[t]he essence of the business record hearsay exception contemplated in *Crawford* is that such records or statements are not testimonial

¹ This Court stayed *State v. Hardin*, Case No. 2011-0122, pending the outcome of *Craig*.

in nature because they are prepared in the ordinary course of regularly conducted business and are ‘by their nature’ *not prepared for litigation.*” (Emphasis added.) *Craig*, 110 Ohio St.3d at 321, quoting *People v. Durio*, 7 Misc.3d 729, 734, 794 N.Y.S.2d 863 (2005).

Furthermore, autopsy reports are nontestimonial, because their primary purpose is to document a decedent’s cause of death for public recordkeeping rather than “for the purpose of establishing or proving some fact at trial.” *Melendez-Diaz*, 557 U.S. at 324. By law, Ohio coroners are required to “keep a complete record of an * * * fill in the cause of death on the death certificate, in all cases coming under [their] jurisdiction.” R.C. 313.09.

In accordance with *Craig*, the Seventh District followed *Craig* in *State v. Mitchell*, 7th Dist. No. 05 CO 63, 2008 Ohio 1525. In *Mitchell*, the Seventh District concluded that “*Craig* still stands for the proposition that an autopsy is a business record, is not hearsay, and does not violate any right to confront the maker of that record.” *Mitchell*, supra at ¶ 104.

Here, in response to Defendant’s Application to Reopen his appeal, the Seventh District concluded that this 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.” (Emphasis sic.) *Adams*, 2012 Ohio 2719, ¶ 20, citing *Craig*, 110 Ohio St.3d at 321-321; accord *State v. Zimmerman*, 8th Dist. No. 96210, 2011 Ohio 6156, ¶ 46; *State v. Monroe*, 8th Dist. No. 94768, 2011 Ohio 3045, ¶ 56; *State v. Hardin*, 4th Dist. No. 10 CA 803, 2010 Ohio 6304, ¶ 20.

Again, nothing in *Melendez-Diaz*, *Bullcoming*, or *Williams* undermined this Court's previous analysis and conclusion in *Craig*.

Second, Dr. Humphrey Germaniuk's testimony did not violate Defendant's right to confrontation because his opinions were based upon *his own review* of the available evidence and records, including a DVD of the actual autopsy and the coroner's report that was properly admitted (without an objection from Defendant).

Evidence Rule 803 states that "facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." Evid.R. 803. Thus, "[i]t has been long accepted that an expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks first-hand knowledge of those facts." *Williams*, 132 S.Ct. at 2233. Accordingly, an expert may opine about evidence that was generated by someone other than himself.

Here, Dr. Humphrey Germaniuk testified in a similar manner to that in *Craig* and *Mitchell*, *supra*.

At trial, Dr. Humphrey Germaniuk testified as to Gina Tenney's cause and manner of death even though he did not perform the autopsy, because Dr. Nathan Belinky, the county coroner who had performed Gina Tenney's autopsy, was *deceased*. (Trial Tr., Vol. II, at 402, 445.)

Prior to his testimony, Dr. Germaniuk reviewed "a file including *photographs* as well as copies of evidence, the *autopsy report*, the *microscopic reports*, and that was basically it. There was a *narrative from the scene investigators*." (Trial Tr., Vol. II, at

403.) Dr. Germaniuk also reviewed the *autopsy video*. (Trial Tr., Vol. II, at 404; State's Exhibit No. 91.)

Dr. Germaniuk testified that Gina Tenney suffered a contusion to her upper right lip, and some abrasions or scrapes on the front part of her chin. (Trial Tr., Vol. II, at 406; State's Exhibit Nos. 9, 10.) She also suffered abrasions to the left side of her chin; abrasions on her breast; and a faint line across her neck. (Trial Tr., Vol. II, at 406; State's Exhibit No. 11.)

Dr. Germaniuk *observed* a couple of irregularly scrapes or abrasions on her abdomen, faint bruising around her right wrist, scrapes to her abdomen, some scrapes on her breast, and on both the left and right wrists and forearms; two bands of contusion or bruising. (Trial Tr., Vol. II, at 406; State's Exhibit Nos. 12, 13, 14.)

According to the death certificate, Gina Tenney's immediate cause of death was suffocation due to traumatic asphyxiation. (Trial Tr., Vol. II, at 408.) Dr. Germaniuk, however, testified that he would have determined the cause of death to be asphyxia. (Trial Tr., Vol. II, at 408.) Dr. Germaniuk explained that if a person died from drowning, the body would take in an air and water mixture from breathing the water into their lungs, and would see a foam cone. (Trial Tr., Vol. II, at 410.) Here, there was no foam cone detected on Gina Tenney. (Trial Tr., Vol. II, at 411.)

"Asphyxiation is a very broad and general term which implies any process that prohibits the body from taking in oxygen and getting rid of carbon dioxide. And under asphyxia there are three broad categories." (Trial Tr., Vol. II, at 411.) Dr. Germaniuk then explained the five categories of asphyxia, (Trial Tr., Vol. II, at 411-413.), and the various categories of suffocation. (Trial Tr., Vol. II, at 413-416.)

Dr. Germaniuk testified, “we have evidence of smothering. You can take a look at the contusion on the lips. If you take a look at the marks about the chin, this is certainly consistent with a hand or an object placed over the face. We certainly have what appears to be ligature strangulation with that 7-inch band by quarter-inch band about the neck. With that we can exclude mechanical[.]” (Trial Tr., Vol. II, at 417.)

Dr. Germaniuk testified that he would simply draw right back to a broad category of asphyxia because he did not know how much of that evidence played a role in Gina Tenney’s death. (Trial Tr., Vol. II, at 417.)

Dr. Germaniuk also *observed* blood spots in her eyes (whites of the eyes), (Trial Tr., Vol. II, at 418.) and ligature marks on her wrists that could have been caused from being bound or tied up. (Trial Tr., Vol. II, at 422.)

Dr. Germaniuk stated that the telephone cord recovered from Gina’s vehicle could have caused the marks on her neck, and the bruises on her face could have been caused by someone hitting her in the face or trying to smother her. (Trial Tr., Vol. II, at 423-424.)

Dr. Germaniuk concluded that based on the evidence he reviewed, the cause of Gina Tenney’s death was likely a combination of smothering (asphyxia) and the ligature. (Trial Tr., Vol. II, at 445.) Dr. Germaniuk further concluded that Gina Tenney’s death was a homicide. Trial Tr., Vol. II, at 446.)

Thus, Dr. Germaniuk did not merely regurgitate Dr. Belinky’s original conclusion regarding Gina Tenney’s cause of death, but instead offered his own conclusions based upon *his review* of the evidence.

Accordingly, Defendant's right to confrontation was not violated because the autopsy report is nontestimonial. Further, Dr. Germaniuk testified to his own expert opinions and conclusions regarding Gina Tenney's cause of death rather than simply passing along testimonial statements.

Here, Dr. Germaniuk's conclusions were based upon the nontestimonial materials that he reviewed prior to trial, including "a file including *photographs* as well as copies of evidence, the *autopsy report*, the *microscopic reports*, and that was basically it. There was a *narrative from the scene investigators*." (Trial Tr., Vol. II, at 403.) Dr. Germaniuk also reviewed the *autopsy video*. (Trial Tr., Vol. II, at 404; State's Exhibit No. 91.)

It is enough to say that Dr. Germaniuk testified to his own conclusions and that Defendant had an ample opportunity to cross-examine him at trial.

Therefore, the record does not demonstrate that had appellate counsel raised an issue concerning the autopsy report and Dr. Germaniuk's testimony, the outcome of the appeal would have been different.

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

- II. **Proposition of Law No. 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. Amend. VI and XIV, Ohio Const. Art. I, §10.

State's Response to Proposition of Law No. 2: Defendant's Right to the Effective Assistance of Counsel was Not Violated, Because Both Trial and Appellate Counsel Provided Defendant Constitutionally Effective Representation Throughout the Trial and Appellate Proceedings.

As for Appellant's second proposition of law, he contends that both trial and appellate counsel deprived him of his Sixth Amendment right to effective representation. To the contrary, both trial and appellate counsel provided constitutionally effective representation, as they competently and effectively represented Defendant, and he suffered no prejudice as a result. Therefore, Defendant's Sixth Amendment right to the effective assistance of counsel was not violated.

A. **TO REVERSE FOR INEFFECTIVE ASSISTANCE OF COUNSEL, DEFENDANT MUST ESTABLISH BOTH DEFICIENT PERFORMANCE AND MUST HAVE SUFFERED PREJUDICE AS A RESULT.**

The standard of review for an ineffective assistance claim comes from the United States Supreme Court in *Strickland v. Washington*. See *Strickland*, 466 U.S. at 668. Under *Strickland*, to prove a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Id.*; see also *State v. Bradley*, 42 Ohio St.3d 136 (1989).

After *Strickland*, this Court adopted a two-part test for analyzing whether claims for ineffective assistance of counsel are below the constitutional standard. See *State v. Mitchell*, 11th Dist. No. 2004-T-0139, 2006 Ohio 618. In order to prove a claim of

ineffective assistance of counsel, the defendant must show “(1) that counsel’s performance fell below an objective standard of reasonableness, and (2) that counsel’s deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding.” *Id.*, quoting *State v. Madrigal*, 87 Ohio St.3d 378, 388-89 (2000), citing *Strickland*, 466 U.S. at 687-688.

In the first prong, a court determines whether trial counsel’s assistance was actually ineffective—whether counsel’s performance fell below an objective standard of reasonable advocacy or fell short of counsel’s basic duties to the client. *See Bradley*, *supra*. To prove the performance was deficient, the defendant must show that counsel made errors, which were so serious that counsel was not acting in a manner guaranteed by the Sixth Amendment. *See id.*

Because of the difficulties inherent in making the evaluation, a court must indulge a **strong presumption** that counsel’s conduct fell within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *See Strickland*, 466 U.S. at 689; *State v. Vlahopoulos*, 8th Dist. App. No. 82035, 2005 Ohio 4287, at ¶ 3, citing *Jones*, 463 U.S. at 750-753; *see also State v. Spivey*, 7th Dist. App. No. 89 C.A. 172, 1998 WL 78656, *6 (Feb. 11, 1998) (stating “this court must indulge in the strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance[.]”).

Further, trial strategy and tactics are left to the discretion of the individual attorney and do not constitute ineffective assistance of counsel. *See State v. Brown*, 7th Dist. No. 96 CA 56, 2001 Ohio 3175.

If a reviewing court finds ineffective assistance of counsel on those terms, the court continues to the second prong to determine whether or not the defendant's defense actually suffered prejudice due to defense counsel's shortcomings, such that the reliability of the outcome of the case should be suspect. *See Bradley*, supra. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the proceeding would have turned in favor of the defendant. *See id.*

Both prongs of this test must be established before a court can make a finding of ineffective assistance of counsel. *See Strickland*, 466 U.S. at 687. And if an appellant's ineffectiveness claim can be disposed of on one prong alone, it should not engage in an analysis of the other. *See Bradley*, 42 Ohio St.3d at 143, citing *Strickland*, supra. The defendant must affirmatively prove the prejudice occurred. *See Strickland*, 466 U.S. at 693. "It is not enough for the defendant [Appellant] to show that the errors had some conceivable effects on the outcome of the proceeding." *Id.* Rather, Defendant must show that there is a "reasonable probability" the results would have been different, "but for" counsel's deficient performance. *See id.* at 694.

"A reviewing court is not permitted to use the benefit of hindsight to second-guess the strategies of trial counsel." *State v. Layne*, 12th Dist. No. CA2009-07-043, 2010 Ohio 2308, ¶ 47, citing *State v. Gleckler*, 12th Dist. No. CA2009-03-021, 2010 Ohio 496, ¶ 10. And this Court "ordinarily refrains from second-guessing strategic decisions counsel makes at trial, even when counsel's trial strategy was questionable." *State v. Jackson*, 107 Ohio St.3d 300, 317 (2006), citing *State v. Clayton*, 62 Ohio St.2d 45, 49 (1980).

Recently, the U.S. Supreme Court has rejected the notion of holding defense counsel to the American Bar Association standards. See *Bobby v. Van Hook*, 130 S. Ct 13, 16 (2009); recognized and followed by *Coley v. Bagley*, N.D. Ohio No. 1:02CV0457, 2010 WL 1375217, at *55 (Apr. 5, 2010); accord *State v. Craig*, 9th Dist. No. 24580, 2010 Ohio 1169, ¶ 17. Previously in *Strickland*, the Court recognized that “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” *Bobby*, 130 S. Ct at 16, quoting *Strickland*, 466 U.S. at 688-689.

Further, it is well established that ABA guidelines and the like are merely guides, and do not create a higher standard of representation beyond that of an objective standard of reasonableness:

Strickland stressed, however, that “American Bar Association standards and the like” are “only guides” to what reasonableness means, not its definition. 466 U.S., at 688, 104 S.Ct. 2052. We have since regarded them as such. See *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). What we have said of state requirements is *a fortiori* true of standards set by private organizations: “[W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.” *Roe v. Flores-Ortega*, 528 U.S. 470, 479, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

Bobby, 130 S. Ct. at 17. Thus, the Court continues to recognize that “[j]udicial scrutiny of counsel’s performance must be highly deferential.” *Wong v. Belmontes*, 130 S. Ct. 383, 384-385 (2009), quoting *Strickland*, 466 U.S. at 689.

Again, concerning appellate counsel’s effectiveness, “appellate counsel *need not raise every possible issue* in order to render constitutionally effective assistance.”

(Emphasis added.) *Jones*, supra at ¶ 6, citing *Tenace*, 109 Ohio St.3d at 452, citing *Sanders*, 94 Ohio St.3d at 151-152. “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.” *Jones*, supra at ¶ 6, quoting *Jones*, 463 U.S. at 751.

1. **COUNSEL’S FAILURE TO OBJECT TO THE TRIAL COURT’S QUESTIONING OF WITNESSES DID NOT VIOLATE HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL.**

In Defendant’s sixth assignment of error, he argued that the trial court erred in admitting non-testimonial hearsay statements of Gina Tenney. He further argued that the trial court’s neutrality was in question because the court asked several questions.

The Seventh District recognized that a trial court “may interrogate witnesses, in an impartial manner, whether called by itself or a party.” *Adams*, 2011 Ohio 5361, at ¶ 291, citing Evid.R. 614(B). The Seventh District further recognized that “[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. *Adams*, 2011 Ohio 5361, at ¶ 291, citing *In the Matter of Gray*, 8th Dist. Nos. 75984, 75985 (Apr. 20, 2000). And “it is presumed that the trial court acted impartially in questioning a witness[.]” *Id.*, citing *Jenkins v. Clark*, 7 Ohio App.3d 93, 98 (2nd Dist. 1982).

In response, the Seventh District found that “[t]he 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.” *Adams*, 2011 Ohio 5361, at ¶ 293.

Thus, the record does not demonstrate that had trial counsel objected to the trial court's questioning, the outcome of the appeal would have been different.

2. **TRIAL COUNSEL'S FAILURE TO OBJECT TO DET. BLANCHARD'S COMMENTS DID NOT VIOLATE HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL.**

In Defendant's ninth assignment of error, he argued that Det. Blanchard's comments during trial violated his right to fair trial. He further argued that the prosecutor's questions, "So from what she had told you?" and "Without saying what she said?," were a deliberate attempt to prejudice the jury. *Adams*, 2011 Ohio 5361, at ¶¶ 325-326.

a.) **Suppression Hearing.**

First, the following inquiry caused Det. Blanchard to mention the suppression hearing:

MR. DEFABIO: Well, you've testified a couple of times already in this case; correct?

DET. BLANCHARD: I have.

MR. DEFABIO: Back in July, once in September?

DET. BLANCHARD: At suppression hearings, yes.

(Trial Tr., Vol. I, at 191-192.) At this point, defense counsel never objected, nor did defense counsel ask for a curative instruction.

The mere mention of "suppression hearings" is meaningless. There is nothing in the record to show that either the jury knew what a suppression hearing is or that the jury was concerned about any suppressed evidence. Furthermore, the mere mention of a suppression hearing does not infer guilt in any way.

b.) Adena Fidelia.

Second, the following inquiry regarded the questioning of Adena Fidelia:

MR. DEFABIO: So you've talked to Adena at least three times up to this point?

DET. BLANCHARD: Yes.

MR. DEFABIO: Any further conversations that you can think of?

DET. BLANCHARD: Not about this case.

(Trial Tr., Vol. I, at 221.) Again, defense counsel never objected, nor did he ask the trial court for a curative instruction.

Det. Blanchard's comment that he did not talk to Adena Fidelia about "this case" does not mean that he talked to her about another case. All it means is that he did not talk to her again about this case. He could have talked to her about a number of other topics. *See Adams*, 2011 Ohio 5361, at ¶ 322.

The Seventh District properly concluded that the comment was not "so prejudicial to require a mistrial[,]” and “if completed it would only have been repetitive of other admissible testimony about the victim having problems with appellant.” *Adams*, 2011 Ohio 5361, at ¶ 326.

Thus, the record does not demonstrate that had trial counsel objected to the State's comments, the outcome of the appeal would have been different.

3. **TRIAL COUNSEL'S FAILURE TO OBJECT TO THE COURT'S FAILURE TO PROVIDE FACTUAL FINDINGS REGARDING HIS RIGHT TO A SPEEDY TRIAL DID NOT VIOLATE HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL.**

In Defendant's twelfth assignment of error, he argued that his right to a speedy trial was violated. Defendant further argued that the trial court's July 28, 2008 decision failed to include the court's essential findings. *See Adams*, 2011 Ohio 5361, at ¶ 133.

The Seventh District previously stated that an appellant cannot establish prejudice by a lacking of findings if the record is sufficient to allow the court a full review of the issues raised on appeal. *See Adams*, 2011 Ohio 5361, at ¶ 135, citing *State v. Sapp*, 105 Ohio St.3d 104, ¶ 96 (2002), and *State v. Benner*, 40 Ohio St.3d 301, 317-318 (1988).

Here, the Seventh District's opinion regarding Defendant's right to a speedy trial encompassed twenty (20) paragraphs of analysis; thus, the record was more than sufficient to allow any reviewing court a full review of Defendant's speedy trial argument.

Thus, the record does not demonstrate that had trial counsel objected to the trial court's essential findings, the outcome of the appeal would have been different.

4. **TRIAL COUNSEL'S FAILURE TO OBJECT TO THE COURT'S FINDINGS UNDER BATSON DID NOT VIOLATE HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL.**

In Defendant's seventeenth assignment of error, he argued that the State excused Juror Nos. 11 and 31 through its peremptory challenges in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). But the State demonstrated race-neutral explanations for

its decisions to excuse Juror Nos. 11 and 31; therefore, Appellant failed to show purposeful racial discrimination by the State in violation of *Batson*.

The Equal Protection Clause of the United States Constitution precludes purposeful discrimination by the prosecution in the exercise of its peremptory challenges so as to exclude racial minorities from service on petit juries. *State v. Franklin*, 7th Dist. No. 06 MA 79, 2008 Ohio 2264, ¶ 62, citing *Batson*, at 85-86. To determine if purposeful discrimination is present, a three-step analysis must be employed. *State v. Lanier*, 7th Dist. No. 06 MA 94, 2007 Ohio 3172, ¶ 65, citing *State v. Bryan*, 101 Ohio St.3d 272, ¶ 106 (2004); accord *Purkett v. Elem*, 514 U.S. 765, 767 (1995).

First, a party opposing a peremptory challenge must demonstrate a prima facie case of racial discrimination in the use of the strike. See *Batson*, 476 U.S. at 96. To establish a prima facie case, the opponent must first show that he is a member of a cognizable racial group and that the peremptory challenge will remove a member of the opponent's race from the venire. See *State v. Hernandez*, 63 Ohio St. 3d 577, 582 (1992). The opponent must then show an inference of racial discrimination by the proponent of the challenge. See *Hicks v. Westinghouse Materials Co.*, 78 Ohio St. 3d 95, 98 (1997).

In the second step, the striking party must then assert a race-neutral explanation for the challenge. See *Batson*, 476 U.S. at 96-98. A simple affirmation of general good faith is not sufficient. The explanation, however, need not rise to the level justifying an exercise of a challenge for cause. See *id.* at 97. The critical issue is whether discriminatory intent is inherent in counsel's explanation for her use of the strike; intent is present if the explanation is merely a pretext for exclusion on the basis of race. See *Hernandez v. New York*, 500 U.S. 352, 363 (1991).

As the U.S. Court explained, “[t]he second step of this process does not demand an explanation that is persuasive, or even plausible[,]” and the “legitimate reason” required by the prosecution “is not a reason that makes sense, but a reason that does not deny equal protection.” *Purkett*, 514 U.S. at 768-769.

In the third step, once the proponent puts forth a race-neutral reason, the trial court must decide based on all the circumstances, whether the opponent has demonstrated purposeful racial discrimination. *See Batson*, 476 U.S. at 98.

The burden of persuasion is on, and never shifts from, the opponent of the challenge. *See Purkett*, 514 U.S. at 768; *accord Rice v. Collins*, 546 U.S. 333 (2006). The findings of the trial court must be afforded great deference since that determination rests largely upon the trial court’s evaluation of the prosecutor’s credibility. *See Batson*, 476 U.S. at 98-99. As Justice Breyer explained, reviewing courts must give trial courts considerable leeway in determining the prosecutor’s credibility:

The trial judge is best placed to consider the factors that underlie credibility: demeanor, context, and atmosphere. And the trial judge is best placed to determine whether, in a borderline case, a prosecutor’s hesitation or contradiction reflect (a) deception, or (b) the difficulty of providing a rational reason for an instinctive decision. Appellate judges cannot on the basis of a cold record easily second-guess a trial judge’s decision about likely motivation. These circumstances mean that appellate courts will, and must, grant the trial courts considerable leeway in applying *Batson*.

Rice, 546 U.S. at 343-344 (Breyer, J., concurring), citing *Hernandez*, *supra*.

Here, the record does not demonstrate that had trial counsel objected to the removal of Juror Nos. 11 and 31, the outcome of the appeal would have been different.

a.) Juror No. 11

As for Juror No. 11, Defendant contends that the State racially discriminated against Juror No. 11 when it exercised a peremptory challenge following general voir dire.

Following its exclusion of Juror No. 11, the State explained:

Your Honor, throughout the entire interview, I don't feel that Juror No. 11 liked what I had to say. She wasn't listening to certain portions of me. She liked court shows, she mentioned hearing both sides of the story during one portion, and when I explained to her that it was just our burden, she agreed with that, but, however, she always talked about motive, and she seemed very disappointed to us that we didn't have to prove why someone did something.

(Voir Dire Tr., Vol. IV, at 758-759.) The trial court found this to be a race-neutral explanation, and no intent to purposely discriminate on the basis of race. (Voir Dire Tr., Vol. IV, at 759.)

As the U.S. Court has continually stated, the findings of the trial court must be afforded great deference. *See Batson*, 476 U.S. at 98-99; *accord Rice*, 546 U.S. at 343-344 (Breyer, J., concurring). And “[t]he second step of this process does not demand an explanation that is persuasive, or even plausible.” *Purkett*, 514 U.S. at 768. Further, the “legitimate reason” required by the prosecution “is not a reason that makes sense, but a reason that does not deny equal protection.” *Id.* at 769.

Here, the State's two main contentions with Juror No. 11 were her failure to listen to the prosecutor and her interest in the State proving Defendant's motive. First, the fact that Juror No. 11 did not pay full attention to the prosecutor is clearly an observation made by the prosecutor during voir dire proceedings, and could not be disproved by the record before any reviewing court. It was the trial court's responsibility to judge the

prosecutor's credibility when she set forth her reasoning, and the trial court found no such discriminatory intent. Further, defense counsel failed to offer anything to the contrary.

Second, Juror No. 11 illustrated her interest in knowing a defendant's motive for committing the offense:

Okay. You know, some people, like they're kind of slow or they had a problem ever since they were born, or maybe they might have snapped. **It all depends on what the circumstances was to do the murder** -- do you know what I'm saying -- ? -- but it might be self-defense also, you know what I'm saying? You might have seen somebody doing something to your child and you all of a sudden snapped and shot them. Your mind wasn't thinking right at the time.

(Voir Dire Tr., Vol. I, at 106.)

Thus, the record corroborated the prosecutor's reasoning. And simply because Juror No. 11 agreed with the prosecutor that the State did not have to prove a motive, it is the prosecutor's duty to assess her credibility during voir dire. This could only be done by examining her gestures, voice inflections, and demeanor in open court, not by simply reading through the transcript.

Therefore, after excusing Juror No. 11, the prosecutor asserted a race-neutral explanation based upon her failure to pay attention and her interest in knowing a defendant's motive for committing the offense. *Batson* requires nothing more.

b.) Juror No. 31

As for Juror No. 31, Defendant contends that the State also racially discriminated against Juror No. 31 when it exercised a peremptory challenge following voir dire.

Following its exclusion of Juror No. 31, the State explained: "Your Honor, I've stated numerous reasons in both my causes, and I would reiterate those, and those being

that she was confused and she's also had a nephew killed and they're still under investigation." (Voir Dire Tr., Vol. IV, at 762.) Like with Juror No. 11, the trial court found this to be a race-neutral explanation, and no intent to purposely discriminate on the basis of race. (Voir Dire Tr., Vol. IV, at 763.)

First, Juror No. 31 made contradictory statements regarding her belief in capital punishment. On her questionnaire, Juror No. 31 indicated that she did not believe in capital punishment, but also indicated that the proper punishment for every person convicted of murder was the death penalty. (Voir Dire Tr., Vol. I, at 191-192.) In fact, Juror No. 31 acknowledged the conflicting answers. (Voir Dire Tr., Vol. I, at 192.) Finally, when questioned by the trial court, she settled on being opposed to capital punishment. (Voir Dire Tr., Vol. I, at 192.)

Juror No. 31 continued to illustrate her opposition to the death penalty and unwillingness to sign a death verdict:

MRS. CANTALAMESSA: What kind of cases do you think the death penalty would be appropriate in?

JUROR NO. 31: I believe that appropriate if someone just up and just murdered you without cause.

MRS. CANTALAMESSA: Okay. Could you yourself sign a verdict form that states the death penalty? Could you yourself give someone the death penalty?

JUROR NO. 31: No.

MRS. CANTALAMESSA: Okay. And why not?

JUROR NO. 31: Because really, I don't believe in it.

MRS. CANTALAMESSA: Okay. You believe in it as a concept, but you yourself wouldn't do it?

JUROR NO. 31: No.

(Voir Dire Tr., Vol. I, at 196.)

MRS. CANTALAMESSA: That's what I'm trying to get to, and I think the judge was trying to ask you that as well.

Do you think that you could ever, if you were instructed to and the judge gave you the law, that you could follow the law, and if you found that the aggravating circumstances outweighed the mitigating factors, you could impose the death sentence?

JUROR NO. 31: I could.

MRS. CANTALAMESSA: Okay. Could you sign a death verdict, though, that states the death penalty?

JUROR NO. 31: Yeah, probably.

MRS. CANTALAMESSA: Okay. Cause you just told me you couldn't, so how do you explain?

JUROR NO. 31: Oh, if I would -- you ask me to sign, could I do it?

MRS. CANTALAMESSA: Yeah, could you yourself sign that verdict?

JUROR NO. 31: No, no.

MRS. CANTALAMESSA: I want to make sure it's clear, okay?

JUROR NO. 31: No, no.

(Voir Dire Tr., Vol. I, at 197.)

MRS. CANTALAMESSA: Okay. Now, do you think that this -- this view you have about the death penalty would impair your ability to sit on this case cause you don't believe in the death penalty?

JUROR NO. 31: Yes.

Juror No. 31's confusion continued, even when questioned by defense counsel. Despite stating that she would follow the law, Juror No. 31 indicated an unwillingness to impose a lesser life option as well:

MR. DEFABIO: Okay. And if you felt beyond a reasonable doubt -- strike that. If you felt the state did not prove beyond a reasonable doubt that death was appropriate, could you sign a verdict imposing one of these life options?

JUROR NO. 31: No.

MR. DEFABIO: Why not?

JUROR NO. 31: Because if you go to prison and some time you -- you change, we look at that, and they bring you out, maybe a few years, you do the same thing over again.

Even defense counsel is confused at this point.

MR. DEFABIO: Okay. And again, I guess I'm confused then. Are you in favor of capital punishment or no?

(Voir Dire Tr., Vol. I, at 219.)

JUROR NO. 31: Yes, I don't believe in it.

(Voir Dire Tr., Vol. I, at 220.) After further prompting by defense counsel, Juror No. 31 states that she would follow the law, and sign a death verdict if the evidence supported it.

(Voir Dire Tr., Vol. I, at 221, 232-233.)

The record clearly demonstrated that Juror No. 31 appeared often confused and continued to offer contradictory answers, regardless of whether she was being questioned by the State or defense counsel. Despite denying the State's challenge for cause of Juror No. 31, the trial court observed that "[o]ne time she couldn't give any penalty, couldn't sign any verdict, * * * I don't know if it's confusion or it's just starting to -- cause her --

she looks puzzled, let's put it this way, her answers are everywhere, including her questionnaire." (Voir Dire Tr., Vol. I, at 238-239.)

Second, the assistant prosecutor stated that she excused Juror No. 31 because her nephew had been murdered. (Voir Dire Tr., Vol. IV, at 762.) This too was a race-neutral explanation, free from any racial discrimination. The record demonstrates that a similarly situated juror, Juror No. 173, had also been excused by the State.

Juror No. 173 first indicated that she was confused when the trial court explained to them the process in which they must determine whether a death sentence is appropriate or not. (Voir Dire Tr., Vol. III, at 505-511.) Juror No. 173 then stated that she would not be able to decide whether a person should live or die. (Voir Dire Tr., Vol. III, at 511.) She further stated that she did not believe in the death penalty. (Voir Dire Tr., Vol. III, at 512.)

When questioned about the fact that her family member had been murdered, Juror No. 173 indicated that this fact would impair her ability to judge the evidence and sit as a juror. (Voir Dire Tr., Vol. III, at 517.) Juror No. 173 was later successfully challenged for cause. (Voir Dire Tr., Vol. III, at 538.)

Thus, the record demonstrates that the State sought to excuse two similarly situated jurors, Juror Nos. 31 and 173, both of whom had relatives who were murdered.

Therefore, after excusing Juror No. 31, the prosecutor asserted a race-neutral explanation based upon her confusion and conflicting answers, and the fact that her nephew had been murdered. Again, *Batson* requires nothing more.

As for Juror No. 31, the Seventh District found that the trial “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.” *Adams*, 2011 Ohio 5361, at ¶ 258.

As for Juror No. 11, the Seventh District found that “[f]eeling 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.” *Adams*, 2011 Ohio 5361, at ¶ 262.

Thus, the record does not demonstrate that had trial counsel objected to the removal of Juror Nos. 11 and 31, the outcome of the appeal would have been different.

5. **TRIAL COUNSEL’S
FAILURE TO EMPLOY A MITIGATION
PSYCHOLOGIST DID NOT VIOLATE HIS SIXTH
AMENDMENT RIGHT TO EFFECTIVE COUNSEL.**

Here, Appellant contends that trial counsel was ineffective for failing to employ a mitigation psychologist at trial.

Specific to a trial counsel’s mitigation investigation, the U.S. Supreme Court has defined stated that “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Wiggins v. Smith*, 539 U.S. 510, 521-522 (2003), quoting *Strickland*, 466 U.S. at 690-691.

Thus, the Court's principal concern was "not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background *was itself reasonable.*" *Wiggins*, 539 U.S. at 523.

Germane to mitigation, "[w]hen trial counsel presents a meaningful concept of mitigation"—no particular number or type of witness being required—"the existence of alternative or additional mitigation theories does not establish ineffective assistance of counsel." *State v. Turner*, 10th Dist. No. 04AP-1143, 2006 Ohio 761, ¶ 28.

Here, trial counsel presented a reasonable and meaningful mitigation argument that counsel felt was the strongest to persuade the jury to spare Appellant's life.

Thus, the record does not demonstrate that had trial counsel employed a mitigation psychologist, the outcome of the appeal would have been different.

6. **TRIAL COUNSEL'S FAILURE TO OBJECT TO DR. GERMANIUK'S TESTIMONY AND THE ADMISSION OF THE AUTOPSY REPORT DID NOT VIOLATE HIS 6TH AMENDMENT RIGHT TO EFFECTIVE COUNSEL.**

Here, Defendant contends that appellate counsel should have argued that Dr. Humphrey Germaniuk's testimony and the admission of the autopsy report violated his Sixth Amendment right to confrontation, because he did not perform Gina Tenney's autopsy (*See* Appellant's first proposition of law). To the contrary, Dr. Belinky's autopsy report is a nontestimonial business record, and Dr. Germaniuk testified to his own expert opinions and conclusions regarding Gina Tenney's cause of death rather than simply passing along testimonial statements. Therefore, the autopsy report and Dr. Germaniuk's testimony did not violate Defendant's Sixth Amendment right to confrontation.

First, this Court's decision in *Craig* remains controlling. This Court found that the medical examiner's testimony did not deny Craig his right to confrontation, even though the medical examiner did not perform the autopsy. *See Craig*, 110 Ohio St.3d at 320. This Court reasoned that the autopsy report was admissible pursuant to R.C. 313.10 (certified records of a coroner are public records and shall be received as evidence in any criminal court), and as a business record under Evidence Rule 803(6). *See id.* "An autopsy report, prepared by a medical examiner and documenting objective findings, is the 'quintessential business record.'" *Id.*, quoting *Rollins*, 161 Md.App. at 81.

This Court properly reasoned that "[t]he essence of the business record hearsay exception contemplated in *Crawford* is that such records or statements are not testimonial in nature because they are prepared in the ordinary course of regularly conducted business and are 'by their nature' *not prepared for litigation*." (Emphasis added.) *Craig*, 110 Ohio St.3d at 321, quoting *Durio*, 7 Misc.3d at 734.

Second, Dr. Germaniuk's conclusions were based upon the nontestimonial materials that he reviewed prior to trial, including "a file including *photographs* as well as copies of evidence, the *autopsy report*, the *microscopic reports*, and that was basically it. There was a *narrative from the scene investigators*." (Trial Tr., Vol. II, at 403.) Dr. Germaniuk also reviewed the *autopsy video*. (Trial Tr., Vol. II, at 404; State's Exhibit No. 91.)

It is enough to say that Dr. Germaniuk testified to his own conclusions and that Defendant had an ample opportunity to cross-examine him at trial.

Thus, the record does not demonstrate that had appellate counsel raised an issue concerning the autopsy report and Dr. Germaniuk's testimony, the outcome of the appeal would have been different.

Therefore, Defendant failed to overcome the *strong presumption* that counsels' conduct fell within the wide range of reasonable professional assistance, as both trial and appellate counsel provided constitutionally effective assistance throughout the trial and appellate proceedings.

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

III. 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 Conviction of Both Aggravated Murder and Capital Specifications.

State's Response to Proposition of Law No. 3: Appellate Counsel's Failure to Raise a Sufficiency Claim in Appellant's First Appeal of Right Did Not Violate His Sixth Amendment Right to the Effective Assistance of Counsel, Because the State Presented Sufficient Evidence that Defendant Purposely Caused the Death of Gina Tenney While Committing or Attempting to Commit, or While Fleeing Immediately after Committing or Attempting to Commit, Kidnapping, Rape, Aggravated Robbery, and/or Aggravated Burglary.

As for Appellant's third proposition of law, he contends that appellate counsel was constitutionally ineffective for failing to raise a sufficiency argument in his appeal as of right. To the contrary, appellate counsel was not constitutionally ineffective for failing to raise a sufficiency argument in his appeal as of right, because the State presented sufficient evidence that Defendant purposely caused the death of Gina Tenney while committing or attempting to commit Kidnapping, Rape, Aggravated Robbery, and/or Aggravated Burglary. Therefore, appellate counsel was constitutionally effective.

A. ONLY IF UPON THE CLOSING OF THE STATE'S CASE-IN-CHIEF, ALL FACTS TAKEN AS TRUE, DID THE STATE LACK EVIDENCE TO SUPPORT AN ELEMENT OF THE INDICTMENT, MAY A REVIEWING COURT REVERSE A SUFFICIENCY CLAIM.

Sufficiency is a legal standard that is applied to determine whether the evidence admitted at trial is legally sufficient to support the verdict as a matter of law. *See State v. Thompkins*, 78 Ohio St.3d 380 (1997). The relevant inquiry is whether there existed adequate evidence to submit the case to the jury. *State v. Lewis*, 7th Dist. No. 03 MA 36, 2005 Ohio 2699. According to this Court,

An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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 of the crime proven beyond a reasonable doubt.

State v. Jenks, 61 Ohio St.3d 259, paragraph two of the syllabus (1991). Given that, sufficiency is a test of adequacy. Again, whether the evidence presented in a case is legally sufficient to sustain a verdict is a matter of law—this follows as a logical complement to Criminal Rule 29(A), which governs motions for acquittal—and not a matter of fact. And on a sufficiency challenge, *the facts are taken as true*. *Id.*; accord *Thompkins*, supra; *State v. Bridgeman*, 55 Ohio St.2d 261 (1978). And “[i]t is well-established that the appellate court is to consider *all* of the testimony before the jury, *whether or not it was properly admitted*.” (Emphasis sic.) *State v. Peebles*, 7th Dist. No. 07 MA 212, 2009 Ohio 1198, ¶ 17, citing *State v. Yarbrough*, 95 Ohio St.3d 227, ¶ 80 (2002), citing *Lockhart v. Nelson*, 488 U.S. 33, 40-42 (1988); and citing *State v. Goff*, 82 Ohio St.3d 123, 138 (1998).

1. **THE STATE PRESENTED SUFFICIENT EVIDENCE THAT DEFENDANT PURPOSELY CAUSED THE DEATH OF GINA TENNEY WHILE COMMITTING OR ATTEMPTING TO COMMIT RAPE, AGGRAVATED BURGLARY KIDNAPPING, AND/OR AGGRAVATED ROBBERY.**

The State presented sufficient evidence that illustrated Appellant's cold and calculated plan to murder, rape, and steal from Gina Tenney because of her continued rejection of his attempts and desires to become more than just neighbors. (Trial Tr., Vol. I, at 93.)

a.) **Gina Tenney Feared Appellant.**

It began in late October of 1985 after Gina Tenney and Mark Passarello had ended their relationship. (Trial Tr., Vol. II, at 368.) Defendant began calling Gina on the telephone, and would ask her if he could come upstairs to her apartment. (Trial Tr., Vol. II, at 368.) Defendant would call Gina nearly every day, and always at night. (Trial Tr., Vol. II, at 370.) These calls made Gina “very upset” and fearful, because they were always late at night and she had not given her number to him. (Trial Tr., Vol. II, at 369, 371; Vol. I, at 100.)

Defendant’s late night calls continued until Gina changed her telephone number in November. (Trial Tr., Vol. II, at 370-371; Vol. I, at 91-92.) Gina changed her telephone number because she was scared to answer it when it rang. (Trial Tr., Vol. I, at 100.) Thereafter, Gina found a card that had been shoved underneath her apartment door. (Trial Tr., Vol. II, at 372, 374.) It was addressed “to a very sweet and confused young lady[,]” and signed “love, Bennie.” (Trial Tr., Vol. II, at 372-373; State’s Exhibit No. 48.)

Gina’s fear of Defendant intensified on Christmas when her apartment was broken into. (Trial Tr., Vol. II, at 386.) Around 1:00 a.m. on December 25, 1985, someone had opened Gina’s apartment door. After hearing some noises, Gina put a chair against her apartment door, but later, the person returned and opened the door and walked into her apartment. (Trial Tr., Vol. II, at 387.) That night, Gina did not hear the outside door to the apartment building open, which usually makes a loud screeching noise when it is opened or shut. (Trial Tr., Vol. I, at 109.) Meaning the person who broke into her

apartment was already in the building. Her friend, Marvin Robinson, stayed with Gina the next two nights, because Gina was now "very fearful" of Defendant. (Trial Tr., Vol. II, at 389-391.) Gina also made her fear of Defendant known to her mother. (Trial Tr., Vol. I, at 71.)

On Saturday, December 28, 1985, Penny Sergeff stayed with Gina at her apartment, because Gina was still afraid to be left alone in her apartment at night, fearful of Defendant, who lived downstairs. (Trial Tr., Vol. I, at 89.) Later that evening, Mark Passarello came over to Gina's apartment, and the three hung out. (Trial Tr., Vol. I, at 120.)

Later, Mark took Penny home but later returned to Gina's apartment. (Trial Tr., Vol. I, at 120.) Mark and Gina reconciled their relationship. (Trial Tr., Vol. I, at 119.) Mark and Gina spoke about their relationship, and Mark apologized for the things he did wrong. (Trial Tr., Vol. I, at 120-121.) Mark spent the night, as Gina also made Mark aware of her fear and that she didn't feel secure in her apartment. (Trial Tr., Vol. I, at 124.) That night, Mark and Gina had sexual intercourse. (Trial Tr., Vol. I, at 121.)

The next day, on December 29, 1985, Jeff Thomas met Gina at the movie theater for a 1:00 p.m. matinee. (Trial Tr., Vol. I, at 139.) After the movie, the two went to Pizza Hut. (Trial Tr., Vol. I, at 141.) During their conversation, Gina mentioned that she feared Appellant. (Trial Tr., Vol. I, at 142.) They left Pizza Hut around 5:00 p.m., and that would be the last time anyone, other than Appellant, saw Gina Tenney alive. (Trial Tr., Vol. I, at 143.)

b.) The Physical Evidence.

Michael Valentine found Gina Tenney's body in the Mahoning River, near the West Avenue Bridge (fka the Water Street Bridge), around 11:00 a.m. the next morning on December 30, 1985. (Trial Tr., Vol. I, at 74-76.)

Prior to his testimony, Dr. Humphrey Germaniuk reviewed the autopsy photographs, evidence from the case, the autopsy report, the microscopic reports, and a narrative report from the scene investigators. (Trial Tr., Vol. II, at 403.)

Gina Tenney suffered a contusion to her upper right lip, and some abrasions or scrapes on the front part of her chin. (Trial Tr., Vol. II, at 406; State's Exhibit Nos. 9 and 10.) She further suffered abrasions to the left side of her chin, her breast, and across her neck. (Trial Tr., Vol. II, at 406; State's Exhibit Nos. 11 and 14.) There were irregularly shaped scrapes and/or abrasions on her abdomen. (Trial Tr., Vol. II, at 406; State's Exhibit No. 12.) Dr. Germaniuk also observed bruising around her right wrist. (Trial Tr., Vol. II, at 406; State's Exhibit No. 13.)

Dr. Germaniuk concluded that there was evidence of smothering:

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

(Trial Tr., Vol. II, at 417.) The ligature marks on her wrists could have been caused from being bound or tied up, and the telephone cord recovered from Gina's vehicle could have caused the marks on her neck. (Trial Tr., Vol. II, at 422-423.)

The bruises on Gina's face were likely caused by Defendant hitting her in the face or trying to smother her. (Trial Tr., Vol. II, at 424.) Based on the physical evidence, Dr.

Germaniuk concluded that Gina's cause of death was likely a combination of being smothered or strangled by Appellant. (Trial Tr., Vol. II, at 445.) Further, Gina was dead before Defendant tossed her body into the Mahoning River. (Trial Tr., Vol. II, at 410-411.)

Therefore, Dr. Germaniuk concluded that Gina's official cause of death was asphyxia, and the manner of death was homicide. (Trial Tr., Vol. II, at 446.)

Dale Laux concluded that the blood type from the semen found on Gina Tenney's vaginal swabs collected during her autopsy was a "B non-secretor." (Trial Tr., Vol. III, at 556.) Both Gina Tenney and Mark Passarello were "A secretors." (Trial Tr., Vol. III, at 556.) Horace Landers was an "A non-secretor." (Trial Tr., Vol. III, at 557.) Of those samples submitted, only Defendant was a "B non-secretor." (Trial Tr., Vol. III, at 557.) The blood typing analysis is not an exact match, but Defendant could not be eliminated as a potential source of the semen found in Gina Tenney's vagina. (Trial Tr., Vol. III, at 557-558.)

Brenda Gerardi, a DNA analyst from Ohio's BCI, excluded "Horace Landers as being a source of any of the DNA, the forensic DNA profiles from the vaginal swabs," and from underwear belonging to Gina Tenney. (Trial Tr., Vol. III, at 586-587.)

"Bennie Adams cannot be excluded as the source of the semen on the vaginal swab. Based on the national database provided by the Federal Bureau of Investigation, the expected frequency of occurrence of the partial DNA profile identified in the sperm fraction of the vaginal swab is 1 in 38, 730, 000, 000, 000 unrelated individuals." (Trial Tr., Vol. III, at 587.) By comparison, in 2008, there are only 6.5 million people in the world. (Trial Tr., Vol. III, at 588.)

Further, "Bennie Adams cannot be excluded as the major source of the semen on the underwear. Based on the national database provided by the Federal Bureau of Investigation, the expected frequency of occurrence of the major DNA profile identified in the sperm fraction of the underwear is 1 in 63, 490, 000, 000, 000, 000, 000 unrelated individuals." (Trial Tr., Vol. III, at 587.)

c.) **The Physical Evidence
and Witness Testimony Excluded
Horace Landers and Mark Passarello
as Suspects in the Murder of Gina Tenney.**

Det. Blanchard testified that Horace Landers cooperated with the Youngstown police and gave a statement shortly after his arrest. (Trial Tr., Vol. II, at 241.) And long before he died, Horace Landers was ruled out as being a suspect because of the blood evidence. (Trial Tr., Vol. II, at 241.)

Dale Laux concluded that the blood type from the semen found on Gina Tenney's vaginal swabs collected during her autopsy was a "B non-secretor." (Trial Tr., Vol. III, at 556.) Both Gina Tenney and Mark Passarello were "A secretors." (Trial Tr., Vol. III, at 556.) Horace Landers was an "A non-secretor." (Trial Tr., Vol. III, at 557.) And of the samples submitted, only Defendant was a "B non-secretor." (Trial Tr., Vol. III, at 557.)

This is further confirmed by Brenda Gerardi's DNA analysis that excluded "Horace Landers as being a source of any of the DNA, the forensic DNA profiles from the vaginal swabs," and from Gina Tenney's underwear. (Trial Tr., Vol. III, at 586-587.)

As for Sandra Allie's identification, Mrs. Allie testified that she choose the wrong person. She testified that she went down to the police station to identify the person she saw at the ATM machine that night, but intentionally chose the wrong person, because

she was terrified: I “went to the extreme opposite and identified a short, light-skinned person.” (Trial Tr., Vol. II, at 325.)

At trial, Sandra Allie looked at a photo of the line-up from 1985, and identified Appellant as the person she saw standing at the ATM machine. Sandra Allie got a good look at Appellant while she waited behind him at the ATM machine. (Trial Tr., Vol. II, at 326-327, 333.) And this is the same person her husband, John Allie, saw there. In fact, when Appellant came out, he stood in front of the Allies’ vehicle and waved to Mr. Allie because they were familiar with each other from the neighborhood. (Trial Tr., Vol. II, at 291-294.)

Furthermore, the Seventh District found that there was overwhelming evidence to establish Defendant’s guilt beyond a reasonable doubt:

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. As the victim knew appellant, a juror could conclude that to rape her would require him to kill her. Ligation marks on her neck and wrists establish that a cord was used, showing the death was not an accidental result of the other felonies.

Adams, 2011 Ohio 5361, at ¶ 354. Further, Defendant “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.” *Id.* at ¶ 366.

Here, the record does not demonstrate that had appellate counsel raised a sufficiency argument, the outcome of the appeal would have been different. The State presented sufficient evidence that Defendant purposely caused the death of Gina Tenney while committing or attempting to commit Kidnapping, Rape, Aggravated Robbery, and/or Aggravated Burglary. Therefore, appellate counsel was constitutionally effective.

Defendant’s third proposition of law is meritless and must be overruled.

Conclusion

WHEREFORE, Appellee-State of Ohio hereby requests that this Honorable Court Overrule Defendant-Appellant Bennie L. Adams' Propositions of Law and Deny his request for relief, allowing his conviction and sentence of death to stand.

Respectfully Submitted,

PAUL J. GAINS, 0020323
MAHONING COUNTY PROSECUTOR BY:

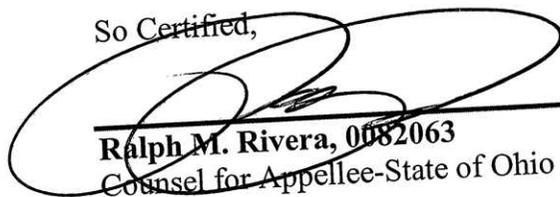

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Certificate of Service

I certify that a copy of the State of Ohio's Answer Brief was sent via U.S. Regular Mail to counsel for Appellant, **Kimberly S. Rigby, Esq.**, and **Kathryn L. Sanford, Esq.**, at their above address on October 23, 2012.

So Certified,


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