

In The Supreme Court of Ohio

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

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

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Reply Brief of Appellant Bennie Adams

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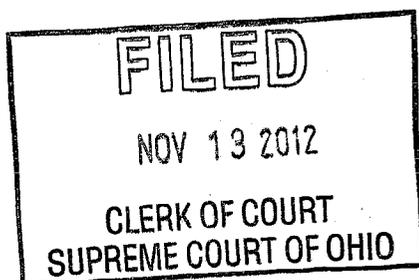
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## **Preface**

Appellant Bennie Adams replies to the Appellee's Merit Brief, which was filed on October 24, 2012. A failure to respond to any specific argument is not a waiver of that argument. Rather, Adams relies on his original Merit Brief.

## Argument

As the State points out, “appellate counsel *need not raise every possible issue* in order to render constitutionally effective assistance.” See State’s Merit Brief at p. 28; *State v. Jones*, 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, 151-52 (2002). However, though an accurate statement of the law, what the State fails to mention is that if there was a reasonable probability of success had trial counsel presented the claims now being raised, it is clearly ineffective performance to forgo raising those claims during the first appeal of right. *State v. Sheppard*, 91 Ohio St. 3d 329, 330, 744 N.E.2d 770 (2001). The claims raised herein would have been successful on appeal. Thus, appellate counsel were ineffective for failing to raise these meritorious issues during the pendency of Adams’ direct appeal. See Exhibits A-C.

## PROPOSITION OF LAW NO. 1

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

### **I. Introduction.**

Contrary to the State's flawed reasoning, both the autopsy report and the testimony of Dr. Humphrey Germaniuk should not have been admitted against Adams at his capital trial. This is a clear violation of the holdings in *Crawford* and its progeny and a violation of Adams' Sixth Amendment right of confrontation.

### **II. The case law relied upon by the State is misleading.**

The State points out the most important cases to be considered in this analysis, including *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009), *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), and *Williams v. Illinois*, 132 S. Ct. 2221 (2012). See State's Merit Brief at pp. 30-35. However, the State then also relies upon *State v. Lopez*, a Twelfth District Court of Appeals case, whose facts bear no resemblance to the case at bar. 186 Ohio App. 3d 328 (12th Dist. 2010). As the State even admits, the reason that this Court granted the State's motion for summary judgment in that case was because the issue could not be decided, since the reasoning of the court below was not that the defendant's right to confrontation had not been violated, but instead that the violation was harmless in light of the facts of the case. See State's Merit Brief at p. 37. *Lopez* is inapposite.

The State next relies on *State v. Craig* (hereinafter *Craig I*), 110 Ohio St. 3d 306, 320 (2006), pointing out to this Court that *Craig I* is technically still controlling here. See State's Merit Brief at p. 38. That may be technically true; however, as this Court is aware, this Court

ordered briefing in *State v. Craig*, No. 2006-1806 (hereinafter *Craig II*) and is currently reconsidering *Craig I*'s decision. In fact, *Craig II* is set for oral argument on January 22, 2012. To argue that *Craig I* is controlling is to ignore that this Court is currently reevaluating its prior decision in light of recent U.S. Supreme Court case law.

The State then argues that regardless what the Supreme Court's pronouncements have been in the recent years, the decision in *Craig I* is still correct. This argument is also unavailing. In light of the change in jurisprudence from the U.S. Supreme Court in the recent years, *Craig I* can no longer stand. Contrary to the State's appeals, autopsy reports, and the testimony that flows from those reports, are testimonial as the primary purpose of an autopsy is indeed "for the purpose of establishing or proving some facts at trial." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). Particularly in a case like Adams, where it is both clear that the death was a homicide (i.e. the victim's body was found in the Mahoning River (tr. 184) and delivered to the morgue by the Youngstown police) and the defendant, Adams here, was an initial suspect, was already in custody, and had already been interrogated by the time that the autopsy was conducted (tr. 149-51), the autopsy and resultant conclusions were clearly prepared for use at the defendant's trial, and specifically, against the defendant. See also *Melendez-Diaz*, 557 U.S. at 317-18, fn.5 (emphasis added) ("Some forensic analyses, such as *autopsies* and breathalyzer tests, cannot be repeated", thus confrontation is the best way to challenge or verify the results in those instances.). *Craig I*'s pronouncement that autopsy reports are non-testimonial business records, at least under the facts as procured here, cannot stand.

**III. Dr. Nathan Belinky did not do the autopsy in this case; Dr. Rona was available to testify.**

The State completely ignores a crucial fact in this case. Dr. Nathan Belinky, the previous Mahoning County Coroner, who was deceased by the time of Adams' capital trial, did not in fact

do the autopsy in this case. Instead, the autopsy was conducted by a Dr. Rona who was listed as the “prosector” on the autopsy report. See State’s Ex. 63; Tr. 440. A “prosector” is defined as “a person who makes dissections for anatomic demonstrations.” See [www.merriam-webster.com/dictionary/prosector](http://www.merriam-webster.com/dictionary/prosector) (current as of November 12, 2012). The State was aware that Dr. Rona conducted the autopsy, since it contacted Dr. Rona prior to trial, and Dr. Rona was alive and ostensibly available. 8/13/08 pretrial, Tr. 12; 9/5/08 pretrial, Tr. 23. Yet, instead of calling the doctor who performed the autopsy, the State chose to have Dr. Germaniuk testify as to the autopsy report and the cause of death. This was constitutional error.

Dr. Germaniuk could not “substitute” for Dr. Rona, as Dr. Rona had the first-hand knowledge of the autopsy and his findings and conclusions. As was laid-out in *Melendez-Diaz*, before a substitute witness is constitutionally acceptable, the test to be employed is two-fold: 1) the pathologist that conducted the autopsy (Dr. Rona) must be unavailable, and 2) if that pathologist (Dr. Rona) is unavailable, then there must have been a previous opportunity to cross-examine that pathologist (Dr. Rona) regarding this autopsy and his techniques utilized. See *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004). The test fails on the first prong (which renders the second prong inapplicable), as Dr. Rona was clearly available.

#### **IV. Dr. Germaniuk’s testimony violated Adams’ right to confrontation.**

Here, Dr. Germaniuk testified about the autopsy and findings. Throughout his testimony, he relied on the findings of Dr. Rona and the final report that was ultimately entered into evidence. See *e.g.* Tr. 408, 423, 424, 425; State’s Exhibit 63. As Dr. Germaniuk did not conduct the autopsy, nor was he even associated with the Mahoning County Coroner’s Office, he was obviously not relying on anything that he observed first-hand. Because Adams had a right to

confront the pathologist who actually conducted the autopsy in this case, none of the testimony should have been presented against Adams. *Crawford*, 541 U.S. at 68-69.

As Adams anticipated, the State argued that Dr. Germaniuk's off-the-report testimony, that criticized Dr. Belinky, the Mahoning County Coroner, and some of the practices utilized during the autopsy, cures any confrontation problem here. State's Merit Brief at pp. 40-43. However, this reasoning is incorrect and cannot cure the constitutional violation that occurred. First, Dr. Germaniuk indeed relied on the conclusions as stated in the autopsy report. State's Ex. 63; *See e.g.* Tr. 408, 423-25. In addition, the fact that Dr. Germaniuk was able to speculate as to how the autopsy was or was not performed correctly only further deepens the problem—instead of the report being admitted as one truth against Adams, two truths were admitted without confrontation: 1) the autopsy report and the cause of death and 2) the ruminations and findings of Dr. Germaniuk, who relied on the autopsy report but then speculated as to his own conclusions, absent first-hand knowledge of the actual autopsy and/or practices utilized.

#### **V. Conclusion.**

Especially in a case like this where it was apparent from the get-go that this was a homicide investigation, the forensic pathologist was on notice that the finalized report would likely be utilized in a criminal prosecution. The pathologist performing the autopsy, here Dr. Rona, did not merely prepare a report as a routinely performed test; instead Dr. Rona was a highly skilled and trained medical specialist whose observations and conclusions, combined with those of the investigating officers, were put into a finalized report. Indeed, "medical examiners are not mere scribes reporting machine generated raw-data." *See Bullcoming*, 131 S. Ct. at 2714. "The observational data and conclusions contained in the autopsy reports are the product of the skill, methodology, and judgment of the highly trained examiners who actually performed

the autopsy.” *United States v. Ignasiak*, 667 F.3d 1217, 1232 (11th Cir. 2012). Therefore, the criminal defendant must have the right to confront the person who actually performed that autopsy. *Id.*

The prejudice is also apparent—absent this report and the attending testimony of Dr. Germaniuk—proving Adams killed Tenney would have been practically impossible. In addition, absent the speculation of Dr. Germaniuk on direct examination concerning the allegations of rape and kidnapping, it would have been all but impossible to prove those specifications. See Proposition of Law No. 3 for further argument as to the prejudice component concerning the specifications of rape and kidnapping.

It was required that Adams have had the opportunity to cross-examine the author of the autopsy report. The findings in that report went unchallenged. Adams’ right to confrontation was violated, and he was prejudiced.

## 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. AMENDS. VI AND XIV, OHIO CONST. ART. I, § 10.**

### II(A)(6)

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

#### I. Introduction.

The State argues that trial counsel were not ineffective for failing to object to Dr. Germaniuk's testimony and the admission of the autopsy report. This is incorrect.

#### II. Unconstitutional testimony.

The State claims that "Dr. Germaniuk testified to his own expert opinions and conclusions regarding Gina Tenney's cause of death rather than simply passing along testimonial statements." State's Merit Brief at p. 61. Dr. Germaniuk did not have credibility to make any findings regarding Ms. Tenney's cause of death—he did not perform the autopsy nor did he ever actually examine the body or perform any testing.

Dr. Germaniuk was a "substitute witness" (Tr. 402) who had no involvement with this case. It was nonsensical for him to testify given that the prosecutor, Dr. Rona, was alive and had been contacted by the Prosecutor. 8/13/08 pretrial, Tr. 12; 9/5/08 pretrial, Tr. 23. Dr. Germaniuk relied on the autopsy report prepared by others, including Dr. Rona, photographs and a DVD for his testimony; Dr. Germaniuk did not have any first-person involvement with examining the victim's body or determining the cause and manner of death. Thus, Dr. Germaniuk was "passing along testimonial statements" because he had to rely on the work of others. For instance, he testified that "*they noted* petechial hemorrhages in the eyes, the whites

of the eyes, and I believe *they also noticed* petechial hemorrhages” (tr. 418) (emphasis added) demonstrating that he was passing along testimonial statements—improperly, under *Crawford v. Washington*, 541 U.S. 36 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) and *Williams v. Illinois*, 132 S. Ct. 2221 (2012).

Similarly, none of the information contained in the autopsy report was subject to proper confrontation because the only witness presented to testify about it, Dr. Germaniuk, did not have any involvement with the actual autopsy. For example, he could not testify from his own knowledge as to the “Autopsy and Physical Findings” (State’s Ex. 63) because he was not a part of that determination.

### **III. Conclusion.**

Trial counsel were ineffective for failing to object to Dr. Germaniuk’s testimony and the admission of the autopsy report. Adams’ rights to confrontation and the effective assistance of counsel as guaranteed by the Sixth Amendment were violated and he was prejudiced because he was not able to cross-examine the person who actually performed the autopsy even though that person was not unavailable. *Strickland v. Washington*, 466 U.S. 668 (1984); *Crawford v. Washington*, 541 U.S. 36 (2004).

## PROPOSITION OF LAW NO. 3

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

#### I. Introduction.

The State cites to the Seventh District Court of Appeals' decision for the argument that Adams' guilt was established beyond a reasonable doubt. State's Merit Brief at p. 71. However, that decision relies on unsupported speculation.

#### II. Unsupported findings.

Specifically, the court of appeals stated in the direct appeal decision that "Ligature marks on her neck and wrists establish that a cord was used..." and that Adams "raped her, strangled her with a cord..." *Id.*, quoting *State v. Adams*, 2011 Ohio 5361 at P354 (7th App. Dist. Oct. 14, 2011). The autopsy report, though, does not make the conclusions that the court of appeals did. The autopsy report states "Ligature type contusion – anterior and lateral aspects of neck area." State's Ex. 63. On the page titled "Full body, female, anterior and posterior views," the marks on the drawing of the female body include the words "Contusion abrasion" with a line pointing to the neck area. But that is not unique because the words contusion and/or abrasion are found at multiple other places on the body on that page of the autopsy report. *Id.*

Dr. Germaniuk's testimony also did not establish the facts found by the court of appeals concerning the ligature marks on the neck and that a cord was used. Dr. Germaniuk testified that "[w]e can see a faint outline of what appears to be a mark across the neck" (tr. 406), "a faint line of bruising on the front part of the neck" (tr. 407), "we certainly have what *appears* to be ligature strangulation with that 7-inch band by a quarter-inch band about the neck" (tr. 417) (emphasis

added), “faint ligature mark” (tr. 420), “faint superficial pressure furrow” (*Id.*). Dr. Germaniuk testified that the cord he was shown by the State may or may not have made the marks to the victim’s neck. Tr. 441. He further testified that he could not really say that the ligature marks were the cause of the victim’s death, that there were a slew of options and it was probably a combination of causes. Tr. 444-45.

As far as the allegations of rape, Dr. Germaniuk was unable to make any definitive conclusion. He testified in agreement with the statement that based on the investigation that had been done, he could not say one way or another whether the victim had been raped. Tr. 438-39. And the autopsy report makes no finding with respect to the victim being raped. The autopsy report states “FEMALE GENITALIA: The uterus, vagina, fallopian tubes and ovaries are present in their *normal positions*. The uterus, ovaries and fallopian tubes are *unremarkable*.” State’s Ex. 63 (emphasis added).

The coroner’s office took swabs from the vaginal, rectal, and oral cavities of the victim. State’s Ex. 63. It only makes sense that while the coroner was retrieving these samples, the examining pathologist, Dr. Rona, would have also noted any evidence that a raped occurred. Yet nothing was noted. Absent cross-examination of Dr. Rona on that point, it is impossible to derive any other conclusion. See Proposition of Law No. I for further argument as to the necessity to cross-examine Dr. Rona as to his findings and conclusions.

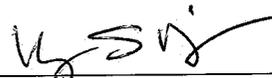
### **III. Conclusion.**

The finding of the court of appeals is unsupported by the evidence presented at trial. The evidence presented was insufficient to support the conviction of aggravated murder and the attendant specifications.

### Conclusion

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

Respectfully submitted,

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### Certificate of Service

I hereby certify that a true copy of the foregoing Reply Brief of Appellant Bennie Adams was forwarded by regular U.S. Mail to Paul Gains and Ralph Rivera, Mahoning County Prosecutor's Office, 21 W. Boardman St., 6th Floor, Youngstown, OH 44503 on this 13<sup>th</sup> day of November, 2012.

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