

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :

Appellee, : Supreme Court Case No. 2009-0739

-vs- : **This is a capital case.**

HERSIE WESSON, :

Appellant. :

**ON APPEAL FROM THE SUMMIT COUNTY COURT OF COMMON PLEAS,
CASE NO. CR2008030710**

**APPELLANT HERSIE WESSON'S APPLICATION FOR REOPENING
PURSUANT TO S.CT. PRAC. R. 11.06**

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PURSUANT TO S.Ct. Prac. R. 11.06

Appellant Hersie Wesson asks this Court to grant his Application for Reopening based upon the ineffective assistance of counsel during Wesson's direct appeal. S.Ct. Prac. R. 11.06 and *State v. Murnahan*, 63 Ohio St.3d 60 (1992).

I. Wesson's direct appeal counsel were constitutionally ineffective.

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). After a review of the direct appeal that was filed on Wesson'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* Propositions of Law I -III, *infra*.

As further evidence of appellate counsel's ineffectiveness, it is informative to look at the opinion and what issues this Court noted were not raised. For example, this Court discussed the issue of voluntary intoxication and how this defense was strictly limited to police questioning

and suppressing Wesson's responses. *State v. Wesson*, 2013-Ohio-4575, 2013 Ohio LEXIS 2342, *P 129. ("However, Wesson did not present evidence of alcohol impairment at the time of the murder, though he claimed that he had been impaired the next day, when he spoke to police."). No defense of voluntary intoxication was presented in relation to the murder itself despite the fact "...Wesson consumed alcohol at a young age, was alcohol dependent, and engaged in bouts of binge drinking." *Id.* Additionally, this Court noted that testimony regarding brain impairment was presented but was never confirmed. *Wesson* at *P 130.

Because appellate counsel were prejudicially ineffective in this case, this Court must reopen Wesson's appeal. *State v. Murnahan*, 63 Ohio St.3d 60 (1992) and S.Ct. Prac. 11.06.

II. Appellate counsel were prejudicially ineffective for failing to raise meritorious issues on Appellant Wesson's behalf.¹

The failure to present a meritorious issue for review constitutes ineffective assistance of counsel. See e.g., *Franklin v. Anderson*, 434 F.3d 412 (6th Cir. 2007); *State v. Ketterer*, 111 Ohio St.3d 70 (2006). Had Appellant Wesson's direct appeal counsel presented the following propositions of law, the outcome of this appeal would have been different.

Proposition of Law No. I: A defendant is denied the right to the effective assistance of counsel when trial counsel prejudicially fails his client during his capital trial. U.S. Const. Amends. V,VI, XIV; Ohio Const. Art. I, §§ 2, 9, 10 and 16.

The Sixth and Fourteenth Amendments guarantee the accused the right to counsel at trial. *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963). When evaluating claims of ineffective assistance of counsel, this Court must determine if counsel's performance was deficient, and if so, whether petitioner was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984); *Glenn v. Tate*, 71 F.3d 1204, 1210-11 (6th Cir. 1995).

¹ Due to the page limitation imposed by S.Ct. Prac. R. 11.06, Wesson is unable to fully brief the issues not raised by prior appellate counsel as he would like. Wesson's failure to fully brief every single point outlined should not be the basis of a waiver of that issue or point.

A. Appellant's trial counsel failed to present the defense of voluntary intoxication.

Appellate counsel did not raise as error trial counsels' failure to present the defense of voluntary intoxication, despite Wesson's admissions on the record that he was a chronic alcoholic and testimony that he drank continuously the day of the offense. Specifically, Wesson testified that he drank a fifth of Mad Dog, "had about 10 beers total," and had nothing to eat all day. (Sup. Hrg. 50-52). This Court has recognized that "the diminished capacity of intoxicated persons to appreciate the wrongfulness of their conduct, and then refrain from such conduct, may be a relevant consideration in determining the degree of punishment inflicted upon them..." *State v. Sowell*, 39 Ohio St.3d 322, 325 (1988). *See also, State v. Staten*, 18 Ohio St.2d 13 (1969); *State v. Bedford*, 39 Ohio St.3d 122 (1988).

Here, the Court's opinion noted the very limited application of the voluntary intoxication defense at trial. *Wesson* at *P 129. Excessive drinking, even in a chronic alcoholic, will result in dangerous risk taking and impaired judgment. (Sup. Hrg. 39). Given Wesson's admissions on the record that he was drunk that day, it is unclear why a voluntary intoxication defense would be abandoned in favor of a self-defense claim involving an elderly victim.

B. Appellant's trial counsel erred by failing to present the testimony of an expert on Alzheimer's disease to support Wesson's defense.

Appellant's trial counsel erred by failing to present the testimony of an expert on the progression of Alzheimer's disease during the trial phase. *Ake v. Oklahoma*, 470 U.S. 68 (1984); *State v. Johnson*, 24 Ohio St.3d 87 (1986). At trial, Wesson stated that the victim "reached into his pocket" and he believed the victim had a gun. *Wesson* at *P 121. Wesson stated that he reacted and was defending himself.

The victim, Mr. Varhola, was elderly and suffered with Alzheimer's. Varhola received medication for this disease and was cared for by his wife. The testimony that was introduced regarding Varhola's Alzheimer's condition, however, reflected a lack of adequate investigation or the presentation of expert testimony. (Tp. 86; 95; 285; 296). It seemed that defense counsel was trying to argue Varhola was confused and violent due to the progression of the disease yet still had access to firearms. Indeed, Wesson testified that Varhola suddenly became agitated and reached into his pocket where he carried a pistol. Wesson reacted. (Tp. 119). Had trial counsel obtained the assistance of an expert on Alzheimer's, they would have had support for their self-defense theory and been able to present a more credible defense.

C. Appellant's counsel presented both inaccurate and incomplete testimony from Dr. Smalldon, the defense expert psychologist.

Trial counsel did not adequately present mitigating evidence of Wesson's long history of head trauma and intellectual limitations. Trial counsel presented the testimony of Dr. Jeffrey Smalldon, a psychologist. Dr. Smalldon's testimony failed to present a complete diagnosis.

1. Brain damage.

Dr. Smalldon testified that Wesson "may have suffered brain impairment caused by head injuries." *Wesson* at *P 130 (Emphasis added). This Court stated that Dr. Smalldon's testimony reflected a lack of support as "he could not confirm it [brain impairment]." *Id.*

Evidence of brain impairment can be a very powerful mitigating factor. *Goodwin v. Johnson*, 632 F.3d 301 (6th Cir., 2011). Here, testing indicated brain impairment yet an experienced neuropsychologist was never retained. The Sixth Circuit has found ineffective assistance of counsel where counsel failed to present such available, important information. *Glenn v. Tate*, 71 F.3d 1204, 1208-11 (6th Cir. 1995) (counsel's investigations deficient where attorneys presented some but failed to uncover more convincing evidence such as neurological

impairment); *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003) (Counsel found ineffective for failing to look into brain impairment).

Medical or psychological assistance is supposed to ensure accuracy and reliability in the fact-finder's verdict. *Ake v. Oklahoma*, 470 U.S. at 82. But substandard assistance from experts result in just the opposite – incomplete and inaccurate findings. That is what happened with the mental evaluation in Wesson's case.

2. Intellectual disability.

Wesson's low intellectual functioning, seventh grade education, significant speech impairment, impulsiveness and lack of vocational training or employment history were mentioned at trial.² Intellectual disability, however, was never fully explored or presented.³ The only full-scale IQ score that was introduced was the seventy-six Wesson scored at the time of trial.⁴ The justification for not exploring Wesson's testing history, examining other areas such as adaptive skills or securing an expert in the area of intellectual disability, was that the client did not want to be portrayed as "mentally retarded." And Wesson had "deep feelings of insecurity and vulnerability and did not want to do some of the testing." (Mit. T.p. 94-95). Regardless, Dr. Smalldon, not an expert in the area of intellectual disability, assured Wesson that he "didn't believe he [Wesson] was mentally retarded." (Mit. T.p. 95). This "assurance," however, was given without conducting the requisite assessment. According to the American Psychological

² Wesson reads at a third grade level and has the math skills of a second grader. (Mit. T.p. 116).

³ The Social Security Administration adopted the term "intellectual disability" to replace "mental retardation." The agency states this change reflects "the widespread adoption of the term 'intellectual disability' by Congress, government agencies, and various public and private organizations." 20 CFR 416; <https://federalregister.gov/a/2013>.

⁴ Experts generally look at three areas for an accurate determination on intellectual functioning: 1) testing to determine functioning level (IQ test); 2) limitations on adaptive functioning; 3) evidence of onset before age 18. American Bar Association, Erwin Chemerinsky, Who is mentally disabled when it comes to the death penalty? (February 27, 2014).

Association (APA), an IQ test has a “standard error of measurement” (“SEM”) approximately five points within a person’s actual IQ score. It is due to the standard error of measurement and the artificial inflation of IQ scores over time (known as the “Flynn Effect”) that clinicians in the field refuse to establish a hard-and-fast ceiling of a single IQ score to diagnose intellectual impairment. Furthermore, the APA argues that clinical assessment of factors such as school records and behavior rating scales, in addition to the IQ test, is necessary to indicate the degree and nature of the impairment. Cornell Legal Information Institute, Holly Tao and Chihiro Tomioka, Hall v. Florida, (March 3, 2014).

The ABA and judicial standards do not permit courts to excuse counsel’s failure to investigate or prepare because the defendant so requested. The ABA requires an investigation to be conducted regardless of any statement by the client because otherwise the client cannot be properly advised. *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003). In Wesson’s case, at a minimum, an expert in the area of intellectual disability should have been consulted. This is particularly true given Wesson’s low IQ, poor problem solving abilities, and his impulsive actions without thought to consequences. *See Penry v. Lynaugh*, 492 U.S. 302, 322 (1989). Further, the scoring of IQ tests, margin of error and its impact on imposition of the death penalty is currently before the United States Supreme Court. *Hall v. Florida*, No. 12-108882. Hall has IQ scores of 60, 76, 79 and 80. American Bar Association, Erwin Chemerinsky, Who is mentally disabled when it comes to the death penalty? (February 27, 2014). This issue certainly should have been pursued in Wesson's case.

The evaluation performed by Dr. Smalldon produced incomplete and inaccurate conclusions concerning Wesson. Without doubt, Wesson was deprived of due process and the effective assistance of counsel.

D. Trial counsel allowed Wesson to make a rambling unsworn statement and "respond" to witnesses' victim impact statements.

The three-judge panel repeatedly referred to Wesson's unsworn statement in their sentencing opinion. During the statement Wesson rambled through his account of the victim's death and stated that if the victim had not reached into his pocket "he would not be up in heaven with God right now." (Tp. 174). Counsel did not limit the presentation. *State v. Lynch*, 98 Ohio St.3d 514, 787 N.E.2d 1185 (2003) (trial court has discretion to allow counsel to ask questions in presenting an unsworn statement); *State v. Barton*, 108 Ohio St.3d 402, 412-13 (2006). Continual guidance was certainly needed given Wesson's low intellectual functioning. Indeed, at one point a heated verbal exchange ensued between Wesson and the victim's son and then later with the victim's nephew. (Mit. Tp. 174; Sentencing Tp. 26). Wesson did not appear to fully comprehend the purpose of the unsworn statement. Without doubt, Wesson's detached narrative and arguments did nothing to assist his defense.

Counsel abdicated their duty to present a coherent, compelling penalty phase presentation. See *Hamblin*, 354 F.3d at 491, 492 (counsel did nothing to help defendant prepare or give a statement). Counsel were ineffective and Wesson was prejudiced.

E. Counsel failed to present evidence of Wesson's ability to adapt to prison life as a mitigating factor.

The United States Supreme Court recognizes adaptability to prison life as a mitigating factor, as does the Supreme Court of Ohio. *Skipper v. South Carolina*, 476 U.S. 1 (1986); *State v. Simko*, 71 Ohio St.3d (1994). In *Skipper*, the Court reasoned "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Skipper*, 476 U.S. at 7.

Defense counsel in a capital case has a duty to investigate all possible mitigating factors, including a thorough review of the defendant's background. *Williams v. Taylor*, 529 U.S. 362 (2000). Wesson's counsel were ineffective and Wesson was prejudiced when counsel failed to present available evidence of his ability to adjust and behave appropriately, while incarcerated.

Wesson served close to twenty years in Ohio's prison system prior to the instant case. Records from the Department of Rehabilitation (DRC) were requested and made available to the court at the time of trial. (See 6/27/08 Order Denying Mot. to Suppress, p. 5; Sup. Hrg. State's Ex. 3). Wesson's DRC records show that he was not aggressive or a threat in prison, making him a good candidate for a sentence of life without parole instead of the death penalty.

In its sentencing opinion the trial court stated that "[t]he panel gives a small amount of weight to the Defendant's reportedly cooperative conduct in jail and the absence of any evidence of bad conduct in prison." (Sentencing Opinion p. 13). The panel could have given more weight to this mitigating factor had Wesson's DRC records been utilized with an expert to put them into context. Dr. Smalldon had "reviewed an extensive collection of records from ODRC." (Mit. T.p. 90-91). Dr. Smalldon, however, was not prepared to explain the importance of the DRC records. As a result of these omissions, counsel acted unreasonably and failed to meet the prevailing standards of practice.

Proposition of Law No. II: Hersie Wesson is mentally ill. His death sentence is in violation of his rights under the Eighth and Fourteenth Amendments of the United States Constitution.

Wesson is a person with a serious mental illness, which he suffered with at the time of the offense and which continues to afflict him presently. His mental illness renders him no more culpable for his crime than a juvenile or a mentally challenged person would be, but both mentally challenged and juvenile offenders are categorically exempted from being executed

under the Constitution. *Atkins v. Virginia*, 536 U.S. 304, 306 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005). Accordingly, Wesson's execution despite his mental illness would violate the Cruel and Unusual Punishment Clause.

A. Mental Illness.

Wesson has serious mental health issues that have had dire consequences in his life. He is a chronic alcoholic, suffers from long-term major depression, suffers from Antisocial Personality Disorder, and has features associated with a narcissistic personality. Wesson is prone to be impulsive with sub-normal judgment and has a very limited ability to consider alternatives. He likely misperceived the victims' actions and reacted in an impulsive and irrational manner. (Sentencing Tp. 129).

B. The law and evolving standards of decency.

Evolving standards of decency indicate that execution of the mentally ill should be barred by the Eighth Amendment. *State v. Lang*, 2011 Ohio 4215, 2011 Ohio LEXIS 2161 (Aug. 31, 2011) (Lundburg Stratton, J., concurring). Connecticut prohibits the execution of the mentally ill. Kentucky and North Carolina have introduced bills to bar the execution of defendants who at the time of the offense met certain criteria for a mental disorder. *Id.*, *P36. Indiana and Tennessee have taken measures to prohibit execution of the severely mentally ill. *Id.*, *P362-3.

The concurring opinions in *Lang* and *State v. Ketterer*, 111 Ohio St.3d 70 (2006), note that the defendants are not sympathetic individuals. They committed horrifying crimes. But there are "other facts vital to understanding this apparently senseless murder." *Ketterer* at 102.

Ketterer did not meet the standard for being found not guilty by reason of insanity. Under our current law, the evidence supported a finding of guilty. However, we can never truly know whether Ketterer would have committed this senseless crime against a long-time friend had he not been seriously mentally ill. This undisputed testimony regarding Ketterer's serious mental illness places him in a very different category from persons without mental illness.

The justifications of deterrence and retribution are inapplicable to Wesson, as his mental illness and its devastating impact on his thought processes, reasoning, and insight, leaves him out of touch with reality and diminishes his level of culpability.

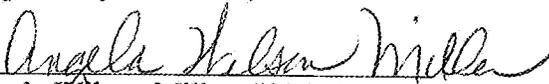
Proposition of Law No. III: A trial court violates a capital defendant's constitutional rights to a fair trial and due process when it fails to record sidebars and comply with its own rulings to ensure a complete record on appeal. U.S. Const. Amends. V, VI, VIII and XIV; Ohio Const. Art. I, §§1, 2, 5,9, 10, 16 and 20.

The trial court held that sidebars were to be recorded. (Sup. Hrg. p. 96). Indeed, early in the proceedings the trial court "caught itself" failing to put the requisite discussions on the record. (Sup. Hrg. p. 96). Yet all sidebar conferences were not recorded. (T.p. 233, 291, 417, 510, 809, 810, 815, 820, 911). Wesson 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); S.Ct. Prac. R. 5.1. Counsel was also ineffective for failing to object or otherwise remedy the court's failure to comply with its own ruling. Counsel must ensure that the record at every stage is complete. ABA Guidelines for Defense Counsel 10.7(B)(2).

III. Conclusion.

Appellant Wesson requests that this Application for Reopening be granted. S.Ct. Prac. 11.06 and *State v. Murnahan*, 63 Ohio St.3d 60 (1992).

Respectfully submitted,


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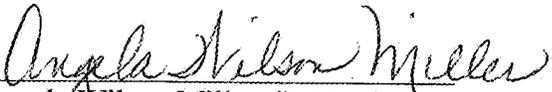
Counsel for Appellant

Certificate of Service

I hereby certify that on March 21, 2014, I served a copy of the foregoing by regular

United States mail addressed to:

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STATE OF OHIO :
Appellee, : Supreme Court Case No. 2009-0739
v. : Trial Court Case No. CR2008030710
HERSIE WESSON, : **DEATH PENALTY CASE**
Appellant. :

AFFIDAVIT OF ATTORNEY ANGELA MILLER

IN THE STATE OF FLORIDA)
) SS:
COUNTY OF PALM BEACH)

I, Angela Miller, after being sworn to law, state as follows:

- 1) I am an attorney licensed to practice law in the State of Ohio and I have practiced law for 18 years. I worked as an Assistant State Public Defender for 11 years and was assigned to the Death Penalty Unit. I am currently in private practice and am Rule 20 certified for appellate work.
- 2) Due to my practice of law 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 penalty was imposed.
- 3) I was appointed by this Court to represent Mr. Wesson and prepare an Application for Reopening (S.Ct. 11.06) on January 27, 2014.
- 4) I have read this Court's opinion, the transcripts, the record and the appellate briefs filed on Mr. Wesson's behalf. I also watched oral argument to prepare the Application for Reopening in this case.
- 5) The Due Process Clause of the Fourteenth Amendment guarantees the effective assistance of counsel on an appeal as of right. *Evitts v. Lucey*, 469 U.S. 587 (1985).

- 6) The initial responsibility of appellate counsel, once the transcript is filed, is to ensure that the entire record is filed with the Supreme Court of Ohio. When appellate counsel files only a partial transcript on appeal, the defendant is deprived of the due process of law guaranteed by the Fourteenth Amendment of the United States Constitution. *Entsminger v. Iowa*, 386 U.S. 748 (1967).
- 7) After making sure that the transcript is complete, counsel must then review the record for purposes of issue identification. This review of the record not only includes the transcript but also the pleadings and exhibits.
- 8) For counsel to properly identify issues, they must have a good knowledge 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 as to 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 briefs are filed.
- 9) 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 in general has become a recognized specialty in the practice of criminal law. Numerous 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 in order to raise and preserve them for appellate and post-conviction review.
- 10) Appellate representation of a death-sentenced individual requires a recognition 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 a 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 eventually 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 upon federal constitutional rights.
- 11) 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. To exhaust an issue, the issue must be presented to the state courts in such a manner that a reasonable jurist would have been alerted to the existence of a violation of the United States Constitution. The better practice to exhaust an issue is to cite directly to the relevant provisions to the United

States Constitution in each proposition of law and in each assignment of error to avoid any exhaustion problems in the federal courts.

- 12) Based on the foregoing standards, I reviewed the record and appellate briefs, communicated with the Office of the Ohio Public Defender, and reviewed the oral argument in the case.
- 13) I have identified three additional issues and numerous sub-claims that should have been evaluated by appellate counsel and presented to the Supreme Court of Ohio. These issues are meritorious and warrant relief. Had former appellate counsel presented these errors to the court, Mr. Wesson would have been granted relief. Thus, appellate counsels' failure to present these errors raises a genuine issue as to whether or not Mr. Wesson was denied the effective assistance of appellate counsel.
- 14) For example, appellate counsel failed to raise the issue of trial counsels' failure to present the defense of voluntary intoxication as error, despite Mr. Wesson's numerous admissions on the record that he had been drinking all day. Indeed, in its opinion, this Court noted that trial counsel limited its defense of voluntary intoxication to the later time period involving questioning by police. *State v. Wesson*, 2013-Ohio-4575, 2013 Ohio LEXIS 2342, *P 129. This Court has recognized that "the diminished capacity of intoxicated persons to appreciate the wrongfulness of their conduct, and then refrain from such conduct, may be a relevant consideration in determining the degree of punishment to be inflicted upon them . . ." *State v. Sowell*, 39 Ohio St.3d 322, 325 (1988).
- 15) At trial, defense counsel raised a weak issue of self-defense. Mr. Wesson argued that he that the victim suddenly became very agitated and reached into his pocket where he was known to carry a pistol. Wesson testified that he reacted and stabbed the victim in self-defense. In an attempt to strengthen this argument, counsel noted that the victim suffered with Alzheimer's disease. Defense counsel, however, did nothing to support the possibility that the victim could have been violent or physically aggressive due to the progression of the disease. Without additional facts, or an expert to review the medical records of the victim, the self-defense theory was empty and lacked credibility. Appellate counsel did not raise this issue on direct appeal.
- 16) Appellate counsel also failed to argue that trial counsel were ineffective for failing to conduct an adequate investigation during the mitigation phase of Appellant's capital trial. Trial counsel presented psychological testimony of Dr. Jeffrey Smalldon, a defense expert, that was grossly lacking. Specifically, several instances of head trauma were referenced but nothing was introduced to support it. Moreover, a neuropsychologist was not hired so that thorough testing could be done to determine defects such as frontal lobe

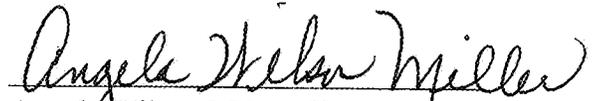
damage. Dr. Smalldon is not a trained neuropsychologist and could only relate what Wesson stated as part of his patient history. This Court noted in its opinion that brain impairment was not substantiated. *Wesson* at *P 130.

- 17) Appellate counsel failed to raise the issue of ineffective assistance of counsel in relation to Wesson's unsworn statement and his response to victim impact statements at sentencing. During the unsworn statement, Wesson rambled through the day of the offense. Counsel did not provide the continual guidance necessary given Wesson's intellectual limitations. *See State v. Lynch*, 98 Ohio St.3d 514, 787 N.E.2d 1185 (2003) (trial court has discretion to allow counsel to ask questions in presenting an unsworn statement). Indeed, the court noted that Wesson blamed the elderly victim for initiating the offense that ultimately resulted in his death. The trial court also specifically states (three times) in its sentencing entry that the "Defendant was not credible." Further, the counsel allowed Wesson to "respond" to victim impact statements that were made at sentencing. This was viewed as combative and lacking in remorse and only served to harm Wesson. (Sentencing Opinion 3/18/09, p. 13).
- 18) Appellate counsel also did not raise the issue of trial counsel's failure to present evidence of adaptability to prison life. Wesson served 20 years in prison prior to this offense and DRC records show that he was not aggressive or a threat while incarcerated, making him a good candidate for life without parole. Adaptability to prison life is a recognized mitigating factor. *Skipper v. South Carolina*, 476 U.S. 1 (1986); *State v. Simko*, 71 Ohio St.3d (1994).
- 19) Hersie Wesson is seriously mentally ill. Appellate counsel did not raise the issue that execution of the mentally ill is a violation of the Eighth and Fourteenth Amendments of the United States Constitution. Evolving standards of decency and the introduction of bills to end execution of the mentally ill in numerous states indicate that the death penalty for the severely mentally ill should be barred by the Eighth Amendment. Also see, *State v. Lang*, 2011 Ohio 4215, 2011 Ohio LEXIS 2161 (Aug. 31, 2011) (Lundburg Stratton, J., concurring); *State v. Ketterer*, 111 Ohio St.3d 70 (2006) (Lundburg Stratton, J., concurring).
- 20) Hersie Wesson's sentence of death is a violation of the Eighth and Fourteenth Amendments of the United States Constitution. Hersie Wesson's intellectual disability was not appropriately raised by trial counsel or considered by the court when determining whether the death penalty was appropriate. At the time of trial, Hersie had a seventh grade education and a full-scale IQ score of 76. He reads at a third grade level and his math skills are that of a second grader. Currently, the United States Supreme Court is examining the position of many states that anything above an IQ of 70 does not qualify as

mental retardation and a state's failure to consider the standard five-point margin of error with these scores. *Hall v. Florida*, No. 12-10882. Appellate counsel failed to raise this error on direct appeal.

- 21) The trial court violated Hersie Wesson's constitutional right to a fair trial and due process when it failed to record all sidebars. Initially, the trial court "caught itself" when it failed to record the first sidebar discussion and went back on the record to note the discussion. The Court, however, continued to fail to record numerous sidebars, which precludes appellate review. Trial counsel was ineffective for failing to object or otherwise attempt to remedy the court's failure to comply with its own ruling. 2003 ABA Guidelines for Defense Counsel 10.7(B)(2). Appellate counsel also did not raise this issue.
- 22) An appellate court has an independent duty to read the transcript and identify errors that are plain even if they are not presented on appeal. R.C. §2929.05. As a practical matter, however, appellate courts rely almost exclusively on appellate counsel to identify errors and the applicable law.
- 23) Therefore, Hersie Wesson, was detrimentally affected by the deficient performance of his former appellate counsel.

Further affiant sayeth naught.



Angela Wilson Miller, #0064902
Counsel for Appellant Wesson

Sworn and subscribed in my presence this 20th day of March, 2014.


Notary Public

