

**ORIGINAL**  
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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

WAYNE S. POWELL,

Defendant-Appellant.

\* S.C. No. 2007-2027

\* On Appeal from the  
\* Lucas County Court of  
\* Common Pleas, Case  
\* No. CR06-3581

\* **DEATH PENALTY CASE**  
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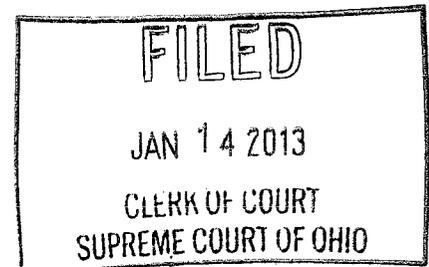
**MEMORANDUM OF APPELLEE, THE STATE OF OHIO IN OPPOSITION TO  
APPLICATION OF APPELLANT TO REOPEN APPEAL**

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JULIA R. BATES, PROSECUTING ATTORNEY  
LUCAS COUNTY, OHIO

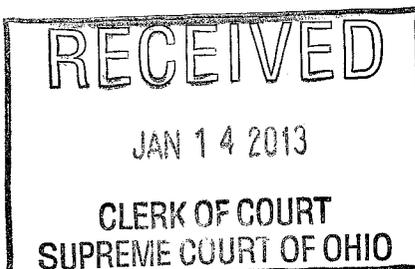
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## **STATEMENT OF THE FACTS AND OF THE CASE**

Defendant-Appellant, Wayne Powell ("defendant") was convicted in August, 2007 of Aggravated Arson, and of the Aggravated Murders of two adults and two children, and was sentenced to death. In defendant's merit appeal he asserted twenty-six assignments of error, all of which were rejected by this court, which affirmed the convictions and death sentence in June, 2012. *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N. E.2d 865.

On December 24, 2012, defendant, represented by new appellate counsel, filed an application to reopen his appeal to this court alleging ineffective assistance of appellate counsel and proposing two additional assignments of error.

### **PROCEDURAL AND SUBSTANTIVE REQUIREMENTS TO REOPEN AN APPEAL**

#### **A. Procedural Requirements**

S. Ct. Prac. R. 11.06(A) provides that an appellant in a death penalty case involving an offense committed after January 1, 1995, may apply for reopening of the appeal based on claims of ineffective assistance of appellate counsel. The rule requires this Court to review the assertions of deficient performance by appellate counsel and deny reopening unless it finds that appellant has raised a "genuine issue as to whether the appellant was deprived of the effective assistance of counsel on appeal."

S. Ct. Prac. R. 11.06(B) sets forth the requirements for an application to reopen, including: (1) one or more propositions of law or arguments in support of propositions of law not considered on the merits or considered on an incomplete record due to claimed ineffective assistance of counsel (*S. Ct. Prac. R. 11.06(B)(3)*), (2) An

affidavit stating the basis for the claims and how the claimed ineffectiveness prejudicially affected the outcome of the appeal (*S. Ct. Prac. R. 11.06(B)(4)*), and (3) "Any relevant parts of the record available to the applicant and all supplemental affidavits upon which appellant relies." (*S. Ct. Prac. R. 11.06(B)(5)*)

### B. Substantive Requirements

The applicable standard for adjudging ineffective assistance of appellate counsel and the circumstances under which an appellate court should reopen an appeal on that basis has been recently set forth by this Court as follows:

"The two-pronged analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to determine whether a defendant has received ineffective assistance of appellate counsel. See *State v. Sheppard* (2001), 91 Ohio St.3d 329, 330, 2001 Ohio 52, 744 N.E.2d 770; *State v. Spivey* (1998), 84 Ohio St.3d 24, 25, 1998 Ohio 704, 701 N.E.2d 696.

"In order to show ineffective assistance, appellant "must prove that his counsel were deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal." *Sheppard*, 91 Ohio St.3d at 330, 744 N.E.2d 770, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. Moreover, to justify reopening his appeal, appellant "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *Spivey*, 84 Ohio St.3d at 25, 701 N.E.2d 696."

*State v. Were*, 120 Ohio St.3d 85, 2008-Ohio-5277, 896 N.E.2d 699, ¶¶10,11.

Appellate counsel need not raise every conceivable issue on appeal. *State v. Gumm*, 73 Ohio St. 3d 413, 428, 1995-Ohio-24, 653 N.E.2d 253. The process of "winnowing out weaker arguments on appeal and focusing on' those more likely to prevail \* \* \* is the hallmark of effective appellate advocacy." *Gumm*, at 428 citing *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434, (1986).

Lastly, reviewing courts must apply a heavy measure of deference to counsel's judgments and indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987, 849 N.E.2d 1, ¶7.

## **ARGUMENT**

### **ADDITIONAL PROPOSED PROPOSITION OF LAW NO. I**

In his merit appeal to this Court, defendant asserted ineffectiveness of trial counsel in failing to object to unrecorded discussions with counsel and the trial court concerning jury instructions in the guilt phase, and in failing to object to unrecorded bench conferences (defendant's Proposition of Law No. XV (B)), and error in the trial court's ex parte discussion with the jury at the conclusion of the trial (defendant's Proposition of Law No. XIX.)

The claim of ineffectiveness in failing to object to not placing all of the discussions about guilt phase jury instructions on the record and failing to object to unrecorded bench conferences was rejected. Citing the syllabus in *State v. Palmer*, 80 Ohio St.3d 543, 1997-Ohio-312, 687 N.E.2d 685 (1997), this Court held that no prejudice was demonstrated, because, among other things, no evidence was provided the reviewing court as to what occurred in the unrecorded conferences, which could have been provided in the form of an agreed statement of the evidence under App. R. 9. *State v. Powell*, 2012-Ohio-2577, ¶¶201-209.

This Court also held that defendant's claim that the trial court erred in conducting an ex parte discussion with the jury at the conclusion of the penalty phase was also not

well taken because any prejudice to defendant was purely speculative and because defendant's appellate counsel did not attempt to show prejudice by reconstructing what occurred in the discussion as permitted by App. R. 9. *Powell*, supra, at ¶¶193-195.

In his first additional proposed Additional Proposed Proposition of Law No. I, defendant claims that his appellate counsel were ineffective for not employing the procedures provided by App.R. 9 in order to provide an appellate record for claiming error as to any part of the trial that was not recorded.

Defendant's application as to Additional Proposed Proposition of Law No. I should be rejected for several reasons:

(1) Defendant's new appellate counsel have not themselves attempted to reconstruct what occurred during the non-recorded portions of the trial which defendant now complains should be the basis of an additional assignment of error.

Defendant claims that his original appellate counsel were ineffective in not employing App. R. 9 to reconstruct portions of the record that were not reported. If defendant's new appellate counsel seriously desire to pursue an appeal based upon these parts of the record, then they themselves must reconstruct what occurred at trial in order to articulate the basis of any new assignment of error to be pursued in a reopened appeal.<sup>1</sup> They could have, for example, met with defendant, trial counsel and the trial court to reconstruct what occurred in each off-record transaction, and supplied a supplemental affidavit to support this application as provided for in S. Ct. Prac. R.

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<sup>1</sup> Similar to App. R 9, S. Ct. Prac. R. 11.03(D) now provides for an appellee to prepare a statement of the evidence or proceeding where material parts of the record were not recorded.

11.06(B)(5) for consideration by this Court. Otherwise, this Court cannot evaluate whether defendant's original appellate counsel were ineffective in failing reconstruct the record in the original merit appeal. Because defendant has not done this, his application should be rejected.

(2) Defendant has done no more than to allege that, somehow, something that occurred in the unrecorded portions of the trial could be of assistance in arguing some unarticulated error in a reopened appeal, without designating what such error might conceivably be.

In *State v. DePew*, 38 Ohio St.3d 275 at 279, 528 N.E.2d 542 (1988), this Court concluded that an appeal predicated on an incomplete transcript must fail when the appellant "makes only general averments that the missing information 'could be vital' to his arguments." See, also, *State v. Palmer*, supra, at 555, ("general averments do not act as a substitute for an actual showing of prejudice").

(3) Defendant has not satisfied his burden of demonstrating that there would have been a reasonable probability of success had original counsel presented a claim based upon unrecorded portions of the trial in the merit appeal.

Defendant bears the burden of establishing that if his former appellate attorneys in the merit appeal had presented an assignment of error based upon the unreported parts of the record, such assignment of error had a reasonable probability of success on appeal. *State v. Were*, 2008-Ohio-5277, ¶11. Not providing a reconstructed record of what these unreported portions of the record would reveal means that defendant has not and cannot establish the further requirement that some assignment of error likely would have been successful on appeal

## ADDITIONAL PROPOSED PROPOSITION OF LAW NO. II

### The Trial Court's Retention Of Juror No. 9 Was Not Error And It Did Not Constitute Ineffective Assistance Of Counsel To Decline To Raise Such Issue On Appeal

After the trial had proceeded for three days, juror no. 9 sent a note to the court advising that she had been carpooling with juror no. 1. In her note and during an in-chamber voir dire of her, juror no. 9 related that juror no. 1 had been trying to discuss with her his thoughts about the case and had advised her that, according to media, the trial would be over by the end of the week (T 1674, 1678.) Apparently the comment about the trial being over by the end of the week was stimulated by juror no. 9's question about how sequestration would work. Juror no. 9 indicated that nothing in her carpool conversations with juror no. 1 would affect her consideration of the case in any way. Juror no. 1 was excused at the request of both the defense and the prosecutor. Juror no. 9 was kept on the panel because the trial judge believed that she had done nothing wrong and that her voir dire by the court and counsel had confirmed her ability to be fair and impartial and to retain her independent judgment of the case (T 1696-1700.)

Defendant claims that the trial court erred in denying trial defense counsel's request to also remove juror no. 9. Juror no. 9 should have been removed, defendant now claims, because she did not follow the court's admonitions when she inquired of juror no. 1 as to how sequestration would work. However, so far as we can determine, the trial court did not admonish the jury not to discuss jury sequestration. The trial court, in its instructions to the jury prior to commencement of voir dire did tell the jury not to

discuss the case among themselves or anyone else or let anyone discuss the case with them. The trial court further advised the jury not to form or express an opinion about the case until it was finally submitted (T 33.) The trial court also told the jury that it must avoid media coverage of the trial and instructed them not to read, view or listen to any reports about the case (T 34.) Although the court advised the jury that it was likely to be put up at a local hotel for an unknown period of time while deliberating the case (T 27, 28), the court did not advise them not to discuss sequestration. It is not improper for a juror to talk to his or her spouse along these lines: "Honey, I am on a jury and cannot talk to you about the case or follow it on the local media, but at the end of the evidence, I may be required to hole up in a local hotel with the other jurors in order to deliberate. I will let you know, as soon as I find out, when I have to go to the hotel." Juror no. 1 was properly removed from the jury for ignoring the court's admonitions in following the case in the media, and for talking to juror no. 9 about his thoughts on the evidence, but juror no. 9 did not do this, nor did she fail in any way to follow the trial court's admonitions. Indeed, on this record, it would have been improper to remove juror no 1, especially after she strongly affirmed that juror no. 1 did not infect her independent judgment and ability to be fair.

Appellate counsel was not ineffective in not raising an issue in the merit appeal pertaining to the trial court's decision to retain juror no. 9, because it is clear that the trial court properly decided to retain her. Appellate counsel have no duty to raise every conceivable assignment of error, but should be expected to exercise their professional judgment in selecting the best arguments for appeal. Moreover, this appeal

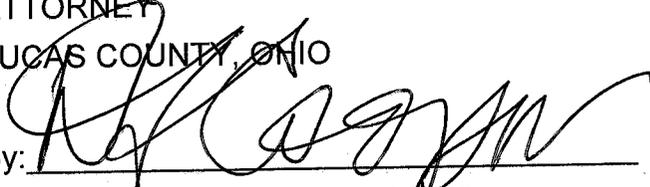
should not be reopened in order to pursue such an assignment of alleged error because it would have no probability of success in this Court.

**CONCLUSION**

For all of the reasons set forth above, this Court should find that no genuine issue exists as to whether defendant was denied effective assistance of counsel.

Respectfully submitted,

JULIA R. BATES, PROSECUTING  
ATTORNEY  
LUCAS COUNTY, OHIO

By: 

David F. Cooper (#0006176)  
Assistant Prosecuting Attorney

**CERTIFICATION**

This is to certify that a copy of the foregoing memorandum was sent via ordinary U.S. Mail this 9<sup>th</sup> day of January, 2013 to Jennifer A. Prillo and Gregory A. Hoover, Assistant State Public Defenders, Office of the Ohio Public Defender, Death Penalty Division, 250 E. Broad St., Suite 1400, Columbus, Ohio 43215, counsel for Defendant-Appellant, Wayne S. Powell.



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