

In The Supreme Court Of Ohio

State Of Ohio, :  
 Appellee, :  
 -Vs- : Case No.: 2007-2027  
 Wayne Powell, :  
 Appellant. : **This Is A Capital Case.**

ON APPEAL FROM THE COURT OF  
 COMMON PLEAS OF LUCAS COUNTY  
 CASE NO. CR06-3581

APPELLANT'S APPLICATION FOR REOPENING  
 PURSUANT TO S.CT. PRAC. R. XI, SECTION 6

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 SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
Appellee, : Supreme Court Case No. 2007-2027  
-vs- : Trial Court Case No.: 06-3581  
WAYNE POWELL, :  
Appellant. : **This is a capital case.**

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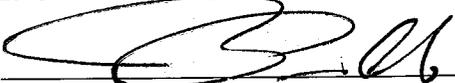
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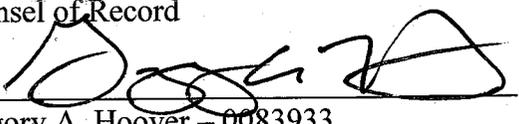
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Appellant Wayne Powell, through counsel, moves this Court to reopen his direct appeal as of right in Case No. 2007-2027. S.Ct. Prac. R. XI, Section 6. Appellant shows good cause for this request, and he presents his assignments of error in support of this request, in his attached Memorandum.

Respectfully submitted,

Office of the Ohio Public Defender

By:   
Jennifer A. Prillo - 0073744  
Counsel of Record

By:   
Gregory A. Hoover - 0083933  
COUNSEL FOR APPELLANT

## Memorandum in Support

### **A. Procedural history.**

Appellant Wayne Powell was indicted on ten counts of aggravated murder and one count of aggravated arson. The jury found him guilty of all counts. Powell was sentenced to death on four counts of aggravated murder and sentenced to 10 years in prison for aggravated arson. Attorneys Spiros Cocoves and Gary Crim represented Powell on appeal.

This Court affirmed Powell's convictions and death sentence on June 13, 2012. *State v. Powell*, 132 Ohio St. 3d 233, 2012 Ohio 2577, 971 N.E.2d 865, (2012). Direct appeal counsel then filed a motion for reconsideration which was denied September 26, 2012.

### **B. Appellate counsel were ineffective for failing to ensure a complete record was before this court.**

Under Article I, § 16, of the Ohio Constitution, Powell is entitled to a "complete, full, and unabridged transcript of all proceedings against him so that he may prosecute an effective appeal." *State ex. rel. Spirko v. Court of Appeals, Third Appellate Dist.*, 27 Ohio St. 3d 13, 18 (1986); *Griffin v. Illinois*, 351 U.S. 12 (1956) (recognizing the necessity of the transcript in order to vindicate a defendant's constitutional right to appellate review); see also S.Ct. Prac. R. 5.1.

Here, appellate counsel failed to ensure that a complete record was before this Court because they failed file a motion to supplement the record with a statement of the proceedings according to Ohio App. R. 9. Because of that omission, portions of the record in this case were missing when this Court affirmed Powell's convictions and sentence on June 13, 2012 and when it denied his motion for reconsideration on September 26, 2012.

"When considered together, the Rules of Criminal Procedure and the Rules of Appellate Procedure clearly require that a complete and accurate record be created in capital cases. The reason for this is simple: the unique nature of capital cases demand a heightened level of care in

constructing the record to guarantee regularity of the proceedings and assist in appellate review.” *State v. Clinkscale*, 122 Ohio St. 3d 351, 354, 2009 Ohio 2746, 12, 911 N.E.2d 862, 866, (2009). Furthermore, this court has laid out a clear test for the reversal in death-penalty cases based on unrecorded proceedings. Counsel must ask that conferences be recorded or object to the failure to do so, attempt on appeal to reconstruct the unrecorded proceedings, and show material prejudice. *State v. Palmer*, 80 Ohio St. 3d 543, 554; 1997 Ohio 312, 27; 687 N.E.2d 685, 696 (1997).

In Propositions of Law Nos. Thirteen and Fifteen in Powell’s merit brief, appellate counsel make a passing reference to unrecorded bench conferences and the jury instruction conference and to trial counsel’s failure to preserve the issues for appellate review. Appellant’s Brief p. 56, 61. They were clearly aware that the record was not complete, yet made no effort to comply with Ohio App. R. 9 and reconstruct the record. During Powell’s capital murder trial, there were at least sixty-nine off the record discussions. Ohio Crim. R. 22 states that in serious offense cases all proceedings shall be recorded. A capital murder trial is certainly a “serious offense case.” Powell’s direct appeal counsel had a remedy available to them to restore the record, but they inexplicably failed to take advantage of that remedy.

Under Ohio App. R. 9(C), appellate counsel should have prepared a statement of what transpired at these unrecorded bench conferences, and moved to have the trial court make them part of the record. “If no recording of the proceedings was made, if a transcript is unavailable, or if a recording was made but is no longer available for transcription, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant’s recollection.” *Id.*

Powell was prejudiced by direct appeal counsel's failure to reconstruct the trial court's post-verdict discussions with the jury. After the jury's sentencing verdict was read but before the court sentenced Powell, the judge met with the jury. Tr. 2672. The failure by appellate counsel to reconstruct this discussion impeded Powell's ability to show what occurred in this exchange, whether improper influence was exerted, and whether Powell's constitutional rights were violated. Appellate counsel raised this issue as trial court error, however, in its decision, this Court noted that Powell had "not attempted, in his effort to show prejudice, to reconstruct what the trial court discussed with the jurors." *Powell*, 132 Ohio St. 3d at 267, 2012 Ohio 2577 ¶195, 971 N.E.2d at 902.

Appellate counsel's failure to comply with this rule resulted in Powell's direct appeal being decided on an incomplete record. It was a violation of Powell's constitutional rights to decide this appeal absent a full and complete record. Article I, § 16, of the Ohio Constitution; *Spirko*, 27 Ohio St. 3d at 18. Therefore, this Court must re-open Powell's direct appeal.

**C. Appellate Counsel was ineffective for failing to raise meritorious issues.**

After a review of the direct appeal brief that was filed on Powell's behalf, it is apparent that his appellate attorneys were prejudicially ineffective for failing to raise meritorious issues that arose during his capital trial. (*See Ex. A.*) Therefore, this Court must reopen his appeal. *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992) and S.Ct. Prac. R. XI, Section 6(E). Specifically, Powell's appellate counsel were ineffective for failing to raise the claims listed in subsection D, below.

**D. Meritorious issues not raised on appeal.**

The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on a criminal appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). Appellate counsel

must act as an advocate and support the cause of the client to the best of their ability. *See, e.g., Anders v. California*, 386 U.S. 738 (1967); *Penson v. Ohio*, 488 U.S. 75 (1988). Failure to present a meritorious issue for review constitutes ineffective assistance of appellate counsel. *See, e.g., Franklin v. Anderson*, 434 F.3d 412 (6th Cir. 2007); *State v. Ketterer*, 111 Ohio St. 3d 70, 855 N.E.2d 48 (2006). Had Powell's direct appeal counsel presented the following propositions of law to this Court, the outcome of his appeal would have been different<sup>1</sup>:

**PROPOSITION OF LAW NO. I: A defendant's right to effective assistance of counsel is violated when counsel's performance is deficient and the defendant is thereby prejudiced. U.S. Const. amends. VI, XIV; Ohio Const. Art. 1 §10.**

Trial counsel were ineffective for failing to file a motion to record all bench conferences at trial. The Sixth and Fourteenth Amendments guarantee the accused the right to counsel at trial. *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963). The standard for judging counsel's effectiveness is found in *Strickland v. Washington*, 466 U.S. 668 (1984). When evaluating claims of ineffective assistance of counsel under *Strickland*, this Court must first determine if counsel's performance was deficient. *Id.* at 686-87. Second, this Court must determine if Powell was prejudiced by counsel's deficient performance. *Id.* at 686-87. This Court must assess whether Powell was deprived of a reliable trial result. *Id.* at 693-94. Thus, an appellant need not demonstrate outcome-determinative error. *See id.; Glenn v. Tate*, 71 F.3d 1204, 1210-11 (6th Cir. 1995).

Without a complete record, Powell cannot exercise the right to appeal in any meaningful or effective way. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). The Ohio Supreme Court has held that "Article I, Section 16 of the Ohio Constitution requires that a defendant in a capital case be afforded a complete, full, and unabridged transcript of all proceedings against him so that he may

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<sup>1</sup> Due to the page limitation imposed by S. Ct. Prac. R. XI, Section 5(D), Powell is unable to fully brief the issues not raised by prior appellate counsel. As such, Powell's failure to fully brief every single point outlined should not be the basis of a waiver of that issue or point.

prosecute an effective appeal.” *State ex rel. Spirko v. Judges of Court of Appeals, Third Appellate Dist.*, 27 Ohio St. 3d 13, 18, 501 N.E.2d 625, 627 (1986).

Powell was prejudiced by the fact that portions of his trial were unrecorded. Twice during the portion of the transcript in which the trial court and the parties were discussing the improper communications between jurors (*see* Proposition of Law II), there are unrecorded discussions. Tr. 1692, 1702. Moreover, the trial court stated on the record that “the Court Reporter has mentioned and reminded me that back part way through this process you [the prosecutor] had also made a request that Juror Number 1 be removed.” Tr. 1702. The prosecutor agreed. *Id.* Yet, nowhere in the transcript is there a record of the prosecutor’s prior request to remove Juror No. 1. Powell’s right to a fair and impartial jury was violated, but his ability to fully litigate that issue is hampered by the lack of a full record.

**PROPOSITION OF LAW II: A capital defendant’s right to due process is violated when a juror has impermissible discussions with another juror about the case and is not removed from the jury. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 5, 10.**

On third day of evidence, one of the jurors sent a note to the court. Tr. 1674; Court’s Ex. E<sup>2</sup>. Juror No. 9, Ms. Salas, indicated to the court that she and Juror No. 1, Mr. Hensel, had an improper discussion while carpooling to court. *Id.* Juror No. 9’s note informed the trial court that while driving to court, Juror No. 1 told her that “even though he wasn’t supposed to be watching the news, it said the trial should be done before the end of the week and no one else knows.” *Id.* Juror No. 9 indicated that she kept trying to change the subject but that Juror No. 1 kept trying to talk about the case. *Id.*

The trial court decided to bring in Jurors No. 1 and 9 to ask them about this conversation. So as not to arouse suspicion, the trial court would bring in two other jurors for a “spot check”

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<sup>2</sup> Juror No. 9’s note to the court was mistakenly marked as Court’s Ex. D. Later in the proceedings, it was noted that it should have been marked Court’s Ex. E. (Tr. 1725).

and would ask them about exposure to media or anyone talking about the case. Tr. 1675. Neither the defense nor the State objected. Tr. 1676-77.

When questioned by the trial court, Juror No. 9<sup>3</sup> gave a different account of events than what she had written in the note. Juror No. 9 told the court that Juror No. 1 kept telling her his feelings about the case. Tr. 1678. She also said that she kept asking him about how sequestering would work and wanted to know how long they would be sequestered. *Id.* Juror No. 9 indicated that Juror No. 1 did not say anything else about the news broadcast. Tr. 1679. The trial court then asked if hearing Juror No. 1 say that he believed, based on the news report, that the trial would be over by the end of the week had any influence on Juror No. 9. Tr. 1679-80. Juror No. 9 responded that it did not. Tr. 1680.

The prosecutor indicated to the judge that he and defense counsel thought that further questioning of Juror No. 9 was warranted to determine if Juror No. 1 talked about the evidence or about his emotional reaction to the case. Tr. 1682. The judge asked Juror No. 9, who responded that she thought Juror No. 1 had discussed his thoughts about the evidence presented. Tr. 1682-83. She went on to say that Juror No. 1 said he did not see how there was enough evidence to convict, that he had taken enough notes about the fire for the other jurors to look at, and that to convict Mr. Powell of murder they would have to convict him of arson. Tr. 1683.

The trial court questioned Juror No. 1. Juror No. 1 told the court that he had no exposure to media coverage of the case. Tr. 1690. Juror No. 1 also stated that no one had attempted to discuss the case with him and that he had not attempted to discuss it with anyone else. Tr. 1690-

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<sup>3</sup> Juror No. 9 is mistakenly referred to as "Juror 1" when she is speaking in this section of the transcript. It is clear that it is actually Juror No. 9 based on the questions and answers, but also she is correctly identified as number 9 before the questioning began as entering the Court's chambers (tr. 1677).

91. The judge specifically asked if he had attempted to discuss the case with any of the other jurors. Tr. 1691. Juror No. 1 said he had not. *Id.*

Defense counsel requested that the trial court remove Jurors 1 and 9. Tr. 1695. The judge and prosecutor expressed concerns that this would leave them with no alternates. Tr. 1695-96. The trial court stated that it would remove Juror No. 1. Tr. 1696-97. The trial court also determined that it would not remove Juror No. 9 because she “did exactly what was asked of [her].” Tr. 1697. The trial court went on to find that the removal of Juror No. 1 “would embolden Number 9 to continue to formulate her own independence as far as her consideration of the evidence one way or the other.” Tr. 1697-98. Defense counsel argued that the concern about having no alternate jurors should not be part of the court’s consideration. Tr. 1699. The judge said that was not part of his consideration, but that he was considering Juror No. 9’s “action bringing this to the Court’s attention, and her apparent desire to follow the rules carefully and follow the letter of the law carefully . . . [she] did exactly what she was asked to do.” Tr. 1699.

The Sixth Amendment guarantee of a trial by jury requires the jury verdict to be based on the evidence produced at trial. *Turner v. Louisiana*, 379 U.S. 466, 472 (1965); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). Extrinsic evidence which has not been subject to the procedural safeguards of a fair trial threatens such constitutional safeguards as to the defendant’s right of confrontation, of cross-examination, and of counsel. *Turner*, 379 U.S. at 473.

Trial courts have an affirmative duty to control all proceedings during the trial in order to prevent bias or prejudice against the accused or a denial of a fair trial. This duty includes preventing prejudicial occurrences from infecting the jury’s impartiality. *See Remmer v. United States*, 347 U.S. 227 (1954); *United States v. Pennell*, 737 F.2d 521, 530 (6th Cir. 1984).

The trial court erred in denying trial counsel's request to remove Juror No. 9. The trial court's reasoning was not sound. Juror No. 9 did not follow the trial court's admonitions. When asked about her interactions with Juror No. 1, Juror No. 9 specifically said that she had attempted to engage Juror No. 1 in conversation about sequestration and this was apparently related to what Juror No. 1 had learned about the end of the trial from the media. Tr. 1678. Juror No. 9 thus did not follow the trial court's rules. Accordingly, her reassurances that she could "fairly and independently consider[] the evidence," were not reliable as she had already failed to follow the trial court's instructions. *Id.*

Even though a juror's attestation of fairness is to be taken at face value, "[w]e cannot ignore the fact that jurors are human beings, subject to the same suspicions, perhaps subconsciously, as all other persons." *Pennell*, 737 F.2d at 532-33 (citing *United States v. Ferguson*, 486 F.2d 968, 971-72 (6th Cir. 1973)). "Determining whether a juror is biased . . . is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it." *Smith v. Phillips*, 455 U.S. 209, 222 (1982).

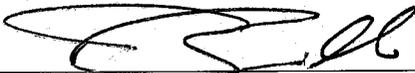
Juror No. 9 brought into the jury room extrinsic information that ultimately allowed impermissible influences upon the jury that determined Powell's guilt and sentence. The trial court had a duty to ensure that nothing would affect the impartiality of the jury's determination. The trial court should have removed both Jurors No. 1 and No. 9 to ensure that the jury was not infected with information from the media and to ensure that Powell's conviction and sentence were decided by a jury capable of following the trial court's admonitions and the law.

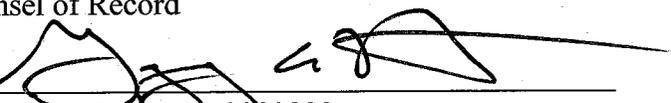
**E. Conclusion.**

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

Respectfully submitted,

Office of the Ohio Public Defender

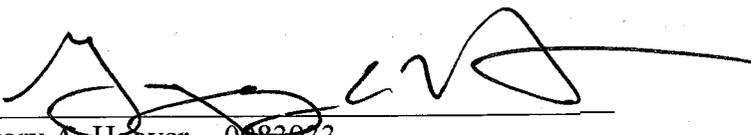
By:   
Jennifer A. Prillo - 0083933  
Counsel of Record

By:   
Gregory A. Hoover - 0083933  
Counsel for Appellant

**Certificate of Service**

I hereby certify that on December 24, 2012, I served a copy of the foregoing by depositing it in the United States mail addressed to:

David F. Cooper  
Assistant Prosecuting Attorney  
Lucas County, Ohio  
711 Adams St., 2<sup>nd</sup> Fl.  
Toledo, Ohio 43604

By:   
Gregory A. Hoover - 0083933

Counsel For Appellant

**EXHIBIT A**

**In The Supreme Court Of Ohio**

State Of Ohio,	:	
Appellee,	:	
-vs-	:	Case No.: 2007-2027
Wayne Powell,	:	
Appellant.	:	<b>This is a capital case.</b>

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**AFFIDAVIT OF JENNIFER A. PRILLO**

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STATE OF OHIO            )  
  ) ss:  
COUNTY OF FRANKLIN    )

I, Jennifer A. Prillo, after being duly sworn, hereby state as follows:

1. I am an attorney licensed to practice law in the state of Ohio since 2001. I have been an assistant state public defender with the death penalty division of the Ohio Public Defender since January 2005 and have been a supervisor in that division since September 2012.
2. I was assigned to work on Wayne Powell's post-conviction case.
3. I have reviewed the record in *State v. Powell*, Lucas County Common Pleas Case No. 06-3581. I have also reviewed the direct appeal briefs and oral argument presented to this Court in this case.
4. I am Rule 20 certified to represent indigent clients in death penalty appeals.
5. Because of the focus of my practice of law, my Rule 20 certification, and my attendance at death-penalty seminars, I am aware of the standards of practice involved in the appeal of a case in which the death sentence was imposed.
6. The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on an appeal as of right. *Evitts v. Lucey*, 469 U.S. 587 (1985).
7. The initial responsibility of appellate counsel, once the transcript is filed, is to ensure that the entire record has been filed with the Ohio Supreme Court. Appellate counsel has a

fundamental duty in every criminal case, and especially in a capital case, to ensure that the entire record is before the reviewing courts on appeal. Ohio Sup. Ct. Prac. R. XIX, § 4(A); R.C. 2929.05; *State ex rel. Spirko v. Judges of the Court of Appeals*, Third Appellate District, 27 Ohio St. 3d 13, 501 N.E. 2d 625 (1986); See also *Griffin v. Illinois*, 351 U.S. 12, (1956) (recognizing the necessity of the transcript in order to vindicate a defendant's constitutional right to appellate review).

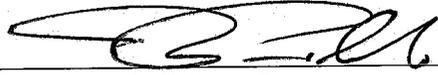
8. Appellate Rule 9(C) provides that where no recording was made of the proceedings, the "appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection." That statement must be served on the appellee no more than 20 days before the date on which the record is due to be transmitted to this Court. *Id.* The appellee may then make objections or propose amendments, and the trial court must settle the differences between the parties and approve the statement. *Id.* Once approved, the statement is included by the clerk of the trial court in the record on appeal. *Id.*
9. There were several unrecorded bench conferences and sidebars during the course of Mr. Powell's capital trial.
10. The record was not made complete via the mechanism provided by the Appellate Rules, thus this Court's decision in *State v. Powell* was based upon an incomplete record.
11. Appellate counsel must review the record for purposes of issue identification. This review of the record not only includes the transcript, but also the trial motions, exhibits, jury questionnaires, jury pool reports, and special jury questionnaires.
12. For counsel to properly identify issues, they must have a solid understanding of criminal law in general. Most trial issues in capital cases will be decided by criminal law that is applicable to non-capital cases. As a result, appellate counsel must be informed about the recent developments in criminal law when identifying potential issues to raise on appeal. Counsel must remain knowledgeable about recent developments in the law after the merit brief is filed.
13. Since the reintroduction of capital punishment in response to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the area of capital litigation has become a recognized specialty in the practice of criminal law. Many substantive and procedural areas unique to capital litigation have been carved out by the United States Supreme Court. As a result, anyone who litigates in the area of capital punishment must be familiar with these issues to raise and preserve them for appellate review.
14. Appellate representation of a death-sentenced client requires recognizing that the case will most likely proceed to the federal courts at least twice: first, on petition for Writ of Certiorari in the United States Supreme Court, and again, on petition for Writ of Habeas Corpus filed in a federal district court. Appellate counsel must preserve all issues throughout the state-court proceedings on the assumption that relief is likely to be sought in federal court. The issues that must be preserved are not only issues unique to capital

litigation, but also case- and fact-related issues unique to the case that impinge on federal constitutional rights.

15. It is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be exhausted in the state courts. This is all the more important in light of a recent case out of the United State Supreme Court, *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011).
16. It is important that appellate counsel realize that the reversal rate in the state of Ohio is approximately eleven percent on direct appeal and two percent in post-conviction. It is my understanding that forty to sixty percent (depending on which of several studies is relied upon) of all habeas corpus petitions are granted. Thus, appellate counsel must realize that in Ohio, a capital case is very likely to reach federal court and, therefore, counsel should prepare the appeal accordingly.
17. Based on the foregoing standards, I reviewed the record in Wayne Powell's case. I have identified the following issues that should have been evaluated by appellate counsel and fully presented to the Ohio Supreme Court:
  - **PROPOSITION OF LAW NO. I: A defendant's right to effective assistance of counsel is violated when counsel's performance is deficient and the defendant is thereby prejudiced. U.S. Const. amends. VI, XIV; Ohio Const. Art. 1 §10.**
  - **PROPOSITION OF LAW II: A capital defendant's right to due process is violated when a juror has impermissible discussions with another juror about the case and is not removed from the jury. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 5, 10.**
18. These issues are meritorious and warrant relief. Thus, appellate counsel's failure to present these errors amounts to ineffective assistance of appellate counsel in this case.
19. Appellate counsel failed to raise these issues in appellant Wayne Powell's direct appeal. Based on my evaluation of the record and understanding of the law, I believe the issues raised in this Application for Reopening are meritorious. Also, had appellate counsel raised these issues, each error would have been properly preserved for federal-court review.
20. Further, had counsel utilized Appellate Rule 9(C), the record on Wayne Powell's appeal of right would have been complete before this Court, and meritorious issues stemming from those missing portions of the record could have raised and preserved for federal-court review.

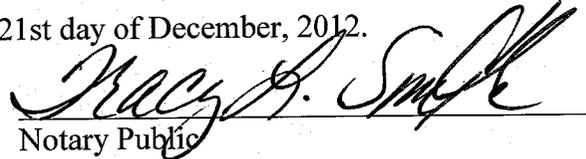
21. Therefore, Appellant Wayne Powell was detrimentally affected by the deficient performance of his former appellate counsel.

Further affiant sayeth naught.



JENNIFER A. PRILLO  
Counsel for Appellant Wayne Powell

Sworn to and subscribed before me on this 21st day of December, 2012.

  
Notary Public

TRACY L. SMITH  
NOTARY PUBLIC, STATE OF OHIO  
MY COMMISSION EXPIRES 5-18-16