

ORIGINAL

In the Supreme Court of Ohio

STATE OF OHIO,)	Supreme Ct. Case No. 02-2241
)	
Respondent-Appellee,)	
)	
-vs-)	Trial Ct. No. 01-CR-04-2118
)	
JONATHON D. MONROE,)	
)	
Petitioner-Appellant.)	Death Penalty Case

**On Appeal From The Court Of Common Pleas
Of Franklin County, Case No. 01-CR-04-2118**

**Appellant Jonathon D. Monroe's Second Application For Reopening Pursuant To
S.Ct. Prac. R. 11.6**

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COUNSEL FOR APPELLANT

FILED
SEP 10 2014
CLERK OF COURT
SUPREME COURT OF OHIO

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**Appellant Jonathon D. Monroe’s Second Application For Reopening Pursuant To
S.Ct. Prac. R. 11.6**

Appellant Jonathon D. Monroe asks this Court to grant his Application for Reopening. S.Ct. Prac. R. 11.6; *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

A. Introduction and Procedural Posture.

A Franklin County Court of Common Pleas jury convicted Appellant of four counts of aggravated murder; each carrying multiple death specifications, for the killings of two people. The trial court sentenced Appellant to death. Appellant was represented at trial by attorneys Brian Rigg and Ronald Janes. Attorneys Todd Barstow and W. Joseph Edwards represented Appellant on his direct appeal to this Court. On March 25, 2005, this Court affirmed Appellant’s death sentences. Appellant previously filed an Application for Reopening, which this Court denied. *State v. Monroe*, 109 Ohio St. 3d 1453; 2006-Ohio-2226; 847 N.E.2d 3 (Ohio 2006).

In federal habeas proceedings, the court authorized depositions of Attorneys Todd Barstow (Exhibit A) and W. Joseph Edwards (Exhibit B). The federal district court found that Appellant had shown good cause for not developing this evidence earlier: “Federal habeas discovery is more critical on claims of ineffective assistance of appellate counsel than on claims of ineffective assistance of trial counsel because Ohio provides no discovery mechanism

whatever ancillary to an application to reopen under Ohio R. App. P. 26(B) or its Supreme Court analogue.” See *Monroe v. Houk*, S.D. Ohio, case no. 2:07CV258, doc. # 82, p. 20. This good cause finding satisfies S.Ct. Prac. R. 11.6 (B) (2), and the State is barred from seeking reconsideration of this finding which should bind this Court.

Proposition of Law #1: Appellate Counsel are Constitutionally Ineffective When They Fail to Ensure a Complete Record, Including Pretrial Proceedings and Side Bars.

The record is not complete. Trial Attorney Rigg testified that there were pre-trial proceedings and that they may not be transcribed. Exhibit C pp. 104-105. Rigg indicated that it was the “custom” not to have all pre-trial proceedings recorded. *Id.* p. 105. Rigg’s time sheet reflects that there were in-court, pre-trial proceedings on 6/25/01 for 1.4 hours, 10/6/01 for 2.0 hours, 12/5/01 for 1.3 hours, and 4/12/02 for 0.4 hours. Exhibit C Depo. Ex. 1. No transcript of these proceedings was made part of the record, nor are the same on file with the Franklin County Court of Common Pleas. The same is true for transcripts of side bar discussions.

Ohio Const. Art. I §16, Ohio Rev. Code Sec. 2929.03(G), and 2929.05(A) require that a defendant in a capital case be afforded a complete, full, and unabridged transcript of all proceedings against him, including transcripts of an arraignment and hearings on motions, so that he may prosecute an effective appeal, and mandamus is proper to enforce the defendant’s right to a full transcript. *State ex rel. Spirko v. Judges of Court of Appeals, Third Appellate Dist.*, 501 N.E.2d 625 (Ohio 1986). Further, in *Griffin v. Illinois* 351 U.S. 12 (1956), the Supreme Court held that an indigent defendant was entitled to a transcript in order to effectively pursue his direct appeal. Direct appeal counsel did not ensure compliance with these unequivocal constitutional protections and rights and thus, were ineffective.

Proposition of Law #2: Appellate Counsel Are Constitutionally Ineffective When They Fail To Ensure That a Defendant Is Represented In Post-Trial Proceedings in a Trial Court to “Correct” the Record.

1. Procedural Background

At sentencing on November 7, 2002, the trial court appointed Edwards and Barstow to serve as appellate counsel to Petitioner. This Court's docket shows that Edwards and Barstow filed a Notice of Appeal on December 31, 2002, and filed their merit brief on July 21, 2003.

On October 9, 2003, The State filed the Motion to Correct the Record. Exhibit A, Barstow Depo. Ex. 23A. The certificate of service states that it was served upon Edwards and Barstow. *Id.* Yet, at this time, Barstow and Edwards did not consider themselves to be representing Petitioner before the trial court. Exhibit A at pp. 91-2; Exhibit B at p. 94. Barstow and Edwards made no response to the Motion and did no investigation. Exhibit B pp. 94-5.

The trial court's docket gives no indication that the Court scheduled or held any hearing on the State's Motion. There being no opposition, the trial court granted the Motion by Entry dated October 29, 2003. Exhibit A, Depo. Ex. 25. With the trial court's order in hand, the State then moved promptly to "correct" the record at the Ohio Supreme Court, filing its Motion with this Court on November 4, 2003. *Id.* Barstow and Edwards offered no response, and without a hearing, this Court granted the State's Motion by entry dated November 21, 2003.

2. The "Correction" of the Record.

The matter sought to be "corrected" by the State was substantive. As set forth in the Motion, the transcript showed that a portion of the jury instructions were omitted from the reading of the instructions to the jury in the penalty phase of the trial. Exhibit A, Barstow Depo. Ex. 23A. In the written jury instructions, the jury was instructed to use one of three forms to deliver the verdict. However, the transcript shows that the third jury form was omitted from the charge given by the judge. *Id.* The third form instructed the jury that if they unanimously found that the aggravating circumstances did not outweigh the mitigating factors, then they were to

recommend a life sentence with eligibility for parole after either 20 or 30 years. *Id.* The transcript showed that the verdict form instructing the jury to recommend a life sentence, instead of a death sentence, was omitted in the reading of the instructions for sentencing on eight separate counts of aggravated murder. *Id.* at p. 2.

The State argued that the omission of the life sentence instruction simply could not be accurate. *Id.* The State's Motion did not say so expressly, but implicitly posited that the court reporter at the trial had failed to record the entirety of the "not guilty" instruction eight separate times while accurately taking down the other portions of the instructions.

3. Petitioner was Prejudiced by the Modification of the Transcript to Include the Omitted Jury Instructions.

The transcript originally submitted to this Court showed a substantial and prejudicial trial court error. The transcript showed clearly that the instructions read to the jury in the sentencing phase had omitted a provision on every single count that instructed the jury what to do if there was a unanimous finding that the aggravating circumstances were outweighed by the mitigating factors. This instruction was critical to the provision of a fair trial, and was intended by the trial court to provide the jury with the means to spare the Appellant's life. The absence of this instruction deprived the jury of an option for a sentence other than death. In the best case scenario, the omission of the "not guilty" charge created confusion in the most important decision ever made in the lives of twelve jurors and the Petitioner.

There is no reason to believe that the transcript was inaccurate. The State offered no evidence that suggested an inaccuracy. Rather, the State merely offered its own belief that there could not possibly have been an error at the trial court. Indeed, the State conceded that the matter warranted an evidentiary hearing. Yet, the trial court conducted no hearing. This critical modification of the record was made upon nothing more than a supposition that the transcript

was wrong in the absence of any evidence supporting that conclusion.

Petitioner was deprived of a fair hearing on this critical matter because he was unrepresented in the matter before the trial court. Although his appellate counsel were served with the State's Motion, they believed that they did not represent Appellant in the trial court, where the Motion was addressed. Exhibit A pp. 91-2; Exhibit B p. 94. Thus, Appellant's then counsel took no action to investigate or contest the State's Motion. Exhibit B p.94-96. This was constitutionally ineffective.

Barstow testified about other cases in which the accuracy of the transcript was at issue and stated that, even on mundane or uncontested matters in non-capital cases, the ordinary procedure is to hold an evidentiary hearing to ensure that any change to the record made is based on evidence. Exhibit A pp. 94-97. Yet, Barstow also testified that the standard of practice applicable to attorneys representing capital defendants requires attorneys to take care to avoid defaulting issues that may warrant review. Exhibit A pp.121-2. This standard was not met in the instant case, and as a result, Appellant's direct appeal proceeded upon the simple assumption that a correct and constitutionally sound instruction was provided to the jury that sentenced Petitioner to death, and the record was modified without anyone representing Petitioner's interests.

The modification of the record by the trial court, and then this Court, without representation constitutes the ineffective assistance of appellate counsel.

Proposition of Law #3: Appellate Counsel Are Constitutionally Ineffective When They Fail to Consult With Their Client On Direct Appeal.

Appellant possessed an appeal of right to the Ohio Supreme Court. Ohio Const. Art. IV, §2; O.R.C. §2929.05(A). Under *Evitts v. Lucey*, 469 U.S. 387 (1985), an appeal of right “trigger[s] the right to counsel” and the concomitant right to the effective assistance of appellate counsel. *Id.* at 402, 401. It is an “obvious truth” that lawyers are “necessities, not luxuries” in

our adversarial criminal justice system. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

In *Pennsylvania v. Finley*, 481 U.S. 551 (1987), the Court recognized that “the substantive holding of *Evitts* - that the State may not cut off a right to appeal because of a lawyer’s ineffectiveness - *depends on a constitutional right to appointed counsel* that does not exist in state habeas proceedings.” *Id.* at 558 (citations omitted). Furthermore, in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), the Court stated that “[a] State’s obligation to provide appellate counsel to poor defendants faced with incarceration applies to appeals of right.” *Id.* at 113 (citing *Douglas v. California*, 372 U.S. 353, 357 (1963)). A State may not “bolt the door of equal justice.” *Id.* at 102 (citing *Griffin v. Illinois*, 351 U.S. 12 (1956)).

Roe v. Flores-Ortega, 528 U.S. 470 (2000), imposes upon appellate counsel a duty to consult. A breach of that duty is a constitutional deprivation. As noted in *Roe*, the *Cronic* principles apply when considering direct appeals. *Roe*, 528 U.S. at 481 (citing *Penon v. Ohio*, 488 U.S. 75, 88 (1989)). In *Freels v. Hills*, 843 F.2d 958 (6th Cir. 1988), the Sixth Circuit presumed prejudice and remanded the case for a new appeal when appellate counsel did not substantially comply with *Anders* procedures.

Direct appeal counsel in the instant case failed to comply with their duty to consult with Appellant. The failure to consult violated Appellant’s rights to the effective assistance of appellate counsel. No appellate counsel ever consulted with Appellant prior to the filing of an appellate brief, and deprived him of his opportunity to consider the trial transcript.

When Appellant was contacted by his appellate counsel and advised of their appointment to represent him, he promptly contacted the same in writing. Exhibit B at Depo. Ex. 8. In this letter, Appellant expressed his gratitude to Mr. Edwards and made clear his interest in his case and his desire to participate in his representation. *Id.* Appellant explained succinctly that he felt

that he could assist in spotting issues and considering the merits. *Id.* Most pertinently, Appellant clearly requested that he be provided with a copy of the transcript so that he could conduct his own review, and that he be provided with copies of any pleadings in advance of filing. *Id.* Appellant assured Edwards that he meant not to question his professional judgment, but simply wished to be involved in these important proceedings. *Id.*

Appellant followed up with his appellate counsel, providing updated contact information so that Edwards could reach Appellant's mother at her new address and phone number. Exhibit B at Depo. Ex. 9. Appellant advised his appellate counsel in that letter that his mother may have information, and again respectfully thanked Edwards for his efforts. *Id.*

Yet, despite the repeated written requests stating Appellant's clearly stated desire to be included in the prosecution of his appeal, his appellate counsel failed to observe their basic duty to consult with him. In spite of this, Edwards described his client completely differently:

A. ...he was very friendly, but he just was a very noncommunicative, didn't appear that he wanted to talk a whole lot about the appeal, and just kind of reassured us that, look, I'm sure you guys know what you are doing, just do what you can to help me.

...

Q. So he didn't have substantive input into the appeal?

A. Absolutely not. I don't know if he was capable of that. I don't know if he was interested in doing that.

Exhibit B p. 30-31.

Edwards' characterization of Appellant cannot be reconciled with the clear written requests and statements contained in Appellant's correspondence. Edwards also testified as to how Appellant's requests for copies of the transcript and copies of pleadings were handled.

A. ...I would not normally send a client a copy of a transcript...But I would not normally give a client a transcript until maybe the case was over with and I was no longer representing them. But I think especially someone like Mr. Monroe, I would not give him a transcript.

* * *

- Q. ...Did you, in fact, allow [Monroe] to review any materials that you filed in advance of filing?
- A. Absolutely unequivocally no. I find that – no. No possible way.
- Q. Okay.
- A. Again, I can't imagine that he would have been any help whatsoever. From my meeting with him, from reading the penalty phase, I can't imagine that he would be of any help on appeal.

Exhibit B pp. 47-49.

Without consultation, appellate counsel decided preliminarily that only one of them needed to review voir dire, and therefore only ordered a single copy of voir dire transcript. Exhibit B p. 52, Depo. Ex. 10. No issues were raised in the appeal related to voir dire, even though Edwards indicated that his notes flagged a potential voir dire issue. Exhibit B p. 101-02. Without consultation, appellate counsel failed to file (and they think of no specific reason why they neglected to undertake the effort to file) a Reply Brief, or file a motion for rehearing after the decision. Exhibit B p. 112, 116; Exhibit A p. 100-02, 115-17.

Thus, Appellant's appellate counsel rebuked his expressed desire to have substantive input in his appeal, and ignored his requests for information and input into the pleadings. The characterizations above resulted from a single meeting with Petitioner, which consisted of a "very, very short conversation" at the beginning of Petitioner's appeal. Exhibit B pp. 30-31. Appellate counsel's performance in the instant case constituted ineffective assistance of counsel because they failed to take the basic steps to consult with their client, to keep their client advised, and to seek and accept their client's input in his own defense.

Proposition of Law #4: Appellate Counsel are Constitutionally Ineffective Where They Fail to Raise Meritorious Arguments to the Defendant's Prejudice.

The following propositions were not, but should have been raised, by Appellate Counsel:

1. **Proposition of Law No 1: A capital defendant is denied the right to a fair trial and due process when the jury instructions given to the jury at trial failed to include the life with parole**

eligibility verdict option. (See Proposition of Law #2 above for argument on this issue).

2. **Proposition of Law No 2: A trial court violates a capital defendant's constitutional rights to a fair trial and due process when the court substantively amends the record without first conducting a hearing. U.S. Const. Amends. VI, XIV.** (See Proposition of Law #2 above for argument on this issue)
3. **Proposition of Law No. 3: A capital defendant is denied his substantive and procedural dueprocess rights to a fair trial and reliable sentencing as guaranteed by U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, §§ 9 and 16 when a prosecutor commits acts of misconduct during his capital trial and trial counsel are constitutionally ineffective in failing to object to the misconduct.**

The defense filed a pretrial Motion to Exclude Evidence of Other Crimes, and the trial court granted that motion prior to empaneling of the jury (Transcript Vol. 1 p. 42-45). Yet, during voir dire, the prosecution made repeated veiled references to Appellant's criminal history, all of which went unchallenged by Petitioner's trial counsel. (Transcript Vol. 1 pp. 203-204); (Transcript Vol. 2, p. 277-78); (Transcript Vol. 1, p. 74-75). Appellate counsel failed to raise these issues on appeal.

The prosecutors offered this information repeatedly under the guise of inquiring into the jurors' feelings about the disparity of the sentences between Petitioner and Shannon Boyd, who separately pleaded to manslaughter for his involvement in the same offense, and who was sentenced to five years, eligible for parole in three and a half years.

Although the prosecution offered these scenarios purportedly in the hypothetical for the purpose of explaining mitigation, they did so using the one type of information, criminal history, that was certain to be prejudicial, and that was already precluded by virtue of an order *in limine*. The prosecutors specifically addressed this subject to panel members who became members of the jury and alternates who would pass judgment upon and sentence appellant.

The communication of this information to potential jurors was prejudicial, and constituted plain error by the trial court, ineffective assistance of trial counsel for failing to object, and prosecutorial misconduct for violating the *in limine* order. The failure to raise the issue on appeal constituted ineffective assistance of appellate counsel and prejudiced Appellant.

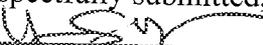
Propositions of Law Previously Raised in Appellant's Motion for Reopening, filed January 17, 2006.

Appellant previously sought to reopen the instant case to permit him to raise claims that were omitted as a result of ineffective assistance of appellate counsel. *See Appellant's Motion for Reopening, January 17, 2006.* Discovery authorized by the District Court has produced evidence which supports the claims raised in Appellant's original Motion for Reopening. In deposition in the federal habeas case, appellate attorneys Edwards and Barstow each testified as to the lack of any tactical or strategic reasons for failing to raise those issues. *See Exhibit A p. 82-83; Exhibit B pp. 121-124.* This Court should consider those arguments with the benefit of a complete record of direct appeal counsel's testimony.

Conclusion/Demand for Discovery, Evidentiary Hearing, Briefing.

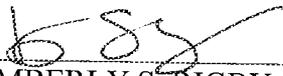
Appellant has shown that there are genuine issues regarding whether he was deprived of effective assistance of counsel on appeal. Exhibit D. Appellant requests that this Application for Reopening be granted, counsel formally appointed, discovery and briefing permitted, and an evidentiary hearing held. S.Ct. Prac. R. 11.6 and *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

Respectfully submitted,


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Certificate of Service

I certify that a copy of the foregoing **Appellant Jonathon D. Monroe's Second Application For Reopening Pursuant To S.Ct. Prac. R. 11.6** was sent by regular U.S. Mail to Mr. Ron O'Brien, Franklin County Prosecutor, 373 South High St., 14th Floor, Columbus, Ohio 43215 this 10th day of September, 2014.



KIMBERLY S. RIGBY (Ohio # 0078245)
Counsel for Defendant, Jonathon Monroe

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

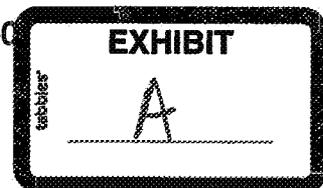
Jonathan D. Monroe,	:	
	:	
Petitioner,	:	
	:	
vs.	:	Case No.
	:	2:07CV258-MHW-MRM
Warden, Ohio State	:	
Penitentiary,	:	
	:	
Respondent.	:	

DEPOSITION OF TODD W. BARSTOW

Tuesday, July 16, 2013
12:08 o'clock p.m.
Ohio Attorney General's Office
150 East Gay Street
16th Floor
Columbus, Ohio 43215

ANN FORD
REGISTERED PROFESSIONAL REPORTER

ANDERSON REPORTING SERVICES, INC.
3242 West Henderson Road
Columbus, Ohio 43220
(614) 326-0177
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24 On behalf of the Respondent.

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TUESDAY AFTERNOON SESSION
July 16, 2013
12:08 o'clock p.m.

- - -

STIPULATIONS

- - -

It is stipulated by and between counsel for the respective parties herein that this deposition of TODD W. BARSTOW, a Witness herein, called by the Petitioner under the statute, may be taken at this time and reduced to writing in stenotypy by the Notary, whose notes may thereafter be transcribed out of the presence of the witness; and that proof of the official character and qualifications of the Notary is waived.

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I N D E X

WITNESS	PAGE
TODD W. BARSTOW	
Examination (By Mr. Linneman)	7
EXHIBITS	MARKED
Petitioner Exhibit No. 1 (Motion, Entry and Certification for Appointed Counsel Fees)	7
Petitioner Exhibit No. 2 (Case Information)	7
Petitioner Exhibit No. 3 (Motion, Entry and Certification for Appointed Counsel Fees)	7
Petitioner Exhibit No. 4 (Proposition of Law Number 1)	7
Petitioner Exhibit No. 5 (Case Cites and Handwritten Notes)	7
Petitioner Exhibit No. 6 (Notes from Transcripts)	7
Petitioner Exhibit No. 7 (Letter to Ms. Johnson from Judge Fais dated 11-22-02)	7
Petitioner Exhibit No. 7A (Letter to Mr. Monroe from Mr. Edwards dated 1-2-03)	37
Petitioner Exhibit No. 8 (Unidentified Document) (Retained by Mr. Linneman)	7

1	I N D E X	
2	- - -	
3	EXHIBITS	MARKED
4	Petitioner Exhibit No. 9	7
5	(Letter to Mr. Barstow from Mr. Edwards dated 3-7-03)	
6	Petitioner Exhibit No. 10	7
7	(Letter to Mr. Edwards from Mr. Barstow dated 3-11-03)	
8	Petitioner Exhibit No. 11	7
9	(Letter to Ms. Berry from Mr. Edwards dated 3-25-03)	
10	Petitioner Exhibit No. 12	7
11	(Facsimile Transmittal with attachment)	
12	Petitioner Exhibit No. 13	7
13	(Telecopier Transmittal Sheet dated 6-26-03)	
14	Petitioner Exhibit No. 14	7
15	(Letter to Ms. Rayce from Mr. Barstow dated 6-26-03)	
16	Petitioner Exhibit No. 15	7
17	(Letter to Ms. Rayce from Mr. Barstow dated 7-7-03 with copy of letter to Supreme Court attached)	
18	Petitioner Exhibit No. 16	7
19	(Letter to Mr. Monroe from Mr. Barstow dated 7-10-03)	
20	Petitioner Exhibit No. 17	7
21	(Letter to Mr. Edwards from Mr. Barstow dated 7-10-03)	
22	Petitioner Exhibit No. 18	7
23	(Telecopier Transmittal Sheet dated 7-11-03 with attachments)	
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I N D E X

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EXHIBITS	MARKED
Petitioner Exhibit No. 19 (Letter to Mr. Monroe from Mr. Edwards dated 7-21-03)	7
Petitioner Exhibit No. 20 (Letter to Mr. Stebbins from Mr. Barstow dated 7-22-03)	7
Petitioner Exhibit No. 21 (Letter to Mr. Monroe from Mr. Barstow dated 11-7-03)	7
Petitioner Exhibit No. 22 (Letter to Mr. Barstow from Mr. Stebbins dated 6-8-04)	7
Petitioner Exhibit No. 23 (Letter to Mr. Monroe from Mr. Barstow dated 1-25-05)	7
Petitioner Exhibit No. 23A (State's Motion to Correct the Record)	91
Petitioner Exhibit No. 24 (Letter to Mr. Monroe from Mr. Barstow dated 5-31-05)	7
Petitioner Exhibit No. 25 (Motion of Plaintiff-Appellee to Supplement the Record)	91
Petitioner Exhibit No. 28 (Handwritten Note)	32
Petitioner Exhibit No. 29 (Entry)	23

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P R O C E E D I N G S

- - -

And, thereupon, Petitioner Exhibit Nos. 1 through 24 were premarked for purposes of identification.

- - -

TODD W. BARSTOW,
being by me first duly sworn, as hereinafter certified, deposes and says as follows:

EXAMINATION

BY MR. LINNEMAN:

Q. Good morning, Mr. Barstow.

A. Good morning.

Q. My name is Rob Linneman -- or good afternoon, I should say. My name is Rob Linneman. I represent the defendant Jonathan Monroe in this case. My co-counsel Larry Komp is here.

I'm sure you're familiar with deposition practice, I would guess, but let me just give you my brief spiel.

For one, I'll ask you to give an oral response to each question for the sake of the record. I'll try not to interrupt you while you're speaking. I'll ask you to do the same for the sake of the

1 record.

2 If I ask a question and you answer it,
3 I'll assume you've heard me and understood, so if at
4 any point I'm not clear, please feel free to ask me
5 to clarify.

6 A. Sure.

7 Q. And if you need to take a break at any
8 point, please let me know.

9 A. Okay.

10 Q. Can you state your name for the record.

11 A. Todd Barstow.

12 Q. And what's your current business address?

13 A. 538 South Yearling Road, Suite 202,
14 Columbus, Ohio, 43213.

15 Q. Do I recall correctly that you've moved
16 recently?

17 A. We moved the first weekend of February of
18 this year.

19 Q. Okay. The previous address, where was
20 that?

21 A. 4185 East Main Street, Columbus, same zip.

22 Q. Have you been there, at that previous
23 address, for at least through the period when this
24 case was -- when you worked on this case?

1 A. Yes. I moved to that address in August of
2 1994 after I left the firm I was working for.

3 Q. Okay. I would like to cover a little bit
4 about your background. Where did you go to college
5 for undergrad?

6 A. I went to Washington and Lee University.

7 Q. That's in Virginia?

8 A. Lexington, Virginia.

9 Q. What did you major in?

10 A. History.

11 Q. When did you graduate?

12 A. 1984.

13 Q. Okay. And where did you go to law school?

14 A. Capital, here in town.

15 Q. Did you go straight to law school from --
16 after you graduated from college?

17 A. No.

18 Q. How long did you spend after that?

19 A. How long did I spend?

20 Q. I'm sorry. What period of time was there
21 in between -- why don't I ask you this.

22 What did you do in between college and law
23 school?

24 A. I was in active duty in the Army.

- 1 Q. For how long?
- 2 A. From May of 1984 to May of 1988.
- 3 Q. Okay. And what was your -- what was your
4 duties in the Army?
- 5 A. I was a field artillery officer.
- 6 Q. What rank did you achieve?
- 7 A. I left active duty as a First Lieutenant.
- 8 Q. Okay. What were you when you went in?
- 9 A. A Second Lieutenant.
- 10 Q. Were you on a -- were you involved in the
11 military at all while you were in college?
- 12 A. I had an ROTC scholarship in college.
- 13 Q. Okay. So four years, and was that the end
14 of your military career then?
- 15 A. No.
- 16 Q. How has that -- what did you do after you
17 left active duty?
- 18 A. I joined the Army -- the Ohio National
19 Guard, the Army National Guard in November of 1988,
20 and I served until May 31 of 2012 in the Ohio
21 National Guard -- the Army National Guard, I should
22 say. And then I retired. That was it. It was a
23 mandatory retirement.
- 24 Q. Okay. Mandatory retirement at -- what is

1 that?

2 A. For years of service.

3 Q. 20 years?

4 A. 28 years.

5 Q. Congratulations.

6 A. Thanks.

7 Q. So then you went to law school beginning

8 in 1988?

9 A. Correct.

10 Q. Fall of 1988?

11 A. August. Yes.

12 Q. So then you graduated in, what, '91?

13 A. May of 1991.

14 Q. Okay. Took the bar in November of '91?

15 A. I took the bar in July of 1991.

16 Q. Oh, excuse me. July, of course. All

17 right. And are you -- where are you admitted to

18 practice?

19 A. Well, Ohio as far as states, and then I'm

20 admitted in the Northern and Southern District of

21 Ohio Federal Court, Sixth Circuit Court of Appeals,

22 the Bankruptcy Courts in both Northern and Southern

23 District, and the U.S. Supreme Court. But no other

24 states.

1 Q. Okay. Are all your licenses in good
2 standing?

3 A. Yes.

4 Q. Or your admissions, I should say.

5 A. Yes.

6 Q. Okay. Have you ever been subject to any
7 suspensions or any disciplinary proceedings?

8 A. Well, I've had bar complaints filed
9 against me, but it's never gone past the local bar
10 association saying would you please respond to this
11 complaint. It's always been closed out. It's never
12 gone past that stage. So people have filed
13 complaints, but it's always been just handled --
14 either dismissed outright or handled at just the
15 local level.

16 Q. Okay. The reason we're here is because of
17 a death penalty case. Are you death penalty
18 certified now?

19 A. Yes.

20 Q. And I believe there was -- your
21 certification was at the time -- was it at the time
22 of this case or had you been certified previously and
23 then it lapsed or something like that?

24 A. It lapsed at some point within the last

1 few years. The reason being, Franklin County just
2 has stopped indicting death penalty cases. There are
3 very few trial cases, and then there are even fewer
4 appeals cases. And so I let it lapse because I
5 wasn't getting any of that business.

6 Q. Sure. Presently you mean?

7 A. I let it lapse --

8 Q. Just in terms of the time period what you
9 just described, are you talking about right now? Are
10 you talking about in, what was it, 2002 when you took
11 this case?

12 A. I was certified. Oh, yeah. I was
13 certified for when I did these cases -- or this case.
14 But within the last -- I just got recertified -- I
15 went to the seminar last November, and I just got the
16 letter, you know, within the last few months saying
17 you're back on for trials -- lead counsel on appeals.

18 Q. Okay.

19 A. But there was maybe a year or so, two
20 years, I don't remember, where I didn't have the
21 certification, but that's been in the last couple of
22 years.

23 Q. Okay. When did you first get certified,
24 do you remember?

1 A. I don't remember. It was before these
2 cases.

3 Q. Okay. Let me try to refresh your memory
4 here. This was out of your file. This is Exhibit 7.
5 We're getting off -- we're getting out of order right
6 away.

7 MS. LEIKALA: 7?

8 MR. LINNEMAN: 7. Yeah.

9 BY MR. LINNEMAN:

10 Q. Take your time. Whenever you're ready to
11 talk, let me know.

12 A. Okay.

13 Q. So it looks like this letter, am I
14 correct, that the judge looks like he's seeking to
15 ensure that your credentials are renewed or up to
16 date or something like that?

17 A. What this says to me is Judge Fais is
18 asking to expedite approval with the Rule 20
19 Committee, and they wouldn't have -- I mean, I would
20 never have been appointed -- well, that's what this
21 letter looks like it's doing.

22 Q. First of all, do you have any independent
23 memory of this?

24 A. No.

1 Q. Okay. Why don't you explain to me the --
2 is there -- what separate set of either
3 certifications or credentials might be necessary to
4 do -- to handle the death penalty appeal to the
5 Supreme Court at the time this case arose?

6 A. Well, Ohio has three levels of
7 certification. There's death penalty co-counsel,
8 trial counsel.

9 Q. Right.

10 A. Then there's death penalty lead counsel,
11 and then there's appeal. There's no breakdown on the
12 appeal. Each one has its own set of requirements
13 that you have to meet in terms of number of cases
14 you've tried, appeals you've handled, et cetera. I
15 don't remember -- I don't know those off the top of
16 my head.

17 Q. Okay.

18 A. But there is a set of requirements that
19 you have to meet. If the court -- and the Rule 20
20 Committee meets on a regular basis to approve people,
21 but a judge can ask for an expedited approval if he
22 wants to approve somebody.

23 My recollection is is that I became
24 co-counsel, trial counsel certified first, and then I

1 started doing a lot of appellate work, and I'm
2 assuming that I met the requirements for Rule 20
3 appellate counsel, but I just hadn't asked the
4 committee to approve me. So you can submit the
5 application, and the committee, I'm assuming, maybe
6 they meet electronically or something. I don't know.
7 I'm not on the committee. But I would assume they
8 have some way to meet and review everybody and say,
9 yeah, this person is okay, go ahead and approve him
10 in an expedited way. It does happen where judges
11 will do that.

12 Q. Should I infer that this was your first
13 death penalty appeal?

14 A. Well, I don't remember if it was my first
15 death penalty appeal. I don't. I've done three. I
16 don't remember if this was the first. There were two
17 that happened right at the same time, and then there
18 was one that came later.

19 Q. Okay.

20 A. Maybe a year or so later.

21 Q. Okay. So do you remember the other one
22 would be Michael Turner?

23 A. Yes.

24 Q. Is that familiar?

1 A. Yes.

2 Q. And so if -- I'm going out of order here,
3 but just if it helps refresh your memory here, I'll
4 give you what's been marked as Exhibit 11. And take
5 your time, but if I can shorthand this, it looks like
6 you and Mr. Edwards are planning a visit to
7 Mansfield, and you're asking to see Mr. Monroe and
8 another --

9 A. And Mr. Turner. Yes.

10 Q. So if I can, taking what you said before,
11 am I correct then -- so if there were two that
12 happened at the same time, which would be these
13 two -- which would be Monroe and Turner -- and then
14 you've done one more which was later in history?

15 A. Correct. James Conway.

16 Q. Okay. So then probably this, depending in
17 which order you were appointed in Monroe and Turner,
18 either Monroe or Turner was your first appointment to
19 an appellate case?

20 A. A death penalty appellate case. Yes.

21 Q. Thank you.

22 A. Okay.

23 Q. You said you also were certified with the
24 trial certification?

1 A. That would have come first.

2 Q. Okay.

3 A. Because, I mean, I'll tell you why. I
4 remember the conversation I had with Judge Fais. He
5 encouraged me to become death penalty certified. I
6 just happen to remember this conversation, me saying,
7 well -- because he asked me, he said, Are you? And I
8 said, No, I'm not. I have all the trial experience
9 that you needed, I just had never gone to the
10 seminar. He said, Well, you need to go to the
11 seminar because I want to appoint you, if I have the
12 opportunity, I would love to put you on a case and
13 give you the opportunity. So that's when I -- it was
14 after that event --

15 Q. Sure.

16 A. -- I went to the seminar.

17 And other judges encouraged me, too. And
18 Judge Fais, I've known him probably the longest of
19 any of the judges, and he's the one, he started
20 appointing me on noncapital appeals. I said, Judge,
21 I've never done one of those. And then Judge Fais
22 said, Don't worry, you'll be fine, just go ahead and
23 do it, or words to that effect. So he was
24 encouraging me to do this sort of thing.

1 Q. So the sort of thing that we're talking
2 about there though is the next step after you were
3 death penalty certified at trial is the appeals?

4 A. Uh-huh.

5 Q. Okay.

6 A. And my recollection --

7 Q. Can I ask you, you're using the term
8 uh-huh. Do you mean yes?

9 A. Yes.

10 Q. That's a yes.

11 A. I'm sorry.

12 Q. That's okay. All right. So how many had
13 you -- how many death penalty cases had you tried at
14 that time? This was, again, the date on
15 Exhibit 11 -- or excuse me -- on -- let's start with
16 7, is November 2002. Do you remember how many
17 capital cases you had tried?

18 A. At that point, no. I don't remember.

19 Q. Okay. Do you have an idea now how many
20 you've done over the course of your career?

21 A. I have tried four, I believe. I've been
22 appointed on other ones that have resulted in,
23 through negotiation, a different -- you know, there
24 are -- excuse me. Let me back up.

1 Other cases I have been assigned that have
2 resulted in a plea to something other than death
3 penalty.

4 Q. Can I get you to take a look at Exhibit 3,
5 which will be identical to Exhibit 3 from yesterday,
6 Mr. Edwards' deposition, and can you tell me if this
7 document is familiar to you?

8 A. Well, I mean, I have not seen this
9 document in a very long time, but it's my handwriting
10 and my signature so.

11 Q. So this was the motion that you filed for
12 approval of your fees in the Monroe appeal?

13 A. That's what it appears to be.

14 Q. You don't have a specific recollection of
15 it, but may I infer that you remember that you, in
16 fact, filed one, and this appears to be it?

17 A. Yes.

18 Q. Okay. I'll show you Exhibit 1, also
19 identical to yesterday's Exhibit 1. During the
20 course of the Monroe case, did you happen to see when
21 Mr. Edwards filed 1? This, I believe, is
22 Mr. Edwards' application in the same case.

23 A. Yes. I recognize Joe's signature. I
24 don't recall any conversations with him about his

1 bill.

2 Q. You didn't review that at the time?

3 A. No.

4 Q. You can leave yours there at the end of
5 the day. They will be there for her.

6 Okay. You mentioned some conversations
7 with Judge Fais. Do you remember how it came to pass
8 that you were appointed in the Monroe case?

9 A. Well, I don't have a specific recollection
10 of what happened. I'm going to assume that I -- the
11 way it usually happens is you get a phone call from
12 the bailiff letting you know that you've been
13 appointed.

14 Q. Okay.

15 A. That's probably how it happened.

16 Q. They don't ask you in advance?

17 A. No.

18 Q. Interesting. All right. So did you -- in
19 terms of the sequence, was this near the time when he
20 had suggested to you that you would be an appropriate
21 candidate to get certified?

22 A. You know, I don't remember the
23 conversation when that occurred, what time of the
24 year it occurred with Judge Fais. The Ohio

1 Association of Criminal Defense Lawyers sponsors a
2 death penalty seminar. It's held traditionally the
3 week before Thanksgiving. The Ohio State Bar
4 Association sponsors a seminar, it's typically held
5 in May. I've only gone to the State Criminal Defense
6 Lawyers seminar, so that's in November. It's every
7 year in November.

8 Q. Okay.

9 A. So in looking at the dates on these
10 letters, it could have been that I had gone to the
11 seminar -- and I'm guessing now -- maybe went to the
12 seminar and didn't fill out the appellate box,
13 because the application is all in one -- it's one big
14 application, and you just check the boxes and fill in
15 the parts that you want to apply for, or you're
16 qualified for. Maybe I didn't do the appellate part,
17 and maybe I just resubmitted the application. I
18 don't remember.

19 Q. Okay. But so was that -- you did that in
20 2002, you believe?

21 A. Well, maybe. I don't know. It appears
22 from this letter that I was not appellate qualified
23 under Rule 20 in November of 2002. That could have
24 been -- I don't know why that was.

1 Q. Okay.

2 A. I certainly met the qualifications by that
3 point, but maybe I just had never asked them to
4 officially approve me.

5 Q. Okay.

6 A. FYI, you can ask the committee to approve
7 you if you don't meet the qualifications, the
8 specific qualifications that they have. You can ask
9 for an exemption. I've never done that.

10 - - -

11 And, thereupon, Petitioner Exhibit No. 29
12 was marked for purposes of identification.

13 - - -

14 BY MR. LINNEMAN:

15 Q. Just to set a time frame here, I am going
16 to show you what's marked as Exhibit 29, also
17 identical to Exhibit 29 from Mr. Edwards' deposition
18 yesterday, and this -- it looks like Judge Fais
19 originally appointed you on November 6, at least he
20 signed the entry there.

21 A. I recognize the signature.

22 Q. So this -- if you don't have a specific
23 memory of it, at least it logically makes sense here
24 based on the correspondence that you were appointed,

1 then updated or sought to enhance your credentials
2 later in the year, became certified and then went on
3 to handle not just this case but also Mr. Turner's.

4 A. Correct. And maybe Judge Fais was more
5 ambitious for my career than I was, I guess. That's
6 the only thing I can surmise. He just assumed that I
7 had done what he had told me to do, but I hadn't. So
8 who knows. Because November 7 is going to be before
9 the seminar. The seminar happens -- it's always
10 that -- it's always the Wednesday, Thursday, and
11 Friday before Thanksgiving. It's almost always
12 that's when they have it. There's been a couple of
13 exceptions, but it's almost always been -- so you can
14 go. You can block that out.

15 Q. Okay.

16 A. And so maybe -- I don't know -- I don't
17 know. I just don't remember what happened.

18 Q. Okay. And then do you also not recall
19 if -- this would be -- I believe that this is going
20 to be -- November 6 is actually before the sentencing
21 in this case.

22 A. I don't know when the sentencing was in
23 this case. I mean, I don't remember. I wasn't
24 there, and I don't remember when it happened.

1 Q. Okay. So you wouldn't have attended
2 any -- did you attend any proceedings in the trial
3 court?

4 A. Not that I remember. I mean, look, I
5 might have walked in the courtroom while the trial
6 was going on, had some other business and not known
7 it, but I didn't consciously go to Mr. Monroe's
8 trial.

9 Q. Okay. Do you recall whether there was a
10 designation formally or an understanding informally
11 as to whether you or Mr. Edwards was, I'll call it,
12 lead counsel in this appeal?

13 A. Well, under Rule 20, there's no lead
14 counsel appellate designation. It's just appellate
15 counsel. However, informally, because Joe Edwards --
16 Mr. Edwards had done a lot more of these and had a
17 lot more experience in death penalty trials as well,
18 I was following his lead. And, in fact, we were also
19 co-counsel in the Michael Turner case, the one that
20 was going on -- the other case that was going on sort
21 of at the same time, the death penalty case. So
22 those were my first two. I don't really say one was
23 before the other because in my mind they were going
24 on at the same time.

1 Q. Okay.

2 A. That's why I say I don't remember which
3 one came first because in my memory, Turner and
4 Monroe just sort of happened at the same time. In
5 fact, they were argued one week after each other.

6 Q. Okay. Sure.

7 A. I don't remember which one was argued
8 first, quite frankly. So that's why I don't -- the
9 Conway case came maybe a year or so later, so in my
10 mind, that's separate. I just remember it
11 separately, if that makes any sense.

12 Q. Yes, it does. And, in fact, I think
13 Mr. Edwards said that one of you did one oral
14 argument and the other of you did the other oral
15 argument. Does that make sense, or do you recall
16 that?

17 A. I remember that I argued Turner because in
18 the Turner case, I did the issues -- I wrote the
19 brief on those issues that were, what I would call,
20 the nonstandard issues. They were not the -- Joe
21 wrote the constitutionality of the death penalty
22 issues, those sorts of standard things that you see.
23 I wrote the -- in both Monroe and Turner, I wrote the
24 trial level evidence problems. Turner was a plea.

1 There's a whole bunch of different issues in Turner.
2 And I wrote -- and so those -- that's why -- but I --
3 my recollection is I did Turner. I don't remember
4 about Monroe.

5 Q. Okay. Well, for what it's worth, it's
6 available on video. I watched it last week, and I
7 can tell you Mr. Edwards did the argument.

8 A. Okay.

9 Q. You can check that. You don't have to
10 believe me, of course. But I believe it sounds like
11 your recollections are consistent is my only point,
12 that Mr. Edwards recalls that he did one and you did
13 the other.

14 A. Yes.

15 Q. I happen to know that Edwards did Monroe,
16 and you seem to recall that you did Turner.

17 A. Turner.

18 Q. So it sounds like your recollections are
19 consistent.

20 Had you worked with Mr. Edwards prior
21 to -- it sounds like these two were closely
22 contemporaneous, but had you worked with him before
23 these two?

24 A. I don't remember. We've done -- we've

1 been assigned as trial counsel in death penalty
2 cases, but I don't remember when those came up in
3 time in relation to Monroe and Turner. I certainly
4 knew Joe. I knew him well --

5 Q. Right.

6 A. -- before I ever got associated.

7 That is one question that I do remember
8 the judge as asking, We're going to appoint -- you
9 know, they ask me -- We're going to appoint Joe
10 Edwards as co-counsel on this appeal, is that -- can
11 you work with Joe? And I said, Of course, fine.

12 Q. But you don't recall specifically whether
13 you had worked with him before that or not?

14 A. I don't.

15 Q. Okay. But since then you have definitely
16 worked together, you think, other than Turner? Have
17 you guys ever tried a case together?

18 A. No. We've never tried a case together.
19 We've had other death penalty cases as trial counsel,
20 but those were resolved with pleas. I think there
21 were two -- there's one I remember for sure. There
22 may be another one. This is, we're talking, maybe
23 sometimes 15 years ago. I don't remember if there is
24 another one. But there's certainly one that I

1 remember because it was -- the facts were crazy, and
2 the client was kind of a wild guy, and I remember
3 that one. There may have been another one.

4 Sometimes you get assigned to these cases,
5 and then somebody hires private counsel, and they
6 just sort of -- you're on the case for a few weeks or
7 months, and then they're gone. I think there was one
8 other. No. We've never tried a case. I'm sorry.

9 Q. Okay. Have you ever -- let's see.

10 MS. LEIKALA: Off the record.

11 (Off the record.)

12 BY MR. LINNEMAN:

13 Q. Let's see. How many times did you meet
14 with Mr. Monroe, do you remember?

15 A. I remember seeing him twice. That's my
16 recollection.

17 Q. Okay. At what stage of the proceedings,
18 do you remember?

19 A. I believe we went up, as you saw from the
20 letter, we went up and saw him fairly soon after
21 being appointed. That's Exhibit 11. That was in
22 March. I don't remember if that was the first time
23 we went and saw them or if it was the second time,
24 but it seems like we went up and saw him a couple of

1 times, at least.

2 Q. Okay. And where was he at that time?

3 A. They were at -- death penalty was at
4 Mansfield, Mansfield Correctional Institute at that
5 time, so that's where we went.

6 Q. For both visits?

7 A. Yes.

8 Q. Okay.

9 MS. LEIKALA: Did you say you saw him in
10 March?

11 THE WITNESS: Well, there's a letter here
12 dated March of 2003 where we're asking to come up and
13 see them. The letter is dated March, but we went to
14 see them in May. You have to make a reservation.

15 MS. LEIKALA: I'm sorry to have
16 interrupted. I just wanted to make sure the record
17 was clear.

18 THE WITNESS: It says May 1, 2003. I
19 don't remember. I remember it was a nice day and Joe
20 was learning Russian, and I had to listen to his
21 Russian tapes all the way up. I do remember that.
22 He probably didn't say that in his deposition.

23 BY MR. LINNEMAN:

24 Q. He didn't mention that. That's funny.

1 Okay. So based on Exhibit 11, you
2 think -- so you think you carried that out on May 1?

3 A. Uh-huh. Right.

4 Q. Well, this is the only -- we'll go through
5 your correspondence, but to my review, this is the
6 only letter that I saw in which there was a request
7 for an appointment, to visit an inmate, that is. And
8 I'm looking at Exhibit 2 right now. I'm just looking
9 at what would have happened between -- it looks like
10 on April 1, 2003, the clerk filed a notice of filing
11 the record, and then on June 26 there was a
12 stipulation of time for the filing of the defendant's
13 merit brief, so that means between -- so in May you
14 were probably in the process of writing the brief, I
15 guess?

16 A. Right. That does make sense.

17 Q. Although when this letter was written, the
18 record wasn't filed yet, so you actually didn't --
19 you would have been anticipating that, but wouldn't
20 actually have known.

21 A. Correct.

22 Q. Am I right then if the record is not
23 filed, did you have the transcript yet at that time?

24 A. Well, I don't have that exhibit in front

1 of me, but it looks like I started reading the
2 transcript in -- according to my billing, in March of
3 2003.

4 Q. Okay.

5 A. So sometimes the record comes in in bits
6 and pieces.

7 Q. Right. And you could have gotten the
8 transcript from the trial court, of course.

9 A. Sure. And we would have gotten the
10 transcript from the trial court. And that would be
11 about right. If the sentencing was in November, by
12 March, with the extension that you get, it should
13 have been in.

14 - - -

15 And, thereupon, Petitioner Exhibit No. 28
16 was marked for purposes of identification.

17 - - -

18 BY MR. LINNEMAN:

19 Q. Okay. I'm going to show you what's been
20 marked as Exhibit 28 from -- identical to Exhibit 28
21 from Mr. Edwards' depo.

22 Take your time and tell me if you have any
23 recollection of receiving this. And I believe,
24 again, everything we're looking at today, I believe,

1 should have come out of your file.

2 A. Well, it's a note. I believe it was
3 written by Mr. Monroe. And my recollection is that I
4 did go up, and, again, I may have gone up by myself
5 to see Monroe and Turner in the same visit, not at
6 the same time, but in the same trip to Mansfield.
7 And I do recall that Mr. Monroe didn't want to come
8 out and speak with me. I do remember meeting with
9 Mr. Turner on that visit but -- and then this may be
10 a note that was a follow-up from Mr. Monroe
11 explaining why he didn't come out and see me.

12 Q. Okay. And you do remember that that
13 happened once, that you went up to visit him, and he
14 didn't come out?

15 A. Yes. I went up to see him. I don't
16 remember when it was. It's not in my billing. Maybe
17 I didn't bill for it because I probably billed for it
18 in the Turner case because I didn't get to see
19 Mr. Monroe. He wouldn't come out and talk to me.
20 That happens.

21 Q. Okay. Tell me your ordinary practice in
22 consulting with a client on a case like this, and
23 then if you could, if anything -- if you recall that
24 anything was different from the norm in this case, if

1 you could -- if you could describe that.

2 A. Well, I've only done three, so I don't
3 know if there's a norm. I can tell you what we did,
4 if that's okay.

5 Q. Okay.

6 A. This is what we did. Obviously, Joe and I
7 met at some point and discussed what -- reviewed the
8 procedures, made sure that we knew what we were going
9 to do. And, obviously, I was -- Joe was -- I was
10 taking his lead. So we would have scheduled this
11 visit. We went up and visited with Mr. Monroe. I
12 believe that Joe may have sent him a letter fairly
13 early on saying, Hey, we are your attorneys for your
14 death penalty -- for your appeal. That would be my
15 standard practice in any case on an appointed case,
16 to send a letter of introduction. And I believe Joe
17 did that.

18 And then we didn't go up to see him,
19 according to this, until May. And my recollection of
20 the visit is we sat down, we talked to him
21 personally, you know, about himself. We talked to
22 him about the case, because at that point we knew
23 something about the case because we had read the
24 transcript at that point, so we knew what was going

1 on.

2 I know that Joe explained to him in detail
3 how the death penalty appeals process works from the
4 Ohio Supreme Court all the way through to where we
5 are today and beyond.

6 Q. This is during the course of this initial
7 visit?

8 A. In the May meeting, correct.

9 Q. Okay.

10 A. And what to expect in the Ohio Supreme
11 Court, what we were going to try to achieve. So it
12 would have been an explanation of procedure as well
13 as talking about Mr. Monroe and what was going on
14 with him and sort of a personal side as well. I do
15 remember that.

16 And then -- and I don't know if Joe did
17 this or not -- my practice is to provide the client
18 with updates and things that get filed, pleadings
19 that get filed. And this I'm talking about appellate
20 cases now, whether they're death or non-death, so
21 they're aware of what's going on with their case, a
22 copy of the briefs. I send them a copy of the
23 transcript. I don't know if he sent Mr. Monroe a
24 copy of the transcript. I don't remember. An

1 invitation to tell me what's on your mind, write me a
2 letter, write me 10 letters. What do you think?
3 What do you want to see? What do you want to see in
4 the brief? What are issues that you had with your
5 attorneys? Anything like that.

6 And then we would have -- I don't remember
7 if Joe did this or not, because my practice would be
8 to once oral argument has happened, that day, we send
9 the client a letter saying, I went to the Court of
10 Appeals with the Supreme Court, conducted oral
11 argument on your behalf. We expect a decision within
12 the next few months. When that decision gets there,
13 when I get it, I'll send you a copy of that and
14 explain to you what -- where you go from there. So I
15 don't know if Joe did those things in Mr. Monroe's
16 case or not.

17 Q. Okay. Well, just to maybe just assure you
18 that your memory in at least some respects is
19 correct, this is Exhibit 7. This is identical to
20 Exhibit 7 from --

21 MS. LEIKALA: We already had a 7.

22 MR. LINNEMAN: This is Exhibit 7 from
23 yesterday. So why don't today we'll call it 7A. I
24 will put a Post-it on there.

1 MS. LEIKALA: So this is Edwards' 7?

2 MR. LINNEMAN: Yeah. I was just going to
3 show him this sort of intro letter that you just
4 described.

5

6 And, thereupon, Petitioner Exhibit No. 7A
7 was marked for purposes of identification.

8

9 BY MR. LINNEMAN:

10 Q. You can take a moment to review that, but
11 that seems to be the letter that you described, at
12 least initially, providing an introduction; and I see
13 that you are listed as a copy recipient of that.

14 A. Okay. Okay.

15 Q. What do you remember about the level of
16 input that Mr. Monroe provided?

17 A. Well, not a lot. Mr. Monroe at
18 mitigation, from talking to his trial attorneys, was
19 not very cooperative with the mitigation phase. That
20 was their perspective. I'm sure you'll depose them,
21 and maybe you already have. I don't know.

22 I think he said something to the effect --
23 he got up in front of the jury and said, I'm not
24 going to stand here and beg for my life. So he was

1 just very hesitant to talk about those sorts of
2 things.

3 I don't remember a whole lot of discussion
4 about the factual accusations in the case. He was
5 not very engaged is my recollection. He was very
6 polite and very friendly, but he was not very
7 engaged, and as you can see from the subsequent
8 visit, he declined a visit.

9 Q. Okay.

10 A. He wasn't hostile. He wasn't angry. He
11 wasn't difficult. He was polite and courteous, but
12 my recollection is he just was not very engaged.

13 Q. So he didn't give you -- you didn't get --
14 let me start over.

15 Is it fair to say he didn't provide
16 meaningful input to the work you were doing?

17 A. That's not my recollection. No, sir.
18 Yeah.

19 Q. I'm sorry. You say it's your recollection
20 that he did not provide?

21 A. My recollection is he just was not, as I
22 say, my phrase was he was just not very engaged in
23 his case. He seemed to be -- and maybe -- you know,
24 he's also serving a life sentence in another

1 unrelated homicide, so maybe he just felt that it
2 just didn't make any difference. I don't know.

3 Q. Okay. How did that affect your work on
4 this appeal?

5 A. It didn't. You know, an appeal is a
6 little bit different than a trial. It's a lot
7 different than a trial. Obviously, you know, direct
8 appeal, you're stuck, quote unquote, with the record.
9 You can't change what's there. And so in an appeal,
10 you know, in a non-death appeal, I don't routinely go
11 and see the client, unless there's some really
12 burning issue. I write them a letter, tell them to
13 write me a letter back, hundred pages, I don't care,
14 I'll read it. Usually the letters are not
15 particularly helpful, but sometimes they provide
16 insight into problems with the defense attorney, with
17 the judge, with the prosecutor that are not in the
18 record. I turn those over to the State PD, let them
19 take that from there.

20 But, you know, of course, I have the
21 folks -- if this isn't responsive, let me know -- I
22 have the folks who want to have some assignment of
23 error in their brief that doesn't have anything to do
24 with anything. I have some folks who file their own

1 briefs in addition to mine.

2 I have a guy right now who wants to come
3 down and do the oral argument instead of me. I told
4 him, That's fine. Go ahead. I don't care. Call,
5 here's the number of the court administration, the
6 10th District, if they let you, go ahead. It doesn't
7 make any difference to me. I'm easy.

8 So it's a little bit different in an
9 appeals case. Obviously, you want to try to find out
10 as much as you can. But it's different than going in
11 a trial, obviously. It's a different dynamic with
12 the client.

13 But it didn't -- I mean, whether people
14 are -- whether they want to argue their own case in
15 the court of appeals or whether they never respond to
16 my communications, it doesn't really change how I
17 approach the case, what I do as far as reviewing the
18 record, writing a brief, arguing the case.

19 Q. Okay. Can you just -- you touched a
20 subject there that I should -- that I would like you
21 to explain to me.

22 Can you explain the distinction between
23 the role of the appellate attorney on a direct appeal
24 and, for example, you said some information you might

1 send to the public defender. Why is that? What's
2 the -- how do those matters get divided up?

3 A. Well, you have somebody who writes me a
4 letter and says, Well, I wanted my attorney to call
5 witnesses A, B and C, and he wouldn't do it. So, I
6 mean, I have the transcript, A, B, and C aren't
7 mentioned. That's a post-conviction problem. I
8 can't deal with that in a direct appeal because
9 there's no proffer. There's no mention. They're not
10 in the record, so there's nothing I can do in that
11 case.

12 That would be an example of a letter I
13 would write to the State PD or contact them. Jay
14 Mackie is the head of that unit that handles that, so
15 I would contact Jay by e-mail or text or something,
16 and say, Hey, in such and such a case, there's this
17 issue that's popped up, and his folks will go take a
18 look at it.

19 Q. So that's outside the scope of the direct
20 appeal?

21 A. Correct.

22 Q. So you just attempt to put it in the hands
23 of the people who are handling the post-conviction
24 matter?

1 A. Who could handle post conviction. Right.

2 Q. Okay. Then how often did you meet with
3 Joe Edwards, if you remember?

4 A. I don't remember. It might be reflected
5 in the bill. In the bill that's in Exhibit 3,
6 there's letters and phone conversations that are
7 reflected at various points. There may be -- there
8 may have been contact that -- like, there's a
9 "writing brief." We may have been in e-mail contact
10 with each other about how to assemble it, getting
11 everything together that's not reflective in the
12 bills as a separate line item. I don't remember how
13 many times. No. Sorry.

14 Q. Okay. So as to your -- as to the process
15 that you've described, the way you do the job of
16 prosecuting an appeal, how do you initially identify
17 the actual issues that you will assign?

18 A. Well, first thing you have to do is you
19 have to read the transcript and you have to review
20 the record, exhibits, whatever you have. And then
21 what I do is I read the transcript first, and I take
22 notes or put stickies on pages and make a note to
23 myself or a note on a legal pad, you know, page such
24 and such, there's some issue that comes up.

1 Sometimes that issue gets resolved later on in the
2 trial through a stipulation or some other --
3 something else, the person is acquitted on that
4 count, so it doesn't make any difference, whatever.
5 Those are just examples.

6 And then, obviously, after you've read the
7 transcript, you want to take a look at the exhibits,
8 and some exhibits you may want to look at more
9 closely than others. If you have a case in which --
10 I'll just give you a recent example -- had a case
11 that hinged on a photo array, picking out a photo
12 array. That's basically -- it's an eye witness case,
13 pizza delivery robbery. The pizza delivery guy
14 picked the defendant, appellant, out of a photo
15 array. So, obviously, I went down and really paid
16 very close attention to that exhibit. That's a
17 linchpin exhibit. I took a lot of notes, came back,
18 and in my brief, I incorporated my views on that in
19 the brief and really focused on that.

20 I didn't look at some of the other
21 exhibits, because they were introduced, but they
22 weren't objected to and they weren't all that germane
23 to what I was focusing on. So that would be how I
24 would do it. And, obviously, if there's -- when you

1 write the brief, there's research that needs to be
2 done.

3 There's a lot of issues that are manifest
4 weight, things like that. The case law hasn't
5 changed very much on manifest weight and sufficiency
6 of the evidence in quite a while. The standard is
7 pretty much the same as Florida versus Tibbs, State
8 versus Getsy, those are in almost every brief that I
9 have because those are the leading cases on those
10 issues.

11 And there may be -- obviously, you want to
12 look and see, maybe there's another case from another
13 district that bears on your eyewitness
14 identification, similar type fact pattern or
15 something. Who knows. If there's research,
16 sometimes you have issues that you say, gee, I've
17 never bumped into that before, so you have to do
18 quite a bit more work.

19 Q. Okay. So do you recall in this case
20 whether you actually -- whether you individually or
21 whether Mr. Edwards individually or whether the two
22 of you collectively had at any point what I'll call
23 just an issue list, the list of items that you were
24 contemplating as items to be assigned as error?

1 A. We did. I don't know -- I don't remember.
2 I'm pretty sure that we did. My recollection is is
3 that when we first met after we had gotten appointed,
4 we met, it may have been over the phone, but we
5 determined that I would write the non-death penalty
6 issues, if you will, the issues that you would see in
7 the appeal of any criminal case, weight and
8 sufficiency of the evidence, ineffective assistance
9 of counsel, hearsay problems, evidentiary problems,
10 evidentiary rulings that you would see in any case,
11 whether it's a misdemeanor theft or a death penalty
12 case, and Joe would concentrate on what I would call
13 the constitutional death penalty specific issues that
14 you see in any death penalty brief. He had those
15 issues already researched, I believe, and had written
16 those before. I wasn't familiar with those as much
17 as he was. That's just how we decided to break it
18 up.

19 So after I read the transcript, I had
20 identified some issues. I don't remember -- I
21 honestly do not remember the brief. I'm sorry. But
22 I would identify whatever issues, and then I would
23 have discussed with him what we were going to put in
24 the brief.

1 Q. Okay. Now is probably a good time to
2 review some of these papers just to kind of document
3 what's in the file here.

4 A. Okay. Sure.

5 Q. Here's what's been marked as Exhibit 4.

6 MS. LEIKALA: This is different than
7 Edwards' 4?

8 MR. LINNEMAN: This is different than
9 Mr. Edwards' 4.

10 BY MR. LINNEMAN:

11 Q. Just for -- I don't want to tell you what
12 the stuff out of your own file is, but I've labeled
13 this bunch of stuff here work products and notes, but
14 you tell me what it is. Just tell me if you
15 recognize it, if any of it looks familiar, if you
16 know what it is.

17 A. I know what it is now. This is Killer
18 Bunny's testimony, the co-defendant. I think that
19 was his nickname. Yeah. Shannon Boyd. He was the
20 cooperating co-defendant. And I believe that --
21 yeah. They had Dave DeVillers, who was in the County
22 Prosecutor's office and now is an AUSA, I believe he
23 came in, and I believe this is right, sort of
24 bolstered the evidence.

1 Q. One thing that might be helpful, it looks
2 like the last page of this packet appears to actually
3 be the first page of the argument that's made.

4 A. Okay.

5 Q. I don't know how it got that way. I don't
6 know, but am I right that this looks to me like these
7 are your draft of at least a portion of the brief?

8 A. Right. Right. And I remember this now.
9 Yeah. There was a plea deal with Mr. Boyd, the
10 co-defendant, and I think the State, there were some
11 concern about the State Prosecutors, that Mr. Boyd
12 was -- I don't remember -- getting a special deal or
13 he was -- they were -- there was something fishy
14 about his deal with the State Prosecutors, the County
15 Prosecutor's office.

16 MR. LINNEMAN: And maybe this will help
17 you. I'm not going to make this brief an
18 exhibit here, but is it all right with you if I just
19 show him the brief? You have access to this, don't
20 you?

21 MS. LEIKALA: Yeah. Are we doing the same
22 thing we did yesterday?

23 MR. LINNEMAN: I'm just comparing these
24 propositions of law to the ones in the brief.

1 MS. LEIKALA: Just for purposes of the
2 record, it's Document No. 63-5.

3 MR. LINNEMAN: Okay. Is there a Page I.D.
4 number in there?

5 MS. LEIKALA: Yeah. The page I.D. number,
6 it begins on -- I think it's -- is it 1,616?

7 MR. LINNEMAN: 1,616. Thank you. Yeah.

8 BY MR. LINNEMAN:

9 Q. Okay. Mr. Barstow, the only reason I
10 offer this is because it does appear to me that the
11 propositions of law here do match the ones in the
12 brief that was filed. So it looks to me as if -- or
13 I guess let's check that.

14 A. Well, I'm looking at Exhibit 4.
15 Proposition of Law No. 1, that's the IAC claim
16 concerning Dave DeVillers' testimony about
17 co-defendant Boyd's testimony, and that looks like
18 Proposition of Law No. 1.

19 I was going to flip into the brief and see
20 if that's -- it looks to be pretty much the same as
21 this Exhibit 4. I mean, I don't think it's word for
22 word. Okay.

23 Q. And 2, at least in the title -- I don't
24 need you to review this all -- it looks like this is

1 a draft of the brief, and it looks like it came
2 pretty close to being -- at least it evolved. We
3 don't need to establish --

4 A. Yes.

5 Q. -- that it is a final draft necessarily.

6 A. No. It appears to be substantially the
7 same sorts of arguments.

8 Q. All right. I'm going to hand you what's
9 been marked as Exhibit 5. Here. I'll take that
10 brief out of your way. Certainly, if you want to
11 refer to it at some point, you're welcome to.

12 A. Sure.

13 Q. Here's some stuff that I've -- that I've
14 labeled as notes, but you tell me what it is. This
15 is Exhibit 5, again, unique from yesterday. And I
16 don't know if you remember this, but your file was
17 pretty thick. You had a whole box of stuff.

18 A. Yes.

19 Q. So we did not duplicate everything in that
20 file --

21 A. Okay.

22 Q. -- because it would have resulted in extra
23 copies of the whole transcript and extra copies of a
24 large number of things that we know we already had

1 copies of, but what I did is where we found
2 handwritten notes, we copied them with whatever they
3 appeared to be referring to.

4 A. Okay.

5 Q. So does this look like -- is this
6 consistent with the description you made earlier of
7 some of your process?

8 A. Yes. Exhibit 5 in the middle pages here,
9 this is my handwriting, and this is an example of
10 what I do. I mean, I'm going through, maybe there's
11 a gruesome photograph claim in here. I would have
12 decided the Maurer case initially, there's a couple
13 of other ones, the DeVillers -- the bolstering,
14 testifying, the Assistant Prosecutor testifying about
15 Mr. Boyd. There's a manifest weight. So yeah.

16 And then it looks like down here is notes
17 on the photographs. And this is -- this was kind of
18 a nasty -- kind of a nasty crime scene. The
19 allegation -- my recollection is that the two women
20 were tortured with knife cuts and cigarettes, and
21 then I think they were shot. I don't remember.

22 Q. Okay.

23 A. So that would have been --

24 Q. You're referring to the top portion of the

1 notes where it says "photos"; is that what you mean?

2 A. Uh-huh. Uh-huh. Photos. And then M, N,
3 P would have been exhibit numbers that when I went --
4 from trial exhibit numbers.

5 Q. I'm sorry. Maybe you can just show me on
6 the --

7 A. I'm sorry. It's page 3, and it says --
8 this is 239 total photographs. That's my
9 interpretation of this note. And then M, the letters
10 and the numbers are the exhibit numbers from the
11 trial so I could refer to them in the brief. Yeah.
12 That's right. I remember this. They were tied up.
13 It was pretty bad. Okay.

14 Q. Okay. So these are your notes?

15 A. It's my handwriting, my notes.

16 Q. The first page of the notes, let's see,
17 "Dodd versus Oklahoma," see that in the middle of the
18 page?

19 A. Right.

20 Q. What's that a reference to?

21 A. It's a reference to a case that -- I don't
22 remember it specifically -- but it's from my notes.
23 It's a case about jail informants and how you deal
24 with jail informants. I don't remember if there was

1 a jail informant in this case or not. I honestly
2 don't.

3 Q. Okay. What about the next one?

4 A. It was murder, no instruction, there was
5 no lessers. I think that was an issue that we
6 raised, there was no instruction to the jury on the
7 lesser.

8 Q. Lesser included offense?

9 A. Lesser included offense, right, of murder.

10 Q. Finally, the last entry on the page
11 appears to be -- it's a Delta, as in defendant's,
12 statement?

13 A. "No Miranda" warnings. That's what it
14 says.

15 Q. Any recollection of what your line of
16 thinking was?

17 A. Maybe there was --- I don't remember if he
18 made a statement to the police if he was or wasn't
19 Mirandized. This note leads me to believe that there
20 may have been a Miranda issue.

21 Q. Okay. Here's Petitioner's 6. Again, I'll
22 try to -- you can assume these are unique to today,
23 unless I say that.

24 And, Mr. Barstow, again, this is the same

1 question now, I'll remind you that what I tried to do
2 here is rather than -- you can see that these are
3 some handwritten notes. I did not photocopy the
4 entire -- these volumes of the proceedings from the
5 transcript are three and 400 pages long, so rather
6 than take a whole acre of pine trees, I just copied
7 the pages to which they appeared to be attached.

8 If you can take a look at these and tell
9 me if you have any recollection of them. First of
10 all, the initial question, just as you identified
11 last time, whether it's your handwriting. I will
12 tell you right in the middle of No. 6, where it says,
13 "Notes from transcripts," that is my handwriting.
14 The original of this has a Post-it on it that says,
15 "Notes from transcripts," but the Post-it doesn't
16 come through.

17 A. Okay.

18 Q. But I can tell you that that's my
19 handwriting.

20 A. Well, it's my handwriting on the top of
21 that page 6. It's my handwriting on the second page,
22 and then there's a couple of pages of transcript.
23 There's another note, my handwriting, "Boyd as
24 co-defendant."

1 Q. Do you have any recollection of what the
2 significance of those -- of these are, of the notes
3 are?

4 A. Well, I don't remember specifically much
5 about the case, but I know that sometimes prosecutors
6 try to claim that people who plead guilty are no
7 longer co-defendants. I don't know where they get
8 that, but that's what they think, some of them. They
9 try to claim that juveniles who are charged out of
10 the same crime are not co-defendants, other kind of,
11 to me, odd ideas, but there may have been some
12 argument in the transcript from the prosecutor that
13 Mr. Boyd was no longer a co-defendant because he pled
14 guilty or he was charged in a separate indictment, so
15 he's not a co-defendant. Whatever.

16 Looks like "Impeach" on the next page.
17 Note about lessers. And I'm not looking at the
18 transcript to see -- looks like we're in jury
19 instructions, so I may have been going through and
20 reminding myself, hey, there were no lessers here.
21 "Use as a weapon."

22 Q. You're looking at the -- it's just
23 before --

24 A. 1,310.

1 Q. -- page 1,310 from the transcript?

2 A. Uh-huh. Possible issue with the
3 definition of burglary, that's before 1,319.
4 "Discuss with anyone capital case," that's before
5 page 600.

6 Q. Do you know what that would refer to?

7 A. Well, I would have to go back and look
8 through the transcript. I would have to sit here and
9 look at the transcript to refresh my memory on these
10 notes. I mean, I can guess.

11 Q. Just if you have any recollection.

12 A. No. I have no recollection. Anything at
13 this point, if it's not a guess, I'll let you know.

14 And then there's page 600. Expert --
15 after page 803 -- "Expert testimony not qualified as
16 an expert."

17 "DeVillers bolstering good issue." I
18 remember this because that's why Dave DeVillers was
19 called, in my view, was to bolster Shannon Boyd's
20 testimony.

21 "Adkins missing" -- could be referral to
22 the Adkins case, Supreme Court case.

23 Q. Adkins -- I'm sorry. What's that? Can
24 you say that again?

1 A. It says --

2 Q. Just what is the handwriting, if you can
3 read it?

4 A. It looks like "Adkins" -- that's my
5 shorthand for "missing" -- and then it looks like
6 witnesses, but I don't know. Sorry.

7 "Witness' prior record no disclosure by
8 prosecutor." Somebody had a record.

9 Q. And that's after --

10 A. This is the last page of 6.

11 Q. Okay. So these are your notes from your
12 review of the transcript?

13 A. Well, they are some. Yes.

14 Q. Okay. That appears to be all that I
15 spotted as notes that between the three what we've
16 labeled as 4, 5 and 6, we have a draft, we have some
17 handwritten notes and some case law and some
18 handwritten notes in the transcript. Do you have any
19 recollection of whether there were any more?

20 A. No, I don't.

21 Q. At this time, your notes from the
22 review -- and this was 2003, of course, 10 years
23 ago -- would your habit have been for that sort of
24 notes to be handwritten?

1 A. Yes.

2 Q. You wouldn't be doing this kind of thing
3 on computer?

4 A. No.

5 MR. LINNEMAN: Okay. Off the record.

6 (Off the record.)

7 BY MR. LINNEMAN:

8 Q. I would like to go through right now, I've
9 got this stack of correspondence, let's just
10 authenticate it real quick. If you can just identify
11 it, and if you can give me any particular
12 recollections you have.

13 You've got a letter already which was a
14 letter from Mr. Edwards to Mr. Monroe, right --

15 A. 7A.

16 Q. -- dated January 2, 2003?

17 A. Correct.

18 MR. LINNEMAN: Here's No. 9. Now, maybe
19 I'll say for the record some of these we saw
20 yesterday, but they probably have different numbers
21 today.

22 MS. LEIKALA: Okay. So these -- we'll
23 give them unique numbers today and not use the
24 Edwards' version?

1 MR. LINNEMAN: Yes. She has labeled
2 these -- Ann has labeled them today with unique
3 numbers.

4 BY MR. LINNEMAN:

5 Q. Mr. Barstow, the question here will just
6 be do you recognize this? Did you receive this?

7 A. Well, to the extent --

8 Q. To the extent you remember.

9 A. Well, I don't remember receiving this. I
10 am assuming that I did.

11 Q. Okay. It looks like it's March, so,
12 again, it sounds like you would have -- he says, "The
13 record's been certified." So you guys are setting
14 your deadlines.

15 A. Uh-huh.

16 Q. And you're getting the transcripts?

17 A. Yes.

18 Q. Okay. But you don't have a specific
19 recollection of receiving it?

20 A. No.

21 Q. You would recognize Joe's signature if you
22 see it?

23 A. Yes.

24 Q. And that's it?

1 A. Yes.

2 Q. Here's what's been marked -- I'm sorry.
3 What is that?

4 A. It's 10.

5 Q. 10. This one's under your signature. Is
6 that your signature?

7 A. That's my signature. It's just a response
8 to 9. I see that the due date's June 2. Extension.
9 And I had gone by and talked to Greg Goepfort,
10 according to this, that's Judge Fais' court reporter
11 at the time, and it says here he was getting it ready
12 to print out, and I had no problem with the division
13 of labor on the merit brief.

14 Q. Okay. Let's talk -- let's speak to that
15 issue. Do you remember -- I think you described
16 generally how you two approached division of labor.
17 Is that what you were talking about before when you
18 categorized them as traditional constitutional death
19 penalty issues, which were delegated to Mr. Edwards?

20 A. Right, which would include voir dire,
21 obviously, it's a very specialized process. A lot of
22 times in non-capital cases, the voir dire isn't even
23 transcribed. It's not that it's not included with --
24 it's not even -- it's waived, so I have no transcript

1 of voir dire a lot of times in felony cases.

2 Q. Who waives it?

3 A. Attorneys.

4 Q. The defendant's attorneys?

5 A. Sometimes defendant's attorneys just waive
6 it.

7 Q. Okay. So with that said, that's a good
8 point. Can you look back at Exhibit 9 for just a
9 moment.

10 A. Sure.

11 Q. One sentence in there, in the second
12 paragraph, Mr. Edwards says he "Does not think that
13 we need a complete second copy of the voir dire," but
14 he'll get copies of the mitigation hearing and all
15 pretrial motions.

16 So do I understand what you said before,
17 because that is a unique death penalty issue,
18 Mr. Edwards handled the voir dire?

19 A. Correct. That's why I wouldn't have a
20 copy of voir dire to read because I wasn't going to
21 do any of that.

22 Q. Okay. So you didn't -- you wouldn't have
23 reviewed the voir dire?

24 A. Well, I don't remember if I did, but it

1 appears that way. I don't remember.

2 Q. Okay. One other thing, back to 10. It
3 says you're directing your secretary to set up a time
4 with your office to travel to Mansfield to meet
5 Mr. Monroe.

6 A. Yes.

7 Q. So may I infer from that that you at least
8 as of March 11, you hadn't met him yet, right?

9 A. No. No.

10 Q. Okay.

11 A. And there's nothing in the bill that
12 indicates we traveled to Mansfield.

13 Q. Okay. Here's Exhibit 12. I don't know
14 what happened to 11.

15 MR. KOMP: 11 is in already.

16 MR. LINNEMAN: Did I put that in?

17 BY MR. LINNEMAN:

18 Q. Again, these also, theoretically, should
19 be in chronological order if that helps. Do you have
20 any recollection of this?

21 A. No.

22 Q. Okay. But you guys filed -- you got an
23 extension of time on the brief?

24 A. Yes. I don't remember doing it, but

1 that's pretty standard. I think they've actually --
2 I think Supreme Court has actually increased the time
3 now, made it a little bit longer, because these cases
4 are usually huge.

5 Q. Okay. This is -- so this is from Joe to
6 you?

7 A. Yes.

8 Q. Do you recall whether -- it looks like we
9 may be missing something from this particular
10 correspondence because it says it's got an enclosure,
11 which doesn't appear to be attached. It says he's
12 enclosing a motion for stay of execution. Do you
13 recall whether you used pleadings from any other
14 cases that you were modeling off of, what I might
15 call today just cut and paste kind of stuff?

16 A. I wouldn't have because I didn't have any
17 of those things because Monroe and Turner were the
18 first two death penalty cases I had done, so I
19 wouldn't have had a library, an electronic library of
20 motions and things like that. I do now, but not
21 then. So Joe would have been preparing all those and
22 signing my name, I assume.

23 Q. Okay. Here's 13. Looks like it's just a
24 fax cover sheet. In places, these are -- you can see

1 we've got what we've got. First of all, do you know
2 whose handwriting that is?

3 A. That's my former secretary, Brenda
4 Bailey's handwriting.

5 Q. She no longer works with you?

6 A. No, sir. She's disabled.

7 Q. Who at this time, during late 2002 and
8 throughout 2003, what was the staff in your office?

9 Who all did you have working with you?

10 A. Just me and I just had a secretary. That
11 was it.

12 Q. Just the two of you?

13 A. Yes.

14 Q. Did you share office space with anybody at
15 the time?

16 A. No. I rented space in a building with
17 other businesses, but no other attorneys. No.

18 Q. Okay. All right. I'm going to show you
19 what's been marked as Exhibit 14. Can you explain to
20 me what this is?

21 A. Well, it's a referral letter or cover
22 letter we have in the office. It's addressed to the
23 prosecutor. It's a service -- it looks like it's a
24 service copy of the extension of time to file a brief

1 signed by -- that's Brenda signing my name on the
2 cover letter, sending it over to the prosecutor, just
3 routine sending it to them, serving it on them.

4 Q. So when you use these cover letters for
5 multiple purposes, you just pick the "X" on what --

6 A. Yes.

7 Q. -- whatever your specific purpose is in
8 that?

9 A. Right. That's why it says, "Refer to the
10 items marked with an 'X' below." So there's no check
11 in there.

12 Q. Okay. And it's your practice -- I see
13 there's a line at the bottom identifying the
14 enclosure, which gives a description of whatever
15 is --

16 A. Enclosed.

17 Q. -- enclosed.

18 A. Right.

19 Q. Here's Exhibit 15. Any recollection of
20 this?

21 A. No. I mean, again, this is the same cover
22 letter. It's dated about a week later than 14. It
23 looks like we're just providing the appellate
24 prosecutor with copy of correspondence to the Supreme

1 Court.

2 Q. Okay.

3 A. It's signed by my -- it's signed by
4 Brenda, my secretary at the time.

5 Q. And with any of these, your practice is to
6 maintain a copy of whatever --

7 A. Correct.

8 Q. -- you're sending out in order to document
9 when and what you are sending out --

10 A. Sure. Yes.

11 Q. -- and to whom?

12 A. Correct.

13 Q. Okay. Here is Exhibit 16. And I guess
14 when we see your signature or a handwritten signature
15 with a slash and the initials BH behind it, that
16 means your assistant signed your name.

17 A. BB.

18 Q. I'm sorry. BB.

19 A. BB, Brenda Bailey. Yes. That's Brenda's
20 signature. She's signing my name, obviously, just
21 routine correspondence. 16 is a copy of the motion
22 of stay of execution that we sent to Mr. Monroe.

23 Q. Okay. 17.

24 A. Sending the same thing to Mr. Edwards.

1 Q. Okay. And that's Brenda's signature?

2 A. Brenda's signature. Yes, sir.

3 Q. Okay. Here's 18. Is that Brenda's
4 handwriting?

5 A. That's Brenda's handwriting. It's just a
6 fax cover sheet. It looks like she maybe attached to
7 this is the extension of time to file a brief, and it
8 looks like maybe from the letter -- from the fax, she
9 thought she had sent it to Joe, but she hadn't, so
10 she was just following up to make sure. And then
11 attached to it is the pleading itself.

12 Q. Here's Exhibit 19.

13 A. Well, this is a letter from Joe to
14 Mr. Monroe saying that he's enclosing a copy of the
15 brief, that Todd and I raised relevant issues, and
16 sort of a possible schedule for oral argument and
17 decision, just so he knew.

18 Q. Okay. And you're a copy recipient of
19 this?

20 A. I am.

21 Q. Do you have any independent recollection
22 of receiving this?

23 A. No, sir.

24 Q. Okay. You mentioned earlier -- let me

1 start over.

2 Do you remember in this case, did you
3 consult with the post-conviction counsel, whoever the
4 attorney was that was handling the post-conviction
5 matters on behalf of Mr. Monroe?

6 A. I don't remember doing that. No.

7 Q. Do you remember the attorney's name?

8 A. I don't know.

9 Q. Okay. Do you know if Mr. Edwards -- the
10 reason I ask, of course, is because this letter says,
11 in the second paragraph, he makes reference to the
12 post-conviction attorneys. Do you know if
13 Mr. Edwards was doing that? Was that something you
14 discussed with Mr. Edwards about him handling
15 consultation with them?

16 A. I don't remember one way or the other.

17 Q. Okay. Do you remember if, as you
18 mentioned earlier, you spotted some item which you
19 thought was appropriate for post-conviction counsel
20 to be aware of in this case?

21 A. I don't remember that.

22 Q. Okay. Here's No. 20. Maybe this will
23 refresh your recollection.

24 A. Okay.

1 Q. Do you know David Stebbins?

2 A. I know Dave quite well, of course.

3 Q. I'm sorry. What is this number?

4 A. This is 20. This is a cover letter
5 sending Dave Stebbins a copy of our brief. So I
6 believe that Mr. Stebbins was the post-conviction
7 attorney. I thought that was the case, but I just
8 couldn't remember.

9 Q. Okay.

10 A. So it looks as though shortly after it was
11 filed, we sent him a copy, and maybe we knew who he
12 was, were in contact with him, and we just sent him a
13 copy. But I don't remember. I don't remember
14 talking to Dave.

15 MR. LINNEMAN: Okay. Why don't we take a
16 break for five seconds just because I'm kind of at a
17 breakpoint here, or maybe just about five minutes, to
18 get my head together.

19 (Recess taken.)

20 BY MR. LINNEMAN:

21 Q. First, before I forget about them, I want
22 to revisit a couple of things that we covered
23 earlier. First, you said at some point you had a
24 phone call from -- concerning your appointment on the

1 Monroe case.

2 A. Uh-huh.

3 Q. And the question was whether you felt like
4 you could work with Joe Edwards.

5 A. Yeah. I remember Tim Jackson, who's the
6 judge's bailiff, asking me. I think he knew the
7 answer, but he asked anyway.

8 Q. That's what I was going to ask. Who was
9 it who actually called you?

10 A. It was Tim Jackson, Judge Fais' bailiff.
11 I don't remember if he called me. I'm pretty sure he
12 called me. He might have seen me at the courthouse,
13 or called me and asked me to come down to the
14 courthouse and see him.

15 Q. Yeah. Do you recall did you speak to the
16 judge at all before this happened about --

17 A. I don't remember talking to the judge.

18 No.

19 Q. Okay.

20 A. I might have. I just don't remember.

21 Q. Okay. Were there any other subjects
22 covered in that conversation?

23 A. Not that I recall. No.

24 Q. Okay. I'm going to go back to -- we've

1 got this packet of your notes, which is Exhibit 5.
2 It's the one -- it's got a case on the front of it.
3 Exhibit 5. And the third page of that are more of
4 your handwritten notes.

5 A. Yes.

6 Q. Do you recall why on the Dodd versus
7 Oklahoma issue, do you recall why that wasn't --
8 whether or why that wasn't raised in the brief?

9 A. I don't remember if it was raised. I
10 don't have the brief in front of me. If I can look
11 at it.

12 Q. Sure. Yeah.

13 A. It doesn't appear that it was. And I
14 don't remember without looking at the transcript what
15 that was all about. I mean, other than it's
16 obviously an issue, pretrial confinement, jailhouse
17 informants. What's their status? Are they plants?
18 Are they freelancing, what have you?

19 Q. Do you have any recollection of whether
20 there was any strategic reason to omit that argument?

21 A. I don't remember the discussion about
22 omitting it.

23 Q. Okay. Same question with the last note on
24 there is, "The defendant's statement. No Miranda."

1 Do you recall why -- do you recall what any
2 discussion with Mr. Edwards -- any of your reasoning
3 whether there was a strategic reason to omit that
4 argument?

5 A. I don't recall.

6 Q. Okay.

7 A. It's the same answer, same context and
8 same answer as the previous question.

9 Q. Okay. Do you recall was there any request
10 that you made or Mr. Edwards made or the two of you
11 made jointly either to the court or to whomever for
12 any resource that you needed in the course of the
13 appeal that was not granted?

14 A. I don't remember anything like that.

15 Q. Okay. Was there any resource that you
16 needed in the course of this appeal that you did not
17 have?

18 A. No. Not that I remember. No.

19 Q. Were you able to do the work you needed to
20 do within the time limits that were imposed?

21 A. Yeah. It was difficult, but we got it
22 done.

23 Q. Okay. I'm going to ask you some questions
24 about the substance of the brief right now to see if

1 you recall.

2 A. Okay.

3 Q. If you want to review it, please feel
4 free.

5 A. Okay.

6 Q. The first proposition of law is one which
7 alleges ineffective assistance of counsel for the
8 failure at the trial to object to the testimony of
9 Mr. DeVillers, who had earlier in the case been
10 involved as a prosecutor.

11 A. Right.

12 Q. And if I recall correctly, or if what we
13 saw earlier correctly -- do I recall correctly that
14 this was an argument which you actually composed and
15 drafted?

16 A. That's my recollection. Yes.

17 Q. Okay. The facts making up that claim,
18 they were framed in the brief in terms of ineffective
19 assistance of counsel based on the fact that the
20 trial counsel did not object and thereby prevent the
21 testimony from coming in, right?

22 A. That's what it appears. Yes.

23 Q. Okay. Could the same argument be made on
24 something of a separate basis in order to argue that

1 that testimony coming in was just simple error on
2 behalf of the trial court to bring it in?

3 A. You could raise that, that it was abuse of
4 discretion, something along those lines.

5 Q. Okay. Same question. Could you also
6 raise that under a different basis, such as, that the
7 offering of the testimony constitutes prosecutorial
8 misconduct?

9 A. I suppose. Again, I haven't seen the
10 transcript in a long time. Arguably, I suppose you
11 could.

12 Q. Okay. Was there any tactical or strategic
13 reason why you didn't raise it in terms of trial
14 court error, as you said, or as prosecutorial
15 misconduct?

16 A. I don't remember what -- why that -- why
17 it was presented only that way. I don't remember.

18 Q. Okay. Can you -- could you look in the
19 index probably is the best way to start with this --
20 can you look at -- compare Proposition of Law 2 to
21 Proposition of Law 8?

22 A. Well, 2 would refer to gruesome
23 photographs being introduced as being prejudicial to
24 the guilt, not guilty determination. I'm just

1 looking to the proposition of law. I'm not going
2 into the substance of them. And 8, it seems to be an
3 error in the penalty phase, so it's a penalty phase
4 error.

5 Q. I notice in Proposition of Law 2, you're
6 right, it specifically identifies the trial, but it
7 also -- in 2, it also mentions sentencing.

8 A. Right.

9 Q. And I guess my only question, if you
10 recall, they do seem to be -- aside from the
11 limitation in Proposition 8, which you identified,
12 they seem to be a bit duplicative. I wonder if you
13 remember was this an instance where maybe both of you
14 handled -- one of you handled one of these and the
15 other handled the other?

16 A. I would have probably written -- I would
17 have written 2, because I remember -- I specifically
18 remember going to the clerk's office at the Supreme
19 Court and going through all of the photographs. And
20 there's notes in one of these deposition exhibits
21 where I list all these photographs. I remember doing
22 that.

23 So I didn't write Prop 8. I think that's
24 something Joe would have written. And without

1 looking at -- I don't remember why I put in fair
2 sentencing determination. It's there. Let me go
3 back and look at 8. I think 8 -- let me look. I
4 guess there's some -- I mean, it is duplication,
5 there is some overlap. I don't know why -- how it
6 ended up that way. I don't.

7 Q. Okay. If Prop 11, I'm going to go and
8 read that one from the actual text because there are
9 some subheadings to this.

10 MS. LEIKALA: What page?

11 MR. LINNEMAN: I'm sorry.

12 MS. LEIKALA: Just the bottom page is
13 fine.

14 MR. LINNEMAN: Page 41 of the brief.

15 MS. LEIKALA: That's what I needed.

16 MR. LINNEMAN: Which will be Page I.D.
17 1,665 in the habeas record.

18 BY MR. LINNEMAN:

19 Q. You see that there are -- it is an IAC
20 argument --

21 A. Yes.

22 Q. -- relating to the penalty phase, and
23 there are subcategories, which are, A, Determination
24 of competence for waiver of mitigation.

1 A. Yes.

2 Q. B, Failure to present relevant mitigation.
3 And then C, it is, Ineffective for trial counsel not
4 to request the court to merge aggravating
5 circumstances.

6 I want to focus on C for just a moment
7 here. First of all, are you still conversant with
8 this argument? Do you recall the basis of it and how
9 it was made?

10 A. Yeah. I didn't write this one, but I'm
11 generally familiar with this argument.

12 Q. Okay. You believe Mr. Edwards was the one
13 who drafted this?

14 A. Yes.

15 Q. Would you mind, could you explain to me
16 the issue of merger to the best of your
17 understanding?

18 A. Well, yeah. When you've got a number of
19 aggravating factors, you want to request that the --
20 that the jury not look at them separately as opposed
21 to the mitigating evidence. And we're talking about
22 multiple murders. They're going to have the same
23 specifications in each count. That's what we're
24 talking about. I'm not talking about one murder,

1 several aggravators. We're talking about two
2 homicides, that each have duplicative and multiple
3 aggravators, you want the court to tell the jury to
4 just look at aggravator one, and aggravator one in
5 the separate murders together, not double counting
6 them would be my understanding of how that would
7 work.

8 So they're not -- you have two homicides,
9 but you don't -- two homicides but -- two people
10 but -- there's two kidnappings, but you want the jury
11 to consider this as one course of conduct, even
12 though two people got kidnapped, for example. Maybe
13 not the best example.

14 Q. Okay. And is it -- was it possible for
15 the defendant to get more than one death sentence for
16 each killing? Do you understand my question?

17 A. Could he have been sentenced to death for
18 each woman?

19 Q. More than once for each woman.

20 A. No. I don't believe that's correct. I
21 believe it's one death sentence no matter how many
22 aggravators you have. You have one killing, one
23 death sentence is my recollection of the law in that
24 area.

1 Q. Okay. Closely related to this, I think,
2 is Proposition 12, which is page 46, Page I.D. 1,670.
3 If there was -- do you recall that this is in the
4 record, in the transcript of the trial, do you recall
5 that there was a reference to a discussion in
6 chambers concerning merger?

7 A. I don't remember that. I'm sorry.

8 Q. Okay. Do you remember whether at the time
9 that you were prosecuting the appeal whether you
10 took -- whether you took any efforts to learn about
11 what had happened in that chambers conversation?

12 A. If it was involving the death penalty, the
13 imposition of the death penalty, that would mean to
14 me everything after the conviction itself. The death
15 qualifying conviction, no, because that's something
16 that Mr. Edwards would have done. So me personally
17 taking an effort, no.

18 Q. So just in terms of your division of
19 labor, that would have been in Mr. Edwards' bucket --

20 A. Yes. Yes.

21 Q. -- as it were?

22 A. Yes. Yes.

23 Q. Do you remember discussing it with
24 Mr. Edwards at all, this issue?

1 A. No, I don't.

2 Q. And if I can ask just a question about
3 generally how you guys worked once you reached that,
4 you know, once you identified an issue as yours and
5 he identified an issue as his, how much collaboration
6 was there between you on that -- you know, on a per
7 issue basis? Is it fair to say that with the
8 specific death penalty issues on which Mr. Edwards
9 had recent experience and more experience than you,
10 that basically once they were in his column, he kept
11 them?

12 A. Correct. I mean, those are fairly obvious
13 to identify. I mean, things that happened, again,
14 after the conviction for death qualifying crimes, in
15 terms of the record and the transcript, that would
16 have been something he handled. That's a pretty easy
17 dividing line.

18 Q. Okay.

19 A. Things that happened before then that may
20 have -- obviously, what happened during the trial is
21 going to -- is part and parcel what happens in the
22 sentencing phase. I don't recall -- I just don't
23 recall the discussion. I would think we would have
24 had a discussion about how things had happened in the

1 trial phase would have affected things that happened
2 in the penalty phase, but I don't remember the
3 specifics of it.

4 Q. Okay. So your -- if I understood you
5 correctly, issues that you had sort of taken the lead
6 on, you might have gone -- you might have worked with
7 him in order to consider what effects they would have
8 on his issues?

9 A. From the penalty phase, correct. Evidence
10 that was introduced, things like that. Yeah. Sure.

11 Q. Okay. I'm going to ask a series of
12 questions now where it's the same question with a
13 different blank filled in.

14 A. Okay.

15 Q. So do you remember that Mr. Stebbins, Dave
16 Stebbins, who we talked about before, he ultimately
17 filed in the Supreme Court a motion to reopen the
18 case after the Supreme Court issued its decision?

19 A. Okay.

20 Q. Do you remember that that occurred or not?

21 A. Wasn't aware of it.

22 Q. Okay. Well, what I'm going to do here is
23 I'm going to review just some of the grounds that he
24 raised in there, and I'll ask you with each one

1 whether there was some tactical or strategic reason
2 why you did not raise any of these issues.

3 MS. LEIKALA: Just for purposes of the
4 record, it's Document 63-6, Page I.D. 1,895.

5 MR. LINNEMAN: Thank you. And what's
6 the -- can you tell me the actual caption on it?

7 MS. LEIKALA: Application for Reopening
8 Pursuant to S.CT.R.PRAC.xi,5.

9 MR. LINNEMAN: Thank you for clarifying
10 the record.

11 BY MR. LINNEMAN:

12 Q. Mr. Barstow, I've handed you a copy of it.
13 Take whatever time you would like to familiarize
14 yourself with it. Again, I'm going to ask you the
15 same question a bunch of times concerning different
16 things that are contained in that motion.

17 A. This is the first time I've ever seen
18 this. Well, I guess I've looked at it. I haven't
19 read the whole thing. We'll see what happens.

20 Q. At any point, if you want more time to
21 review it or whatever you need to do.

22 A. Okay. Probably be better if you ask me
23 the questions, and then I can look at that particular
24 part of the document rather than sitting here taking

1 half an hour to read the whole document.

2 Q. I agree.

3 A. Okay.

4 Q. Did you consider or was there a tactical
5 or strategic reason to avoid raising the question of
6 whether Mr. Monroe was denied the effective
7 assistance of counsel in the pretrial investigation
8 of the case or in the motion practice of the case?

9 A. I don't remember a discussion about that.
10 I don't recall any.

11 Q. Okay. Same question. Did you consider or
12 was there a tactical or strategic reason to avoid
13 raising the issue whether Mr. Monroe was denied
14 effective assistance of counsel in the investigation
15 and preparation for the penalty mitigation phase?

16 A. I don't remember a discussion about that.

17 Q. Okay. Do you remember if was there a
18 tactical or strategic reason, was there any
19 discussion of raising any sort of international law
20 claim?

21 A. I don't remember something like that. No.

22 Q. Okay. Was there a tactical or strategic
23 reason to avoid raising a Brady claim, that is, a
24 failure of the prosecutor to disclose disculpatory

1 information?

2 A. I don't remember any discussion about
3 that. No.

4 Q. Okay. Was there a tactical or strategic
5 reason to avoid raising an argument concerning the
6 adequacy of proportionality review by the Ohio
7 Supreme Court?

8 A. I don't recall.

9 Q. Was there a tactical or strategic reason
10 or do you remember any discussion of avoiding a
11 challenge to the trial court's sentencing entry in
12 this case?

13 A. No.

14 Q. Okay.

15 A. I don't remember.

16 Q. Let's see. Was there a tactical or
17 strategic reason to avoid challenging the weighing
18 process between the aggravating circumstances against
19 the mitigating factors in sentencing?

20 A. I don't recall that.

21 Q. Okay. Was there any tactical or strategic
22 reason to avoid challenging improper arguments made
23 by the prosecutor appealing to the prejudice or
24 passions of the jury?

1 A. I don't recall that. No.

2 Q. Okay. Do you recall in the review of the
3 transcript -- I'm finished with that, by the way.

4 A. Okay.

5 Q. -- a part of the court in which a Columbus
6 Police detective offered an opinion as to a witness
7 lying or offering an explanation of why the officer
8 believed that Mr. Monroe was guilty?

9 A. I don't remember that.

10 Q. Okay. Do you recall any strategic
11 decision being made to avoid that, such an argument
12 concerning that evidence?

13 A. No.

14 Q. Do you recall -- or let's say -- was there
15 a tactical or strategic reason to avoid making an
16 argument concerning evidence in the transcript of the
17 defense counsel being surprised by either the
18 presentation of DNA evidence or the availability of
19 DNA evidence for testing?

20 A. No. I don't remember that.

21 Q. Okay. Strategic or tactical reason to
22 avoid an argument concerning disclosure of a witness
23 at the trial who was a neighbor who purportedly
24 witnessed two people visiting the scene of the crime

1 sometime before the crime that day?

2 A. I don't remember that. No.

3 Q. Okay.

4 A. I remember something about that in the
5 transcript.

6 Q. You do?

7 A. I recall there was some sort of neighbor
8 who testified, but I don't remember any more details
9 than that.

10 Q. Okay. This might have been -- well, there
11 was a neighbor -- let me distinguish for you on that
12 point because there was a -- there were two
13 neighbors, I believe, who actually testified at
14 trial.

15 A. Okay.

16 Q. What I am referring to now is the
17 existence of a witness who did not testify, who was a
18 neighbor, but who -- and the fact that the defense in
19 the transcript states that they only learned of the
20 existence of the witness.

21 A. That I don't remember. No. Okay.

22 Q. Okay. So you don't recall there being any
23 strategic reason to avoid that subject?

24 A. No. I don't remember anything about that.

1 Q. Okay. Do you recall -- now, on the
2 testimony of the other neighbor, the one who did
3 testify, are you aware of any strategic or tactical
4 reason to avoid an opinion offered by that witness,
5 to challenge an opinion testimony offered by that
6 witness concerning the fact that one of the persons
7 fleeing from the crime scene looked as if they were
8 scared?

9 A. I don't remember anything about that.

10 Q. Obviously, we're into some pretty detailed
11 stuff about the transcript here, but another one.
12 Was there a strategic or tactical reason to avoid
13 raising an issue in the appeal concerning the
14 suppression of evidence at the trial concerning a
15 subpoena -- a federal grand jury subpoena which
16 apparently was found at the crime scene?

17 A. I don't remember anything about that.

18 Q. Okay.

19 MS. LEIKALA: Just to clarify the record.
20 Do you have record citations for the transcript pages
21 for the issues that you're asking about?

22 MR. LINNEMAN: I do not have them right
23 here as I'm asking these questions.

24 MS. LEIKALA: Okay. If you had them, we

1 could put them in the record.

2 MR. LINNEMAN: Right. Yeah.

3 BY MR. LINNEMAN:

4 Q. Did you discuss with Mr. Edwards the
5 effect of the -- or excuse me -- the fact that late
6 in the trial -- let me start with the piece of
7 evidence I'm referring to, and we'll go from there.

8 Do you recall that there was a notice of
9 alibi that was submitted in the trial?

10 A. I don't remember that.

11 Q. So I suppose you also don't remember that
12 the notice of alibi was withdrawn late in the
13 defense's case?

14 A. I just don't remember that.

15 Q. Okay. Do you remember -- so you don't
16 remember also whether you consulted with Mr. Edwards
17 concerning the effect of the withdrawal of the alibi
18 and how that may have affected the relationship of
19 defense counsel to the defendant as it related to
20 mitigation in the case?

21 A. I don't remember any discussion of alibi.

22 Q. Do you remember whether any strategic or
23 tactical reason guided your review concerning why you
24 might have excluded as an assignment of error an

1 evidentiary issue which was the State's DNA expert
2 offering testimony concerning exclusion of
3 possible -- of other possible suspects?

4 A. I don't remember that.

5 Q. Okay. Did you do anything to prepare for
6 this today?

7 A. No.

8 Q. You said that you remember specifically
9 going to the Supreme Court because you said you were
10 reviewing the photographs?

11 A. Well, I was reviewing all of the exhibits.

12 Q. Okay.

13 A. Yeah.

14 Q. Tell me about what's the norm there, and
15 what was -- how many times did you go to the -- I'm
16 going to start over.

17 How many times did you go to the Supreme
18 Court, and what did you do there?

19 A. Well, I remember going one time. As I
20 recall, I called them first and made arrangements to
21 go to the clerk's office. You go to the clerk's
22 office, they give you whatever they have. I think
23 they have a room or like a place where you can look
24 at it. I pulled everything out and went through

1 everything.

2 Q. Okay. At what stage of the proceedings
3 was that?

4 A. It was before we wrote the brief. I don't
5 remember if it was before I had read the transcript
6 or after I read the transcript or while I was reading
7 the transcript, but it was at some point during the
8 preparation of the brief.

9 Q. Okay. What do you do to ascertain that
10 the record is complete once it is certified?

11 A. There is -- I believe in this case, there
12 was a list from -- well, there's two -- now I'm
13 trying to remember.

14 There's two ways you can do it. First of
15 all, you can take notes as you go through the
16 transcript what exhibits were admitted. Also, in the
17 transcript, normally the court reporter will place
18 here's what exhibits were admitted and where they
19 were admitted in the transcript, so you have that.
20 And then sometimes the clerk will prepare -- or the
21 prosecutor will prepare a form that will list all the
22 exhibits so you can sort of double check. I don't
23 remember in this case what exactly was there.

24 My normal practice is to check this

1 exhibit was admitted here, this exhibit was admitted
2 here, so you have all of them, and then bounce that
3 list off of what comes up to the Supreme Court
4 because I've found errors. In the Conway case, the
5 wrong autopsy was in the record from the Franklin
6 County Clerk of Court, some other guy's autopsy.

7 Q. So if I heard that right, as you read the
8 transcript, you keep track of exhibits?

9 A. Double check that against -- usually, the
10 court reporter will list what exhibits were admitted
11 somewhere in the transcript. Sometimes it's a
12 separate sheet, sometimes it's a page at the end or
13 page at the beginning, part of their index or
14 something, so you can double check and make sure you
15 got everything.

16 Q. I'm going to show you what's been marked
17 as Exhibit 21. First of all, do you recall -- this
18 is to Mr. Monroe. It looks like sending a copy of a
19 motion to supplement the record. Do you remember
20 that the State filed a motion to supplement the
21 record in this case?

22 A. I don't remember that. No.

23 Q. Okay. I'm going to hand you what were
24 marked yesterday in Mr. Edwards' deposition as

1 Exhibit 23 and Exhibit 25.

2 - - -

3 And thereupon, Petitioner Exhibit Nos. 23A
4 and 25 were marked for purposes of identification.

5 - - -

6 (Off the record.)

7 BY MR. LINNEMAN:

8 Q. 23A, I believe, is Court of Common Pleas,
9 and 25 is in the Supreme Court.

10 A. Okay.

11 Q. I'll give you a sec. Whenever you're
12 ready, just let me know.

13 A. Okay.

14 Q. So does this refresh your memory? Do you
15 recall seeing these?

16 A. No.

17 Q. Now, my first question has to do with in
18 the Court of Common Pleas, you can see in the
19 certificate of service, I believe, that you and
20 Mr. Edwards are identified as having been served with
21 this. Am I reading that right?

22 A. It looks like it.

23 Q. Did you ever make any appearance in the
24 Court of Common Pleas?

1 A. Not on the case. No. No.

2 Q. So you didn't attend a hearing on this?
3 Clarify what you mean for me by, not in the case?

4 A. I didn't represent him in the common pleas
5 court.

6 Q. Okay. So clearly not at trial, but the
7 State apparently sent this to you as his attorney.
8 Do you recall did you attend a hearing on this
9 motion?

10 A. I don't remember. No.

11 Q. Did you file a response to it?

12 A. I don't recall.

13 Q. For what it's worth, I do not -- I haven't
14 seen one, so I'm not suggesting you did. I'm just --
15 but you don't recall?

16 A. No.

17 Q. It appears that the way this transpired is
18 that the motion was filed first in the Court of
19 Common Pleas, was granted by the Court of Common
20 Pleas, and then the State moved to supplement the
21 record in the Supreme Court having been granted the
22 right to -- I'm making the quotation symbol --
23 correct the record in the trial court. Do you recall
24 if you filed a response in the court -- in the

1 Supreme Court?

2 A. No, I don't.

3 Q. And, again, by my review of the docket, I
4 don't see that you did. So does this refresh your
5 recollection? Do you recall what this was all about?

6 A. I don't.

7 Q. Okay. Do you recall -- if I can summarize
8 here -- the contention of the State at the time this
9 was filed was that the transcript was incorrect and
10 an omission reflected in the transcript of a portion
11 of the jury instructions was to be corrected. Is
12 that familiar at all?

13 A. I'm just not familiar with this. I have
14 to sit down and read this to see what's going on
15 here.

16 Q. Okay. Do you recall whether you and
17 Mr. Edwards discussed what the State was asking --
18 what the relief the State was asking for?

19 A. I don't recall this at all.

20 Q. Why don't I give you a minute to review
21 that quickly just to see if it refreshes your memory
22 at all.

23 A. Yeah. Well -- okay.

24 Q. First question, does it refresh your

1 memory at all?

2 A. No, it doesn't. I have no memory of this
3 whatsoever.

4 Q. Okay. Have you ever seen -- in your other
5 experiences, have you had a similar instance to what
6 the State is asking in this motion?

7 A. Not in the -- not on a death penalty case.
8 No.

9 Q. But you've seen it in another case?

10 A. Yes.

11 Q. Okay. And what happened in that case?

12 A. Well, I've had it happen a couple of
13 times. It's Appellate Rule 9C or E, I don't remember
14 which. It might be E. It's correction of the
15 record. I've had a couple of cases in which it
16 wasn't -- I believe they both involved the presence
17 of the defendant during jury questions and things
18 like that, and it wasn't clear from the record if the
19 defendant was present, so I raised that issue in my
20 brief. The State has responded with this motion to
21 determine -- to correct the record, and we've had --
22 both times we've had evidentiary hearings in front of
23 the trial judge, and the trial judge has made rulings
24 as to the completeness of the record.

1 Q. Okay. How would you ascertain that
2 when -- if there's something -- some fact omitted,
3 like in your case, the presence or absence of the
4 defendant, how do you figure out whether they were
5 there or not?

6 A. The appellate rule allows the trial court
7 judge to fix the record and make a determination as
8 to whether or not something did or didn't happen.

9 Q. So in the case you described, you had an
10 evidentiary hearing. Did you have testimony of
11 witnesses --

12 A. Yes.

13 Q. -- who said, like, for example, the
14 attorneys --

15 A. Yes. Trial attorneys.

16 Q. -- who testified --

17 A. Yes.

18 Q. -- it's my belief that the defendant was
19 present --

20 A. Yes.

21 Q. -- or absent?

22 A. Prosecutor. Yes. Yes.

23 Q. Okay. And in the instance that you're
24 describing, was it contested?

1 A. No. I think in both instances, the
2 defense counsel -- my recollection is is in both of
3 these cases, it was -- the question was whether or
4 not the defendant was present at some critical stage
5 of the trial, and in both cases, defense counsel and
6 the prosecutor -- trial prosecutor, trial counsel
7 testified that the defendant was present.

8 Q. Okay. And do you recall whether at the
9 time of this -- I know you already told me you don't
10 remember this motion, but I'm just going to ask you a
11 couple of follow-ups here.

12 Do you recall whether you or Mr. Edwards
13 took any steps to ascertain how -- to ascertain a
14 means of discovering the correctness of the State's
15 proposition?

16 A. No, I don't.

17 Q. You don't remember?

18 A. Do not remember.

19 Q. Do you know at that time the practice in
20 Franklin County Court of Common Pleas in creating the
21 record? Is there, for example, a video that is
22 contemporaneously made or a recording of any type
23 that is made during the trial in addition to the
24 court reporter?

1 A. Not that I'm aware of. No.

2 Q. I know, obviously, there was a court
3 reporter present, but in some counties that I've
4 practiced in, there's also sometimes they've just got
5 video or --

6 A. Not -- no.

7 Q. -- sound recording.

8 A. Nope.

9 Q. So the answer is to the best of your
10 knowledge, there is no backup to the court reporter?

11 A. No. To this day, as far as I know.

12 Q. Oh, really. Okay. Okay. So may I also
13 infer that you do not recall any strategic or
14 tactical reason why no investigation would have been
15 made or why no objection would have been made to this
16 State's motion?

17 A. No. No.

18 Q. Let's see. What was the last
19 correspondence -- Exhibit 21 was the last one I put
20 in front of you, right?

21 A. Huh-uh.

22 MS. LEIKALA: While you are switching
23 exhibits, I'm going to note my objection for the
24 record of raising any issues that have not been pled

1 in the petition that exceeds the scope of the
2 discovery that was granted.

3 MR. LINNEMAN: Okay. The objection is
4 noted.

5 BY MR. LINNEMAN:

6 Q. Mr. Barstow, what is the date on 21?

7 A. November 7, 2003.

8 Q. And that is to Mr. Monroe?

9 A. Yes.

10 Q. And it encloses a copy of the motion to
11 supplement record?

12 A. That's correct.

13 Q. I just wanted to make sure I put the right
14 number on this.

15 Okay. Here's Exhibit 22. Do you recall
16 receiving this letter?

17 A. No.

18 Q. Okay. And I think you said this doesn't
19 refresh your memory as to any consultation with
20 Mr. Stebbins?

21 A. No.

22 Q. Okay. Would you know Mr. Stebbins'
23 signature if you saw it?

24 A. No.

1 Q. Okay. Here is Exhibit 23. To be
2 distinguished from 23A, Exhibit 23 is original,
3 unique to Mr. Barstow's deposition.

4 Is that your assistant's signature?

5 A. Yes. Different assistant, but this is in
6 January of 2005.

7 Q. And who's your assistant then?

8 A. Patrick Johnson.

9 Q. Okay.

10 A. He was a law student at Ohio State at the
11 time.

12 Q. Okay. And had there -- were there any
13 other changes in your staff during the lifetime of
14 this case that you recall?

15 A. Not that I recall. If I see something
16 different, I'll let you know.

17 Q. And you didn't add -- for example, you
18 didn't hire an attorney or something like that ---

19 A. No.

20 Q. -- that would have been -- that would have
21 participated meaningfully in the case?

22 A. No.

23 Q. So do I understand correctly you're
24 sending Mr. Monroe just a copy of a pleading that's

1 been filed in the case by the State?

2 A. That's what it appears. Yeah.

3 Q. Do you recall that the State filed a
4 notice of additional authorities?

5 A. No.

6 Q. Do you recall whether you and Mr. Edwards
7 filed any notice of additional authorities?

8 A. I don't remember.

9 Q. Okay. The sequence of events in this
10 case, and most Supreme Court cases, I guess, is after
11 you filed -- after the appellate or the petitioner in
12 this case files the appellate's brief, then the State
13 files an appellee brief?

14 A. Uh-huh.

15 Q. And what's your normal practice then, or
16 what did you do in this case once you got the
17 appellee brief?

18 A. We had the opportunity to file a reply
19 brief if you choose. I don't remember if we filed
20 one or not. I don't believe we did, but I don't
21 remember.

22 Q. My review of the docket suggests no reply
23 was filed.

24 A. Okay.

1 Q. Yeah. What criteria do you apply in
2 deciding whether or not to file a reply?

3 A. I mean, you look at the -- obviously, look
4 at the appellee's brief and see if there's any -- is
5 it a real issue that remains unresolved or maybe has
6 been misconstrued by the State. I've done it a few
7 times. Usually, if there's a legal issue where I
8 think the State is offering a red herring or
9 misconstruing something that was in my brief or
10 something like that or is -- but I don't normally
11 file them in the non-death cases.

12 Q. Okay. Do you have a normal for in death
13 cases?

14 A. No. I've only done three, so I don't have
15 a whole lot -- I don't have much of a track record.
16 I mean, I've done in non-death cases a couple hundred
17 maybe appellate cases, maybe 150, something like
18 that. It's a very large -- to me, it's a very large
19 number. So I have a much bigger track record there,
20 a much bigger breadth of experience.

21 Q. When you get the appointment in a case
22 though, you are -- do I understand correctly that
23 you're authorized to do the work that you deem
24 necessary to make the case, right?

1 A. Sure.

2 Q. So, for example, the court would have --
3 wouldn't have disputed the payment, for example, for
4 your fees to file a reply?

5 A. No. I didn't say that.

6 Q. I'm not suggesting you did. I just want
7 to make sure I understand the --

8 A. Sure.

9 Q. -- maybe the scope of the engagement.

10 A. Okay. Sure. Sure.

11 Q. And you wouldn't have to go get special
12 permission to do that?

13 A. No. No.

14 Q. Okay. So do you recall conversation
15 between yourself and Mr. Edwards or yourself and
16 Mr. Monroe concerning whether or not to file a reply?

17 A. No, sir.

18 Q. Do you remember the reasons why -- the
19 reasons for not filing a reply?

20 A. I don't remember that. No.

21 Q. All right. Here is Exhibit 24. And I
22 should say, would there be a tactical or a strategic
23 reason not to file a reply?

24 A. Again, as I say, I suppose if you felt

1 that the issues had been briefed and there wasn't
2 anything more to say, then you wouldn't file one.

3 Q. Okay.

4 A. To me, that would be a reason.

5 Q. Okay. 24, again, just to document your
6 activities here. It looks like -- do I understand
7 correctly that this letter is your cover letter in
8 which you sent Mr. Monroe a copy of the Supreme
9 Court's decision?

10 A. That's correct.

11 Q. Is that your signature?

12 A. No, it's not.

13 Q. That's your new assistant?

14 A. Yes. Well, I think Mr. Johnson had
15 graduated -- or no. He had left Ohio State and had
16 returned to Pennsylvania. And that would be
17 Heather's signature. Yeah. She came -- she was --
18 in full disclosure, her father was the court reporter
19 in this case.

20 Q. Oh, really?

21 A. Judge Fais asked me and her father asked
22 me if -- she was looking for work and if I would
23 employ her. She's an excellent worker. She was a
24 college student at the time.

1 Q. So her last name is --

2 A. Goepfort.

3 Q. Can you spell that for Ann.

4 A. G-o-e-p-f-o-r-t.

5 Q. Okay. All right. What did you do -- this
6 takes us to the Supreme Court has rendered their
7 decision, and it says that that decision -- this date
8 in the enclosure line indicates the date of the
9 Supreme Court's decision, right?

10 A. Okay. Yeah.

11 Q. What did you do after that?

12 A. I didn't do anything.

13 Q. Let me back up just a second. We skipped
14 over oral argument briefly, although we talked about
15 it earlier.

16 Again, do I understand correctly it's your
17 recollection or did you have a recollection of who
18 did oral argument in this case?

19 A. I think Joe did it, but I don't really
20 remember.

21 Q. Do you remember anything about the
22 preparation for oral argument?

23 A. Not really. No.

24 Q. Would you normally have met with him or

1 worked with him to prepare if he's going to be doing
2 the argument or would that be something that he's --
3 once you've made that decision, he just does it on
4 his own?

5 A. I'm sorry. Could we go off the record for
6 a minute?

7 (Off the record.)

8 (Signature not waived.)

9 - - -

10 And, thereupon, the deposition was
11 adjourned and continued in progress at approximately
12 2:45 p.m.

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1 State of Ohio :
2 County of Franklin: SS:

3 I, TODD W. BARSTOW, do hereby certify that
4 I have read the foregoing transcript of my deposition
5 given on July 16, 2013; that together with the
6 correction page attached hereto noting changes in
7 form or substance, if any, it is true and correct.

8
9
10 _____
TODD W. BARSTOW

11 I do hereby certify that the foregoing
12 transcript of the deposition of TODD W. BARSTOW was
13 submitted to the witness for reading and signing;
14 that after he had stated to the undersigned Notary
15 Public that he had read and examined his deposition,
16 he signed the same in my presence on the _____ day
17 of _____.

18
19 _____
Notary Public

20 My commission expires _____
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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Jonathan D. Monroe,	:	
	:	
Petitioner,	:	
	:	
vs.	:	Case No.
	:	2:07CV258-MHW-MRM
Warden, Ohio State	:	
Penitentiary,	:	
	:	
Respondent.	:	

DEPOSITION OF TODD W. BARSTOW

VOLUME II

Thursday, October 24, 2013
2:36 o'clock p.m.
Ohio Attorney General's Office
150 East Gay Street
16th Floor
Columbus, Ohio 43215

ANN FORD
REGISTERED PROFESSIONAL REPORTER

ANDERSON REPORTING SERVICES, INC.
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THURSDAY AFTERNOON SESSION
October 24, 2013
2:36 o'clock p.m.

- - -

STIPULATIONS

- - -

It is stipulated by and between counsel for the respective parties herein that this deposition of TODD W. BARSTOW, a Witness herein, called by the Petitioner under the statute, may be taken at this time and reduced to writing in stenotypy by the Notary, whose notes may thereafter be transcribed out of the presence of the witness; and that proof of the official character and qualifications of the Notary is waived; that the reading and signature of the said witness to the transcript of the deposition are expressly waived by counsel and the witness; said deposition to have the same force and effect as though signed by the said witness.

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I N D E X

WITNESS PAGE

TODD W. BARSTOW

Examination 112
(By Mr. Linneman)

Examination 119
(By Ms. Leikala)

Examination 128
(By Mr. Linneman)

EXHIBITS MARKED

Exhibit No. 3 112
(Motion, Entry and Certification for
Appointed Counsel Fees)

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P R O C E E D I N G S

- - -

And, thereupon, Exhibit No. 3 was previously marked for purposes of identification.

- - -

TODD W. BARSTOW,
being by me previously duly sworn, as hereinafter certified, deposes and says as follows:

EXAMINATION

BY MR. LINNEMAN:

Q. So we are back on the record here today for the deposition of Mr. Todd Barstow, and we will resume from what was the date of that, from July 16, 2013 in the afternoon, and Mr. Barstow, I'm going to -- you've -- rather than re-swear you, we've acknowledged that you are still under oath from that time.

A. Yes.

Q. And what I'm going to have Ann do is just read back to you the question that we were in the middle of when we broke last time.

A. Yes.

(Question read back.)

THE WITNESS: And I'm just reading the

1 printed deposition so I can refresh my memory,
2 because to be totally honest, I don't remember a
3 whole lot of what happened that day.

4 MS. LEIKALA: Why don't we take a break
5 and let him read the last couple of pages.

6 MR. LINNEMAN: Sure. Why don't we do
7 that. Let's go off the record for a second.

8 (Off the record.)

9 BY MR. LINNEMAN:

10 Q. You go ahead, I guess.

11 A. My recollection on the oral argument
12 between Joe Edwards and myself, I know that we would
13 have talked about who was going to do what parts of
14 the oral argument. I don't remember anything
15 specific about meeting and strategizing. I just
16 don't have a recollection of that. I would imagine
17 that we did, so we weren't wasting time and crossing
18 over into things, but as I recall, we sort of broke
19 it down into who was going to do what parts of the
20 case.

21 Q. Now, if I remember correctly, I watched
22 the video, and I know you were there.

23 A. Yes.

24 Q. But I believe it's my recollection that

1 Mr. Edwards actually did the whole -- the entire
2 argument. I don't think -- does that sound right?

3 A. He may have.

4 Q. Okay.

5 A. I don't recall. I don't recall doing
6 anything in that case. So no.

7 Q. Your invoice, billing history, reflects
8 that you were there certainly.

9 A. Yes.

10 Q. And that's very close to the end of the
11 billing history. So okay.

12 And do you remember what you did when the
13 decision -- let's say this.

14 Did anything happen in between the oral
15 argument and the issuance of the decision?

16 A. Not that I recall. No. Just waiting for
17 it. No.

18 Q. And then when the decision was issued, do
19 you remember what you did?

20 A. I seem to remember Joe and I talking about
21 the decision and what we were going to do next, and I
22 seem to recall a conversation with Joe about do we --
23 do we -- or who does a filing with the United States
24 Supreme Court? Do we do that or do we have the Ohio

1 Public Defender get involved with that, or what
2 exactly do we do, because I had never been in that
3 situation before. And my recollection is that Joe
4 said that the Ohio Public Defender would take care of
5 that. So not knowing any better, I guess, I don't
6 recall doing -- I think -- I seem to recall -- I
7 don't remember going back up to Mansfield and talking
8 with Jonathan about the decision. I really don't. I
9 don't have a memory of that.

10 Q. Okay.

11 A. So that's kind of what happened. And at
12 that point, that was the end of the case for me.

13 Q. Okay. What about the filing of, let's
14 say, a motion for rehearing?

15 A. Reconsideration or something --

16 Q. Okay.

17 A. -- in the Ohio Supreme Court?

18 Q. Yes.

19 A. I don't remember discussing that. I don't
20 know if we did or not, I just don't remember it.

21 Q. Okay. In terms of what procedural steps
22 are available after that point, am I correct -- I
23 mean, off the top of my head, it seems to me you
24 could ask for -- you could file a motion for a

1 rehearing.

2 A. Uh-huh.

3 Q. You could file a motion for
4 reconsideration. I don't believe either of those
5 were done. Do you have any recollection of that?

6 A. I don't believe those were done. No.

7 Q. Did you -- was there a decision made for
8 some reason not to take either of those steps?

9 A. I don't remember.

10 Q. Okay. But you do remember then what I
11 would consider just temporally, logically makes
12 sense, then, just as you said, you would go file a
13 petition for certiorari to the U.S. Supreme Court.

14 A. Well, what I remember is I believe this
15 was the first death penalty decision that -- in a
16 case that I had had. So when I got the decision, I
17 contacted Joe. I don't remember if I saw him at the
18 courthouse or called him or e-mailed him or
19 something, but there was contact with Joe. What do
20 we do next? What's our -- obviously serious case,
21 what's our responsibilities? What do we do next?
22 Something along those lines. And I'm thinking, you
23 know, you want to file with the U.S. Supreme Court at
24 some point. Joe's position was OPD does that, they

1 take care of it. We don't need to do anything more.
2 Our work here is done.

3 In terms of going to the U.S. Supreme
4 Court, I'm licensed there. I was at the time. I
5 don't know about Joe. I don't remember a
6 conversation about a rehearing, reconsideration in
7 the Ohio Supreme Court.

8 Q. Okay. And just you would have had these
9 all in front of you last time.

10 A. Sure.

11 Q. But there's -- can you just read off the
12 front what exhibit that is off the first page.

13 A. It's Exhibit 3, Petitioner's Exhibit 3.

14 Q. I don't know if that will refresh your
15 memory. That's your time sheet. And it looks
16 like --

17 A. Right. In "Review decision," it says --
18 it's an hour. It didn't take me an hour to read the
19 decision, but I'm assuming included in that, well, I
20 mean --

21 Q. It might have.

22 A. I don't think so. I don't think it took
23 that long to sit down and read it. I think included
24 in that was probably a conversation with Joe on or

1 about that same day, you know, What do we do now?
2 There's a letter to client. That would have probably
3 been sending a copy of the decision to Mr. Monroe so
4 he would have had it. So that's --

5 Q. Okay. And at that time, am I correct that
6 there was already an attorney from the Ohio Public
7 Defender who was actively representing Mr. Monroe in
8 post-conviction proceedings; is that correct?

9 A. I believe there was. I don't -- it seems
10 like there was. I don't specifically remember.

11 Q. Okay. All right. Then, again, I just
12 want to make sure I've got that the record is clear
13 on this question.

14 To the best of your recollection, you
15 didn't affirmatively decide, you know, for some
16 reason, whether on the merits or as a matter of
17 strategy, not to request either reconsideration by
18 the Ohio Supreme Court or for a rehearing?

19 A. I don't remember a discussion on either of
20 those topics.

21 MR. LINNEMAN: Okay. That's all I have
22 for you.

23 THE WITNESS: Okay. Sorry I couldn't have
24 held out longer last time.

1 MR. LINNEMAN: No. Have you got anything?

2 MS. LEIKALA: Yeah. I just have a few.

3 THE WITNESS: Sure.

4 EXAMINATION

5 BY MS. LEIKALA:

6 Q. And some of these are follow-ups to what
7 you had testified to the last time. So if you don't
8 exactly remember, we'll hand you a copy of your
9 transcript.

10 A. Okay.

11 Q. Now, I believe on direct there had been
12 some question about how you picked and chose what
13 issues to present. Just as a practical matter for
14 appellate cases, are you required to raise all
15 possible arguments?

16 A. Well, in a non-capital case, I would say
17 no. I do a ton of -- I do a lot of those. I
18 don't -- I just did that today in a case I decided
19 that there were a couple of things, in a brief I just
20 filed when I was talking to you, I'm not going to
21 pursue that. It's just not -- there's better areas.

22 In capital cases, I think you'd probably
23 be much -- that decision would be much different in
24 terms of what issues you would raise. I would think

1 that based on my experience with the cases that I've
2 done, that you would be much more careful about not
3 pursuing an issue.

4 Q. Well, I think -- and I'm trying to find
5 where it was in the transcript, I think you were
6 asked a question about whether you raised an argument
7 about whether death penalty violated U.S. treaties.
8 Do you recall any question about that?

9 A. Uh-huh. Yes. I think so.

10 Q. And I think you said that, no, you've
11 never raised that. That that's --

12 A. I don't remember my answer. I remember
13 being asked the question. I don't think we raised it
14 in this case. So I don't remember my answer. So you
15 would have to --

16 MS. LEIKALA: Okay. Can we go off for a
17 second?

18 (Off the record.)

19 MR. LINNEMAN: Can the record reflect that
20 the witness is reviewing the transcript from the last
21 deposition.

22 THE WITNESS: Okay. I see the question
23 and the answer.

24

1 BY MS. LEIKALA:

2 Q. Okay. Now, you had been asked a question
3 about whether there was any reason that you wouldn't
4 raise an international law claim, and your answer was
5 that you don't remember something like that, no.

6 So there were some issues that you didn't
7 raise. Do you recall why you didn't raise them?

8 A. No. And I'm looking through that part of
9 the transcript, and I was asked a series of questions
10 about different issues, and my answer, I think, was
11 pretty consistently I don't recall or don't remember
12 why something wasn't raised.

13 Q. But in normal appellate practice, is it a
14 requirement that you raise every possible claim that
15 there ever could be?

16 A. No. In a non-capital case you mean?

17 Q. In any appeal that you would do. Wouldn't
18 the rules for non-capital and capital be the same?
19 Is there a requirement that you raise every
20 conceivable claim in any brief, a legal requirement?

21 A. Well, I disagree with you. I think
22 there's a difference between capital and non-capital
23 cases.

24 Q. Okay. But in either case, is there any

1 legal requirement that you have to raise every
2 conceivable claim that may possibly be an issue?

3 A. Well, in a non-capital case, no. I think
4 that's pretty clear, the IAC case law is fairly
5 clear. In a capital case, I think it's a much
6 different look that you're going to get in
7 ineffective assistance cases. I think that winnowing
8 out issues in a capital case is not the preferred
9 strategy, at least that's my view now.

10 Q. Okay.

11 MR. LINNEMAN: If I can just state, I will
12 acknowledge this witness clearly had some expertise
13 in this area, but as to ultimate questions of law,
14 we'll -- we're going to -- I'll just note that this
15 is a -- what you just asked is a pure question of
16 law, I think.

17 BY MS. LEIKALA:

18 Q. Now, some of the claims that I believe you
19 were asked about in the last part of the deposition
20 were items that I think you had responded that they
21 were post-conviction relief issues. Do you recall
22 any questioning about things like that?

23 A. No. I don't remember discussing that. I
24 remember Mr. Linneman asking me a series of questions

1 about issues that weren't raised.

2 Q. Well, just from an appellate practice,
3 what does the direct appeal, what types of issues are
4 you looking to appeal on direct appeal?

5 A. Well, on a direct appeal, you are sort of
6 stuck with what's in the record, maybe sometimes
7 what's not in the record, but you're stuck with
8 what's in the record. I mean, if you have a client
9 who in the classic class is the client who says,
10 well, I gave my lawyer a list of seven witnesses to
11 call, and he didn't call any of them. And, again, I
12 divide the world into capital and non-capital cases.

13 In a non-capital case, you can raise an
14 ineffective assistance of counsel claim. I can tell
15 you in the 10th District Court of Appeals or in the
16 5th District, where I do most of my practice, it's
17 going to go nowhere. You're going to get hostility
18 from the court. So that's sort of the classic gap in
19 the record.

20 In a capital case, you probably would put
21 that in there because those cases are much more
22 likely to be reviewed in the post-conviction habeas
23 arena, to wit, today's deposition, than your garden
24 variety aggravated robbery, non-capital case.

1 Q. Even in capital cases, are there some
2 issues that you just really are pretty much
3 foreclosed from bringing in direct appeal because
4 they are issues outside of the record, and taking out
5 the ineffective assistance because that's kind of a
6 murky issue?

7 A. Well, if it's not an ineffective
8 assistance of counsel claim, and it's something
9 that's not in the record, you're going to have a
10 difficult time doing anything with it in a direct
11 appeal.

12 Q. Okay.

13 A. Because I'm trying to think of some other
14 area.

15 Q. Okay. For instance, a Brady claim, would
16 a Brady claim most appropriately in most
17 circumstances be a post-conviction issue versus a
18 direct appeal because it requires evidence outside of
19 the record?

20 A. Right. And I would think that, yeah, that
21 would be a good example because in a Brady claim, the
22 defense attorney may not even be aware of something
23 that was missing unless he or she brought that to the
24 court's attention and said, you know, I'm looking at

1 the file, and I filed a motion -- but then it's in
2 the record. You know, it would be difficult to sniff
3 out a Brady claim just from the record because it's
4 going to look okay.

5 Q. Okay. So if there was -- I believe back
6 on page 82 of the last deposition, you were asked the
7 question, it starts at page 82, line 22, "Was there a
8 tactical, strategic reason to avoid raising a Brady
9 claim?"

10 I believe your answer was, "I don't
11 remember any discussion about that. No."

12 Am I reading that accurate?

13 A. Yes. Yes, ma'am.

14 Q. But a Brady claim, would it be uncommon to
15 not raise a Brady claim in a direct appeal brief?

16 A. Yes, because it would be difficult to
17 develop that in the record.

18 Q. Okay. And would that same rationale be
19 for the adequacy of proportionality review by the
20 Supreme Court, would that be an issue that could be
21 developed based upon the record, or would that need
22 evidence outside of the record?

23 A. Well, I mean, that's not going to be --
24 probably not going to be something that's discussed

1 at the trial court level, but that's something you
2 could put in your brief by looking at case law
3 decisions from the Ohio Supreme Court about --
4 because there are some good dissents and some things
5 like that about the whole constitutionality of
6 whether the Supreme Court's -- are you talking about
7 the Supreme Court's independent review, independent
8 weighing?

9 Q. I'm looking at what the question was.

10 A. I'm sorry.

11 Q. It's on page 83. Yes. It is the Supreme
12 Court's proportionality.

13 A. There's some good dissents on that that
14 the justices have written over the years, and so
15 that's something you could put in in an argument to
16 preserve that issue. To me, that's more of a legal
17 argument, and you could add what's in the record that
18 you have.

19 Q. But that could also be raised on
20 post-conviction, bringing in outside --

21 A. Sure.

22 Q. -- evidence?

23 A. Yeah. Yeah. I would imagine so. And,
24 again, I don't do post-conviction, capital or

1 non-capital, so I'm not familiar with those things.

2 Q. But there is a difference with issues that
3 are on the record, within the trial court record,
4 versus things that you would need outside evidence
5 for, correct?

6 A. I'm not sure I understand the question.

7 Q. There's a difference in what you can put
8 in your brief that is -- let me rephrase.

9 There are some issues that are entirely
10 outside of the record; is that correct, you know, in
11 any case, like a Brady claim or something that you
12 could not necessarily get from the trial court
13 record?

14 A. Sure. There can be issues. Right.

15 Q. Okay. And those issues you then,
16 therefore, could not raise on direct appeal because
17 they're not part of the record; is that correct?

18 A. No. Yeah. I think the court would not
19 consider them.

20 Q. Okay.

21 A. Yeah. I think you would probably get some
22 motion from the prosecutor to strike those portions
23 of the brief that were not based on the record.

24 MS. LEIKALA: I think that's all I had.

1 Let me just check with something real quick.

2 MR. LINNEMAN: Can we go off the record?

3 (Off the record.)

4 MS. LEIKALA: I don't think I have
5 anything else.

6 MR. LINNEMAN: Can I do one more?

7 FURTHER EXAMINATION

8 BY MR. LINNEMAN:

9 Q. Do you remember seeing jury questionnaires
10 when you did your review of this case?

11 A. I don't remember if there were any or not.
12 Are you talking about in the record?

13 Q. Yeah.

14 A. No. I don't remember.

15 Q. Okay.

16 A. And I'm going to say my trial -- death
17 penalty trial experience, I don't recall getting
18 those into the record. That would be -- that
19 contains a lot of really personal information. Are
20 you talking about the completed questionnaire,
21 questionnaires, or the one that was given to the
22 jurors? I guess I'm confused.

23 Q. Yeah. The completed ones so that a person
24 reviewing could see who had, you know, what the --

1 what the trial attorneys had before them during
2 voir dire.

3 A. I don't remember that. And I don't
4 remember as a trial attorney ever making an effort to
5 try to get those into the record. They would have to
6 be under seal.

7 Q. And in other capital cases, do you recall
8 seeing jury questionnaires --

9 A. In other --

10 Q. -- when you did the appeal, that is?

11 A. I don't remember.

12 MR. LINNEMAN: Okay. Just they don't seem
13 to be in the file anywhere. I don't know who
14 would -- you may be right that they wouldn't be part
15 of the record. I just wondered if they wouldn't be
16 in the trial attorney's file.

17 MS. LEIKALA: Off the record.

18 (Off the record.)

19 THE WITNESS: I'll waive.

20 (Signature waived.)

21 - - -

22 And, thereupon, the deposition was
23 concluded at approximately 3:08 p.m.

24 - - -

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CERTIFICATE

State of Ohio :

SS:

County of Knox :

I, Ann Ford, Notary Public in and for the State of Ohio, duly commissioned and qualified, certify that the within named witness was by me duly sworn to testify to the whole truth in the cause aforesaid; that the testimony was taken down by me in stenotypy in the presence of said witness, afterwards transcribed upon a computer; that the foregoing is a true and correct transcript of the testimony given by said witness taken at the time and place in the foregoing caption specified.

I certify that I am not a relative, employee, or attorney of any of the parties hereto, or of any attorney or counsel employed by the parties, or financially interested in the action.

IN WITNESS WHEREOF, I have set my hand and affixed my seal of office at Columbus, Ohio, on this _____ day of _____, _____.

ANN FORD, Notary Public
in and for the State of Ohio
and Registered Professional
Reporter

My Commission expires: April 18, 2016.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

FILED
COMMON PLEAS COURT
FRANKLIN CO., OHIO
03 OCT -9 PM 2:34
CLERK OF COURTS

STATE OF OHIO,

Plaintiff,

-vs-

Case No. 01CR-2118

JONATHON MONROE,

JUDGE FAIS

Defendant.

STATE'S MOTION TO CORRECT THE RECORD

Pursuant to S.Ct.Prac.R. XIX(3)(D), the State of Ohio requests that the Court correct the record to reflect that this Court read off all three verdict forms to the jury in the penalty phase jury instructions as set forth in the written instructions that are part of the record. The reasons for this motion are stated in the attached memorandum in support.

Respectfully submitted,

RON O'BRIEN 0017245

Prosecuting Attorney

Steven L. Taylor

STEVEN L. TAYLOR 0043876

Assistant Prosecuting Attorney

and

Laura M. Rayce

LAURA M. RAYCE 0071197

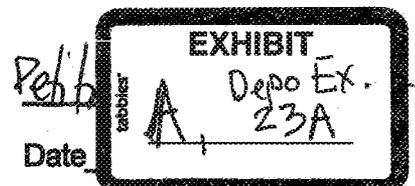
Assistant Prosecuting Attorney

373. South High Street - 13th Floor

Columbus, Ohio 43215

614/462-3555

Counsel for Plaintiff



MEMORANDUM IN SUPPORT

Defendant Jonathon Monroe faced eight aggravated murder counts in the penalty phase, and the trial transcript indicates that twenty-four verdict forms were submitted to the jury in the penalty phase, (T. 1515), which means three verdict forms were submitted for each count. According to the written instructions that were submitted to the jury in the penalty phase, this Court read off all three verdict forms, as follows:

The first verdict form as to Count I reads as follows:

“We, the Jury, having unanimously found that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, hereby recommend the sentence of death on Count One.”

The second verdict form reads:

“We, the Jury, having reached a deadlock on whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, hereby unanimously recommend the following life sentence on Count One (check one):

- Life Imprisonment with parole eligibility after 30 full years.
- Life Imprisonment with parole eligibility after 20 full years.”

The third verdict form reads:

“We, the Jury, having unanimously determined that the aggravating circumstances do not outweigh the mitigating factors beyond a reasonable doubt, hereby recommend the following life sentence on Count One (check one):

- Life Imprisonment with parole eligibility after 30 full years.
- Life Imprisonment with parole eligibility after 20 full years.”

The verdict forms with respect to Counts II, III, IV, V, VI, VII, and VIII are the same.

(Penalty Phase Instructions, at pp. 9-10; attached hereto)

In the trial transcript, however, it appears that this Court only read off the first and second verdict forms and not the third verdict form. (See T. 1515) While defendant is not challenging the third verdict form on appeal, he is challenging the second verdict form in his Ninth Proposition of Law. The State brings the present motion to correct record so that the Ohio

Supreme Court can have a full and accurate understanding of the three verdict forms that were submitted to the jury.

The State believes that the trial transcript is in error and that this Court in fact read off all three verdict forms for the jury. Given the written instructions, which this Court was reading off, it is unlikely that this Court skipped an entire paragraph of the written instructions. In addition, neither of the parties pointed out any such omission to the court. Since both parties would have had their own copies of the written instructions and would have been following along as this Court read off the written instructions, it is highly unlikely that both parties would have failed to catch this Court omitting an entire paragraph of the written instructions.

~~Under these circumstances, the State believes that the trial transcript is in error. This~~
Court in all likelihood did read off all three verdict forms. If necessary, the Court can hold a hearing to hear evidence on this point. This Court has the authority to correct the trial transcript's error pursuant to S.Ct.Prac.R. XIX(3)(D), which provides, as follows:

(D) Correction or Modification of the Record.

If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated in the record, the parties by stipulation, or the trial court, either before or after the record is transmitted to the Supreme Court, or the Supreme Court, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the Supreme Court.

In light of the foregoing, the State is asking this Court to file an entry correcting the record to reflect that the trial transcript is in error on page 1515 when it omits the oral discussion of the third verdict form and to reflect that all three verdict forms in the penalty phase were read

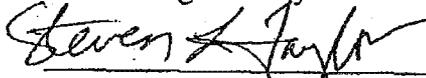
off exactly as written in the written instructions that went back with the jury in the penalty phase.

For the above reasons, the State respectfully requests that the motion to correct the record be granted. A proposed entry granting this motion is being proffered with this motion.

Respectfully submitted,

RON O'BRIEN 0017245

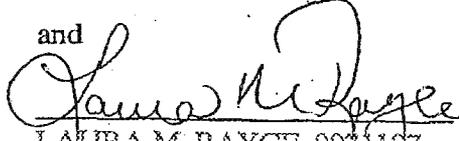
Prosecuting Attorney



STEVEN L. TAYLOR 0043876

Assistant Prosecuting Attorney

and



LAURA M. RAYCE 0071197

Assistant Prosecuting Attorney

Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent first-class U.S. Mail this day, October 9, 2003, to Joseph Edwards, 495 South High Street, Suite 100, Columbus, Ohio 43215 and Todd Barstow, 4185 East Main Street, Columbus, Ohio 43213; Counsel for Defendant-Appellant.



STEVEN L. TAYLOR 0043876

Assistant Prosecuting Attorney

Counsel for Plaintiff

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION 40564A17

State of Ohio, :
 :
Plaintiff, : CASE NO. 01CR2118
 :
-vs- : JUDGE FAIS
 :
Jonathon D. Monroe, :
 :
Defendant. :

JURY INSTRUCTIONS

In the first trial, the guilt phase of these proceedings, you found the Defendant, Jonathon D. Monroe, guilty of eight (8) counts of Aggravated Murder. The four (4) Specifications listed below are the aggravating circumstances you are to consider. The Aggravated Murders of Travinna Simmons and Deccarla Quincy themselves are not an aggravating circumstances, and shall not be considered as such by you. You found beyond a reasonable doubt that the State of Ohio proved the following Specifications as to each Count of Aggravated Murder and they are as follows:

1. Specification One - That on or about April 17, 1996, the Defendant, Jonathon D. Monroe, committed the Aggravated Murder while committing or attempting to commit Aggravated Burglary, and the Defendant was the principal offender in the commission of the Aggravated Murder or, if not the principal offender, committed the Aggravated Murder with prior calculation and design.
2. Specification Two - That on or about April 17, 1996, the Defendant, Jonathon D. Monroe, committed the Aggravated Murder while committing or attempting to commit Aggravated Robbery, and the Defendant was the principal offender in the commission of the Aggravated Murder or, if not the principal offender, committed the Aggravated Murder with prior calculation and design.

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COMMON PLEAS COURT
FRANKLIN CO., OHIO

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CLERK OF COURTS

3. Specification Three - That on or about April 17, 1996, the Defendant, Jonathon D. Monroe, committed the Aggravated Murder while committing or attempting to commit, ^{40561A18} or fleeing immediately after committing or attempting to commit Kidnapping, and the Defendant was the principal offender in the commission of the Aggravated Murder or, if not the principal offender, committed the Aggravated Murder with prior calculation and design.

4. Specification Four - That the Defendant, Jonathon D. Monroe, committed the Aggravated Murder as part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons.

Now, in the second trial or second phase of these proceedings, referred to as the sentencing phase, it is your duty to determine the appropriate sentence for the Defendant in this case.

As you were told during the first *voir dire* of the first trial, and in the opening statements of this part of the proceedings, you have only three (3) choices with respect to sentencing, and those choices are:

1. a sentence of death;
2. a life sentence with parole eligibility after the Defendant has served a full thirty (30) years in prison;
3. a life sentence with parole eligibility after the Defendant has served a full twenty (20) years in prison.

Your decision between death and one of the alternative life sentences will depend on whether each of you finds beyond a reasonable doubt that the aggravating circumstances outweigh

the mitigating factor(s) presented by the defense.

40564A19

To "outweigh" means to weigh more than, to be more important than. The existence of mitigating factor(s) does not preclude or prevent the imposition of the death sentence, if each of you finds beyond a reasonable doubt that the aggravating circumstances in this case outweigh the mitigating factor(s).

Ultimately, however, it is the aggravating circumstances which you must find beyond a reasonable doubt outweigh the mitigating factor(s) before you can impose the death sentence.

In making your decision, you will consider all the evidence, arguments of counsel, and all other information and reports which are relevant to the aggravating circumstances and any mitigating factor(s).

The only Counts for which you are to consider a penalty are the Aggravated Murder Counts. The penalty for each individual Aggravated Murder Count must be assessed separately. Only the aggravating circumstances related to each specific Count may be considered in assessing the penalty of that Count.

You were reminded in previous instructions in the trial or guilt phase of this case, that even though there are eight (8) Counts of Aggravated Murder, they involve only two acts, specifically, the deaths of Travinna Simmons and Deccarla Quincy. The State of Ohio does have the right to charge the offenses of Aggravated Murder in the alternative and they have done so. However, when you engage in the weighing process, it would be improper for you to engage in a "stacking" of the Counts and the aggravating circumstances as to the eight (8) Counts.

The aggravating circumstances with respect to each Count should be considered by you

separately as to each Count, and your findings and the weighing process you engage in with respect to each Count should not influence your findings in the weighing process with respect to any other Count. 40564A20

Mitigating factor(s) are not meant to justify or excuse the crime, however, in fairness and mercy, they may be considered by you as they call for a penalty less than death, or diminish the appropriateness of the sentence of death as a penalty.

The mitigating factors which you may consider in this case are:

1. The nature and circumstance of the offense;
2. The history, character, and background of the offender;
3. The youth of the offender;
4. Any other factor(s) that are relevant to the issue of whether the offender should be sentenced to death.

Mitigating factor(s) must be considered collectively when they are weighed against the aggravating circumstances as to each Count. Mitigating factor(s) may not be considered for any purpose other than mitigation. Absence of mitigation shall not be considered by the jury as an aggravating circumstance. The Defendant bears the burden of going forward with or producing any mitigation.

A single aggravating circumstance is sufficient to support a death verdict if you find beyond a reasonable doubt that it outweighs all of the mitigating factors collectively. A single mitigating factor is sufficient to support a life verdict if you are not convinced beyond a reasonable doubt that the aggravating circumstances outweigh that mitigating factor. If you find the aggravating

circumstances and the mitigating factor(s) to be of equal weight then you must choose one of the life sentences.

40564801

You shall sentence the Defendant to death only if you unanimously find by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factor(s).

Ohio law permits each juror to decide for himself or herself whether one or more mitigating factors exist, and just what those factors are. Although the jury, as a whole, can and should discuss these matters, the decision about what counts as a mitigating factor in this case is one which the law leaves to each individual juror.

Once you have reached your individual decisions about what mitigating factor(s) exist in this case, your next task is to weigh the mitigating factor(s) that you find against the aggravating circumstances, in order to determine if the aggravating circumstances outweigh the mitigating factor(s) beyond a reasonable doubt.

It is up to the jury, in its own independent weighing process to choose or assign what weight is to be given to any mitigating factor presented by the defense. It may give it no weight at all, if it considers the evidence non-mitigating.

On the other hand, as stated before, any one mitigating factor, standing alone, may be sufficient to support a sentence of life imprisonment depending on the weight each juror individually or collectively gives that piece of evidence.

Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced that the aggravating circumstances outweigh the mitigating factor(s). Reasonable doubt is a doubt based upon reason and common sense.

Reasonable doubt is not mere possible doubt because everything related to human affairs or
depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a
reasonable doubt is proof of such character that an ordinary person would be willing to rely and act
upon it in the most important of his/her own affairs.

I realize that some of the instructions that I am giving you were given in the first phase,
however, you should also use these instructions to evaluate the evidence in the second phase of this
case.

Evidence is all the testimony and exhibits produced at the first trial which is relevant to the
aggravating circumstances and/or mitigating factor(s). Evidence is also testimony received from
the witnesses and any exhibits admitted during the sentencing phase or during this hearing. Facts
stipulated to or which are agreed to by counsel in either hearing are also evidence.

Evidence may be direct or circumstantial, or both. Direct evidence is testimony given by a
witness who has seen or heard the facts to which he/she testifies. It includes exhibits admitted into
evidence during trial.

Evidence may also be used to prove a fact by inference. This is referred to as circumstantial
evidence. Circumstantial evidence is the proof of facts by direct evidence from which you may
infer other reasonable facts or conclusions.

The sufficiency of circumstantial evidence to prove a fact depends on whether reason and
common sense leads us from the fact or facts proved by real or direct evidence to the fact or facts
sought to be proved. If you determine that the connection between what is proved and what is
sought to be proved is strong enough to support a finding of proof beyond a reasonable doubt, the

circumstantial evidence is sufficient. On the other hand, if that connection is so weak that you cannot say that the fact or facts sought to be established have been proven beyond a reasonable doubt, then the circumstantial evidence is insufficient.

40564803

Where the evidence is both direct and circumstantial, the combination of the two must satisfy and/or support your finding beyond a reasonable doubt.

To infer, or to make an inference, is to reach a reasonable conclusion of fact which you may, but are not required to make, from other facts which you find have been established by direct evidence. Whether an inference is made rests entirely with you. You may not make an inference from another inference, but you may draw more than one inference from the same facts or circumstances.

The evidence does not include the indictment or opening statements or closing arguments of counsel. The opening statements and closing arguments of counsel are designed to assist you, they are not evidence.

Statements or answers that were stricken by the Court or which you were instructed to disregard are not evidence and must be treated as though you never heard them.

You must not speculate as to why the Court sustained an objection to any question or what the answer to that question might have been. You must not draw any inference or speculate on the truth of or any suggestion included in a question that was not answered.

You are the sole judge of the facts, the credibility of witnesses and the weight of the evidence.

As jurors, you have the sole and exclusive duty to decide the credibility of witnesses who

testified in this case, which simply means that it is you who must decide whether to believe or disbelieve any particular witness. In making your determination, you will apply the tests of truthfulness which you apply in your daily lives. These tests include the appearance of each witness on the stand; his or her manner of testifying; the reasonableness of the testimony; the opportunity he or she had to see, hear and know the things concerning which he or she testified; his or her accuracy of memory; frankness or lack of it; intelligence, interest and bias, if any; together with all the facts and circumstances surrounding the testimony. Applying these tests, you will assign to the testimony of each witness such weight as you deem proper. You are not required to believe the testimony of any witness simply because it was given under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief.

You should not decide any issue of fact merely on the basis of the number of witnesses who testify. Rather, the usual test in judging evidence should be the force and weight of the evidence, regardless of the number of witnesses who testify. The testimony of one witness, if believed by you, is sufficient to prove any fact. Also, discrepancies in a witness's testimony or between his/her testimony and that of others, if there are any, does not necessarily mean that you should disbelieve the witness, as people commonly forget facts or recollect them erroneously after the passage of time. You are certainly aware of the fact that two persons who are witnesses to an incident may often see or hear it differently. In considering a discrepancy of any witness' testimony, you should consider whether such discrepancy concerns an important fact or a trivial one.

If you conclude that a witness has willfully lied in his/her testimony, you would then have

the right to reject all of the testimony unless, from all of the evidence, you believe that the probability of truth favors the testimony in other particulars. 40564805

It is your duty to weigh the evidence, to decide all of the disputed questions of fact, to apply the instructions of law of the Court to your findings and to render your verdict accordingly.

In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your findings with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the Defendant will feel that their case was fairly and impartially tried.

If, during the course of the trial or this phase of the case, the Court said or did anything which you consider an indication of the Court's view on the facts, you are instructed to disregard it.

The Judge must be impartial and I sincerely desire to be impartial presiding over this and every other trial before a jury or without one.

I will now read the verdict forms. You are not to place any emphasis on the order in which I read the forms. You will note that the wording "recommend" is used in the verdict forms. You are not to construe the use of that word to, in any way, diminish your sense of responsibility in this matter.

You will have twenty-four (24) verdict forms. As in the trial stage, your verdict in this stage must be unanimous. All twelve (12) of you must agree on the appropriate verdict. The first verdict form as to Count I reads as follows:

"We, the Jury, having unanimously found that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, hereby recommend the sentence of death on Count One."

The second verdict form reads:

40564806

"We, the Jury, having reached a deadlock on whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, hereby unanimously recommend the following life sentence on Count One (check one):

- Life Imprisonment with parole eligibility after 30 full years.
 Life Imprisonment with parole eligibility after 20 full years."

The third verdict form reads:

"We, the Jury, having unanimously determined that the aggravating circumstances do not outweigh the mitigating factors beyond a reasonable doubt, hereby recommend the following life sentence on Count One (check one):

- Life Imprisonment with parole eligibility after 30 full years.
 Life Imprisonment with parole eligibility after 20 full years."

The verdict forms with respect to Counts II, III, IV, V, VI, VII, and VIII are the

same.

As stated previously, before you can sign the verdict form recommending the sentence of death, you must be unanimous in your verdict that the State of Ohio has proved beyond a reasonable doubt that the aggravating circumstance(s) in this case outweigh the mitigating factor(s) presented by the defense.

If, however, after due and fair consideration you cannot reach unanimity on the verdict form calling for the recommendation of death, you must then consider the recommendation of life imprisonment without parole eligibility until a period of thirty (30) full years and/or life imprisonment without parole eligibility until a period of twenty (20) full years. With respect to either of these two (2) alternative life sentence recommendations, you must be unanimous in your verdict.

You are not required to unanimously find that the state failed to prove that the aggravating
40564807
circumstances outweigh the mitigating factors before considering one of the life sentence
alternatives. You should proceed to consider and choose one of the life sentence alternatives if any
one or more of you conclude that the state has failed to prove beyond a reasonable doubt that the
aggravating circumstances outweigh the mitigating factors. One juror may prevent a death penalty
determination by finding that the aggravating circumstances do not outweigh the mitigating factors.

You must be unanimous on one of the life sentence alternatives before you can render that
verdict to the court. If you cannot unanimously agree on a specific life sentence, you will then
inform the court by written note that you are unable to render a sentencing verdict.

Your initial conduct upon entering the jury room is important. It is not wise immediately to
express a determination to insist upon a certain verdict, because if your sense of pride is aroused
you may hesitate to change your position even if you later decide you are wrong.

Consult with one another, consider each other's views and deliberate with the objective of
reaching an agreement if you can do so without disturbing your individual judgment. Each of you
must decide this case for yourself, but you should do so only after a discussion and consideration of
the case with your fellow jurors. Do not hesitate to change an opinion if convinced that it is wrong.
However, you should not surrender honest convictions in order to be congenial or to reach a verdict
solely because of the opinion of the other jurors. Before you can recommend a verdict, you must
unanimously agree on your verdict.

When you retire to the jury room, you should select a foreperson. The foreperson will be
responsible for the exhibits and the verdict forms and return them to the courtroom. The foreperson

1 IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
2 CRIMINAL DIVISION
3

4 STATE OF OHIO,
5 PLAINTIFF,
6 VS.
7 JONATHON D. MONROE,
8 DEFENDANT.

CASE NO. 01CR-2118

9 TRANSCRIPT OF PROCEEDINGS

10 VOLUME VI

OFFICE OF THE
CLERK OF THE COURT
FRANKLIN COUNTY
OHIO
RECORDED
25 FEB 11 2001

11
12 APPEARANCES:

13 THE HONORABLE RONALD O'BRIEN, PROSECUTING ATTORNEY,
14 FRANKLIN COUNTY, OHIO,

15 BY MR. JAMES L. LOWE AND MS. SHERYL PRICHARD,
16 ASSISTANT PROSECUTING ATTORNEYS,

17 ON BEHALF OF THE PLAINTIFF, STATE OF OHIO.

18 MESSRS. RONALD B. JANES AND BRIAN J. RIGG,
19 ATTORNEYS AT LAW,

20 ON BEHALF OF THE DEFENDANT, JONATHON D. MONROE.
21
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25

1 YOU WILL HAVE TWENTY-FOUR VERDICT FORMS. AS IN
2 THE TRIAL STAGE, YOUR VERDICT IN THIS STAGE MUST BE
3 UNANIMOUS. ALL TWELVE OF YOU MUST AGREE ON THE APPROPRIATE
4 VERDICT.

5 THE FIRST VERDICT FORM AS TO COUNT ONE READS AS
6 FOLLOWS:

7 WE, THE JURY, HAVING UNANIMOUSLY FOUND THAT THE
8 AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING FACTORS
9 BEYOND A REASONABLE DOUBT, HEREBY RECOMMEND THE SENTENCE OF
10 DEATH ON COUNT ONE.

11 THE SECOND VERDICT FORM READS:

12 WE, THE JURY, HAVING REACHED A DEADLOCK ON
13 WHETHER OR NOT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE
14 MITIGATING FACTORS BEYOND A REASONABLE DOUBT, HEREBY
15 UNANIMOUSLY RECOMMEND THE FOLLOWING LIFE SENTENCE ON COUNT
16 ONE (CHECK ONE):

17 _____ LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY
18 AFTER 30 FULL YEARS.

19 ----- LIFE IMPRISONMENT WITH PAROLE ELIGIBILITY
20 AFTER 20 FULL YEARS.

21 THE VERDICT FORMS WITH RESPECT TO COUNTS TWO,
22 THREE, FOUR, FIVE, SIX, SEVEN AND EIGHT ARE THE SAME.

23 AS STATED PREVIOUSLY, BEFORE YOU CAN SIGN THE
24 VERDICT FROM RECOMMENDING THE SENTENCE OF DEATH, YOU MUST
25 BE UNANIMOUS IN YOUR VERDICT THAT THE STATE OF OHIO HAS

IN THE SUPREME COURT OF OHIO
2003

STATE OF OHIO,

Case No. 02-2241

Plaintiff-Appellee,

-vs-

On Appeal from the
Franklin County Court
of Common Pleas

JONATHON D. MONROE,

Common Pleas Case
No. 01CR-04-2118

Defendant-Appellant.

DEATH PENALTY CASE

MOTION OF PLAINTIFF-APPELLEE TO SUPPLEMENT THE RECORD

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and

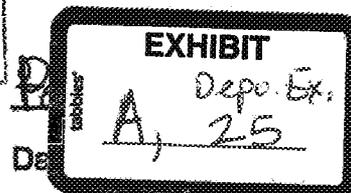
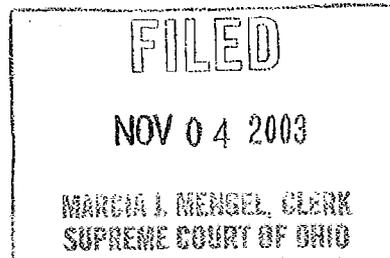
and

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Assistant Prosecuting Attorney

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COUNSEL FOR PLAINTIFF-
APPELLEE

COUNSEL FOR DEFENDANT-
APPELLANT



MOTION OF PLAINTIFF-APPELLEE TO SUPPLEMENT THE RECORD

Defendant Jonathon Monroe faced eight aggravated murder counts in the penalty phase, and the trial transcript indicates that twenty-four verdict forms were submitted to the jury in the penalty phase, (T. 1515), which means three verdict forms were submitted for each count. According to the written instructions that were submitted to the jury in the penalty phase, the trial court read off all three verdict forms. In the trial transcript, however, it appears that the trial court only read off the first and second verdict forms and not the third verdict form. (See T. 1515) While defendant is not challenging the third verdict form on appeal, he is challenging the second verdict form in his Ninth Proposition of Law.

On October 9, 2003, the State filed a motion to correct the record in the trial court to address the omission in the trial transcript. On October 31, 2003, the trial court granted the State's unopposed motion pursuant to the following entry:

ENTRY GRANTING STATE'S MOTION TO CORRECT THE RECORD

Pursuant to S.Ct.Prac.R. XIX(3)(D), and for the reasons set forth by the State's motion filed on October 9, 2003, the Court hereby **GRANTS** the State's motion to correct the record. The Court finds that the trial transcript is in error on page 1515 when it omits this Court's oral discussion of the third verdict form, and this Court further finds that all three verdict forms in the penalty phase were read off exactly as written in the written instructions that went back with the jury in the penalty phase.

(See Entry, attached)

In light of the trial court's October 31st entry, the State requests that the appellate record be supplemented in this Court with the following matters from the trial court: (1) the State's October 9th motion to correct record; and (2) the trial court's October 31st

entry granting said motion. Supplementation of the record will ensure that, when this Court addresses defendant's Ninth Proposition of Law, this Court will have a full and accurate understanding of the three verdict forms that were submitted to the jury.

Respectfully submitted,

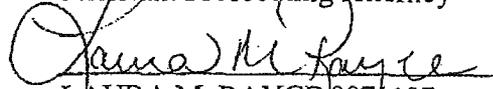
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Franklin County Prosecuting Attorney



STEVEN L. TAYLOR 0043876

(Counsel of Record)

Assistant Prosecuting Attorney



LAURA M. RAYCE 0071197

Assistant Prosecuting Attorney

Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 4th day of NOV., 2003, to W. Joseph Edwards, Esq., 495 South High Street, Suite 100, Columbus, Ohio 43215, and to Todd W. Barstow, Esq., 4185 East Main Street, Columbus, Ohio 43213, Counsel for Defendant-Appellant.



STEVEN L. TAYLOR 0043876

Assistant Prosecuting Attorney

Counsel for Plaintiff-Appellee

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,

Plaintiff,

-vs-

Case No. 01CR-2118

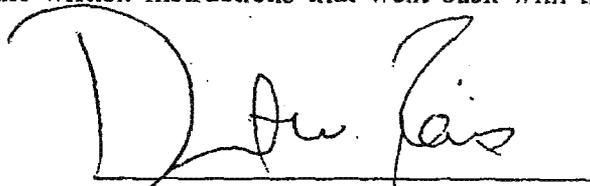
JONATHON MONROE,

JUDGE FAIS

Defendant.

ENTRY GRANTING STATE'S MOTION TO CORRECT THE RECORD

Pursuant to S.Ct.Prac.R. XIX(3)(D), and for the reasons set forth by the State's motion filed on October 9, 2003, the Court hereby GRANTS the State's motion to correct the record. The Court finds that the trial transcript is in error on page 1515 when it omits this Court's oral discussion of the third verdict form, and this Court further finds that all three verdict forms in the penalty phase were read off exactly as written in the written instructions that went back with the jury in the penalty phase.



JUDGE DAVID W. FAIS
Franklin County Court of Common Pleas

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
03 OCT 31 PM 3:14
CLERK OF COURTS

10-29-03

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

- - -

Jonathan D. Monroe, :
 :
Petitioner, :
 :
vs. : Case No.
 : 2:07CV258-MHW-MRM
Warden, Ohio State :
Penitentiary, :
 :
Respondent. :

- - -

DEPOSITION OF W. JOSEPH EDWARDS

- - -

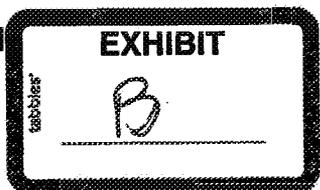
Monday, July 15, 2013
1:04 o'clock p.m.
Ohio Attorney General's Office
150 East Gay Street
16th Floor
Columbus, Ohio 43215

- - -

ANN FORD
REGISTERED PROFESSIONAL REPORTER

- - -

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9 and

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16 On behalf of the Petitioner.

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19 Criminal Justice Section
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24 On behalf of the Respondent.

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MONDAY AFTERNOON SESSION
July 15, 2013
1:04 o'clock p.m.

- - -

STIPULATIONS

- - -

It is stipulated by and between counsel for the respective parties herein that this deposition of W. JOSEPH EDWARDS, a Witness herein, called by the Petitioner under the statute, may be taken at this time and reduced to writing in stenotypy by the Notary, whose notes may thereafter be transcribed out of the presence of the witness; and that proof of the official character and qualifications of the Notary is waived; that the reading and signature of the said witness to the transcript of the deposition are expressly waived by counsel and the witness; said deposition to have the same force and effect as though signed by the said witness.

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1	I N D E X	
2	- - -	
3	WITNESS	PAGE
4	W. JOSEPH EDWARDS	
5	Examination (By Mr. Linneman)	8
6	Examination (By Ms. Leikala)	125
7	- - -	
8	EXHIBITS	MARKED
9	Petitioner Exhibit No. 1	8
10	(Motion, Entry and Certification for Appointed Counsel Fees for Mr. Edwards)	
11	Petitioner Exhibit No. 2	8
12	(Case Information)	
13	Petitioner Exhibit No. 3	8
14	(Motion, Entry and Certification for Appointed Counsel Fees for Mr. Barstow)	
15	Petitioner Exhibit No. 4	8
16	(Newspaper Article)	
17	Petitioner Exhibit No. 5	8
18	(Handwritten Notes)	
19	Petitioner Exhibit No. 6	8
20	(Criminal Rules)	
21	Petitioner Exhibit No. 7	8
22	(Letter to Mr. Monroe from Mr. Edwards dated 1-2-03)	
23	Petitioner Exhibit No. 8	8
24	(Handwritten Letter to Mr. Edwards from Mr. Monroe)	

1	I N D E X	
2	- - -	
3	EXHIBITS	MARKED
4	Petitioner Exhibit No. 9	8
5	(Handwritten Letter to Mr. Edwards from Mr. Monroe)	
6	Petitioner Exhibit No. 10	8
7	(Letter to Mr. Barstow from Mr. Edwards dated 3-7-03)	
8	Petitioner Exhibit No. 11	8
9	(Letter to Ms. Berry from Mr. Edwards dated 3-25-03)	
10	Petitioner Exhibit No. 12	8
11	(Letter to Mr. Barstow from Mr. Edwards dated 6-19-03)	
12	Petitioner Exhibit No. 13	8
13	(Letter to Mr. Edwards from Mr. Barstow dated 7-10-03)	
14	Petitioner Exhibit No. 14	8
15	(Letter to Mr. Monroe from Mr. Edwards dated 7-21-03)	
16	Petitioner Exhibit No. 15	8
17	(Telecopier Transmittal Sheet dated 7-11-03)	
18	(Retained by Mr. Linneman)	
19	Petitioner Exhibit No. 16	8
20	(Telecopier Transmittal Sheet dated 7-15-03 with attachment)	
21	Petitioner Exhibit No. 17	8
22	(Entry in State of Ohio vs. Jonathan D. Monroe)	
23	(Retained by Mr. Linneman)	
24	Petitioner Exhibit No. 18	8
	(Letter to Mr. Monroe from Mr. Edwards dated 6-2-05)	

1	I N D E X	
2	- - -	
3	EXHIBITS	MARKED
4	Petitioner Exhibit No. 19	8
	(Motion for Stay of Execution)	
5	Petitioner Exhibit No. 20	8
6	(Motion to Extend Time to File the Record)	
7	Petitioner Exhibit No. 21	8
	(Instructions to Clerk)	
8	Petitioner Exhibit No. 22	8
9	(Certification of Record)	
10	Petitioner Exhibit No. 23	8
	(State's Motion to Correct the Record)	
11	Petitioner Exhibit No. 24	8
12	(Entry)	
	(Retained by Mr. Linneman)	
13	Petitioner Exhibit No. 25	8
14	(Motion of Plaintiff-Appellee to	
	Supplement the Record)	
15	Petitioner Exhibit No. 26	8
16	(Letter to Mr. Edwards from Ms. Nash	
	dated 4-1-03)	
17	(Retained by Mr. Linneman)	
18	Petitioner Exhibit No. 27	8
	(Notice of Additional Authorities)	
19	Petitioner Exhibit No. 28	28
20	(Handwritten Note)	
21	Petitioner Exhibit No. 29	41
	(Entry)	
22		
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P R O C E E D I N G S

- - -

MR. LINNEMAN: We're on the record right now to memorialize that counsel for the defendant have produced today two binders. One of them is black and has a salmon-colored cover on it labeled Jonathan Monroe. It has what appear to be entirely duplicative documents, crime scene photographs, but these are materials that we believe may have migrated at some point from trial counsel's file into the habeas file, and for that reason, we are making them available today because we missed them at an earlier production of documents.

The second binder is much thicker. It is a white binder and it, in the same large font, is labeled Jonathan Monroe Discovery. It has a blue cover, and it also contains some handwritten notes on Post-its, so we are making those available today to the Attorney General.

Anything to add?

MS. LEIKALA: No. Nothing.

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And thereupon, Petitioner Exhibit Nos. 1 through 27 were premarked for purposes of identification.

- - -

W. JOSEPH EDWARDS,
being by me first duly sworn, as hereinafter certified, deposes and says as follows:

EXAMINATION

BY MR. LINNEMAN:

Q. Mr. Edwards, my name is Rob Linneman. I represent Jonathan Monroe in this federal habeas case. My co-counsel Larry Komp is seated next to me. First, thanks very much for your time and your appearance today. I want to tell you up front that Mr. Komp and I both respect very much the work you do. We're very glad there are people like you dedicated to this kind of work and that are out there doing it in the trenches.

A. Thank you. I wanted to apologize for being an hour late. I don't like to do that. I apologize very much, but I was in court. Again, I apologize.

Q. Not a problem. Thank you for your time.

1 A. Sure.

2 Q. Okay. So can you tell me -- state your
3 name for the record.

4 A. Sure. It's W. Joseph Edwards.

5 Q. And tell me your current business address.

6 A. Current business address is 341 South
7 Third Street, Suite 200, Columbus, Ohio, 43215.

8 Q. Little bit about your background. Where
9 did you go to undergrad?

10 A. I went to undergrad at Thiel, T-h-i-e-l,
11 College, which is located in Greenville,
12 Pennsylvania, and I attended Thiel College in 1977 to
13 1981. And I graduated with two degrees, one in
14 chemistry and one in philosophy.

15 Q. And where did you go to law school?

16 A. I went to law school at the University of
17 Dayton in Dayton, Ohio. Began law school in 1982 and
18 completed law school in, I believe it would have been
19 May of 1985.

20 Q. Okay. What are your current bar
21 admissions? You're licensed in the State of Ohio?

22 A. Yes. I am licensed in the State of Ohio,
23 and then I'm also licensed in the Northern and
24 Southern Districts of Ohio as well as the

1 Sixth Circuit, U.S. Court of Appeals for the
2 Sixth Circuit.

3 Q. The Northern and Southern Districts. You
4 mean Federal District Court?

5 A. Yes, sir.

6 Q. Okay. Are your bar admissions all in good
7 standing?

8 A. Yes, sir.

9 Q. Okay. Have you ever had any suspensions
10 or any disciplinary proceedings since you've been
11 licensed?

12 A. I've never been suspended. I've never had
13 like an official grievance filed against me. But
14 over the years, I've had grievances filed by the
15 clients over the years, but nothing resulted in like
16 an official complaint being filed. They have all
17 been dismissed.

18 Q. So you've had clients who have submitted
19 grievances, all of which have been found to be
20 without merit then?

21 A. Correct. Yes.

22 Q. You've never had a discipline inquiry by
23 the body themselves, by either a local bar
24 association or by the State Bar?

1 A. Well, I don't want to be nit-picky here,
2 but when a client files a grievance with the bar
3 association or with the disciplinary council for the
4 Supreme Court, you do get letters from them.

5 Q. Okay.

6 A. Okay. But I've never had like an actual
7 complaint filed against me. I've had grievances, but
8 not complaints. Grievances are merely allegations by
9 clients, but either the Columbus Bar or the Ohio
10 Supreme Court have never found those meritorious to
11 actually file a complaint.

12 Q. I see. Okay. Great. Thank you for that
13 clarification.

14 A. No problem.

15 Q. Okay. And you are death penalty
16 certified, I take it?

17 A. You know what, currently I am not. At the
18 time, obviously, I did Mr. Monroe's appeal, I was.
19 I'm hoping to get recertified this fall, which would
20 be the fall of 2013.

21 Q. Okay. So when was -- when did you
22 originally obtain that certification, if you
23 remember?

24 A. Well, I entered private practice on

1 October 1, 1990, so I probably, if my memory serves
2 correctly, I probably attended a seminar in November
3 of 1990, so I was certified right after entering
4 private practice, and I maintained that certification
5 up until approximately two years ago and it lapsed.
6 And now I'm -- I'll attempt to get recertified, which
7 I'm hopeful it's not any problem.

8 Q. What did you do right out of law school?
9 It sounds like you were in private practice beginning
10 in '90?

11 A. Yes. In 19 -- I graduated from law
12 school -- that's right -- I graduated in 1985, then I
13 passed the Ohio Bar Exam in November of '85, so my
14 first almost three years out, I worked for the then
15 Attorney General Anthony J. Celebrezze, so I was an
16 Assistant Attorney General for the State of Ohio, and
17 I was assigned to the Federal Litigation Section, so
18 I worked at that job for approximately three years.

19 And then in 1988, January of 1988, I
20 became an assistant county prosecutor with the then
21 Franklin County Prosecutor S. Michael Miller. I
22 worked as an assistant prosecutor for two years,
23 until October of 1990, when I entered into the
24 private practice of law.

1 Q. Okay.

2 A. You know what, is it possible -- I hate to
3 ask this -- can I get something to drink?
4 Nonalcoholic, of course. I'll leave that to the
5 Attorney General's discretion.

6 MR. LINNEMAN: Why don't we go off the
7 record.

8 (Off the record.)

9 BY MR. LINNEMAN:

10 Q. I'm going to hand the witness exhibits
11 which have been marked as Exhibits 1, 2 and 3, and
12 they are respectively, I believe, Mr. Edwards' Motion
13 for Approval of Payment of Appointed Counsel; the
14 second one is just a copy of the case information
15 sheet from the Monroe case before the Ohio Supreme
16 Court; and the third one is Mr. Barstow's time
17 records.

18 So, first of all, let's start with
19 Exhibit 1, Mr. Edwards, do you recall filling out and
20 signing this and filing it with the court?

21 A. I can identify this as my bill, but if
22 you're asking me do I specifically remember like
23 walking this up to the Supreme Court and filing it, I
24 don't really remember that.

1 Q. Just --

2 A. But I can identify that this is, in fact,
3 my bill.

4 Q. Okay. Great.

5 A. Yes.

6 Q. And now, let's see. What is the way you
7 would ordinarily handle your time keeping and your
8 billing in a case like this? And the reason I ask is
9 that this is an interim bill, but it apparently --
10 you see the termination date on the front sheet says
11 "Interim bill," but it is also the only one that I
12 found.

13 A. Yes.

14 Q. So do you know why that would be, why you
15 did not send a bill for additional time?

16 A. I think -- here's what I think happens in
17 these cases. I think the maximum that we can bill is
18 this, in my opinion, a ridiculously low amount of
19 \$5,000.

20 Q. I agree.

21 A. Again, I'm not suggesting \$5,000 is not a
22 lot of money, but I think to do an appeal on a death
23 penalty case, I think that's a low amount of money.
24 So normally what I would do is I would just do the

1 work, and then when -- like, I think I probably did
2 this bill, like, say after the brief was filed, and I
3 realized that was going to be probably 80 to
4 90 percent of my work, so I just said, well, look, if
5 I spend all this time doing this brief, I need to get
6 paid, so I just submit a bill. And, you know, I
7 probably could have billed more time on it, but I
8 just said, I probably don't want to go through the
9 hassle of billing for whatever was left on this. I
10 don't know if it's \$86 times 50 or times 60 or
11 whatever, but, you know, I probably maybe could have
12 resubmitted a bill because I'm not sure if this
13 contains, like I said, preparation for oral argument.
14 So I don't know.

15 Maybe I could still -- maybe I could still
16 submit a bill. Maybe they owe me some money. But
17 probably what I did was I just did the bulk of the
18 work, and I just wanted to get paid and submitted the
19 bill.

20 Q. Okay. And, well, that is what
21 specifically draws it to my attention is that I know
22 you did an oral argument, because I've watched video
23 of it, and it is not -- it takes place after this was
24 submitted and approved.

1 A. Right.

2 Q. And as far as by my review of the record,
3 I do not see any subsequent requests for payment.

4 A. Yeah. I probably just did not bill that
5 time because, again, I'm not sure if this is \$50 an
6 hour. I don't know if it's 86 times 50. I don't
7 know if it's 86 times 60. I just know the limit is
8 \$5,000.

9 Q. Or was at that time.

10 A. Or was at that time. So, you know, it
11 could have simply been that I submitted this initial
12 bill, and for whatever reason, it slipped my mind. I
13 normally don't forget to bill people, but that may
14 have occurred. So, I mean, I know that there was
15 additional time invested in this case because,
16 obviously, I did the oral argument, but if it wasn't
17 billed, it wasn't billed. That's my fault.

18 But yeah. That's probably what happened
19 here. I will admit that I think I've gotten better
20 at keeping records. At this point in time, 2004, I'm
21 not sure who I was working with as far as like
22 secretary or a legal assistant, but apparently just
23 didn't get done.

24 Q. Okay. Let's turn to Exhibit 3. That's a

1 time record for Mr. Barstow. Would you have any --
2 your signature is not on here, but do you have any
3 knowledge about whether his time records were
4 accurate or not?

5 A. Oh, absolutely not. This is the first
6 time I've ever seen this. No. I would never look at
7 or examine this kind of a bill. I mean, I wouldn't
8 say never. I mean, maybe in a different kind of a
9 case, I might ask somebody if they had done their
10 bill first, hey, could you send me a copy of your
11 bill, maybe because I'm missing some dates and times.
12 But, no, I've never seen this bill before.

13 Q. That's fine. Okay. But back to Exhibit 1
14 then, your motion for approval of payment then, are
15 you confident that the entries in here, at least up
16 until the time when this was -- when it's submitted,
17 accurately reflect the time that you spent in the
18 case?

19 A. Oh, I would say no. I would say probably
20 not. No. They don't.

21 Q. Why not?

22 A. Well, because I think there probably are a
23 lot of other things that were done on the case, you
24 know, like, for example, maybe like phone

1 conversations with co-counsel. I'm sure that Todd
2 and I probably had 10 or 15 different phone
3 conversations. But, you know, see, what I'm trying
4 to do is I'm just trying to submit a bill that is --
5 I don't know how to say this -- I'm submitting a bill
6 of work that I know that I've done. And my view is
7 if I don't bill certain -- you know, you can never
8 get in trouble for not billing something. You can
9 only get in trouble if you're over-billing something.
10 So yeah. There are probably -- I mean, like, for
11 example, here, it looks to me like I'm billing solely
12 for what I would consider bulk type time, reviewing
13 transcripts, drafting the brief, reading case law,
14 doing research. But I know that Todd and I probably
15 had 10 or 15 phone conversations where we were
16 talking about things and exchanging different ideas.

17 You know, I know that I had conversations
18 with Mr. Monroe's trial counsel. But a lot of times
19 those are like I'm driving home from work, I see
20 people at the courthouse. There are things that are
21 going on when I'm not in my office, I'm not in front
22 of my calendar, so I would say that this --
23 everything that's billed on this bill was work done,
24 but there's also probably a lot of other time that I

1 just didn't bill for.

2 Q. Okay. Mr. Monroe's trial counsel you
3 mentioned. Who was -- do you remember who that was?

4 A. For some reason, you know, I think it was
5 like a guy named Ron Janes, J-a-n-e-s. I think it
6 was Brian Rigg, R-i-g-g. Again, I am not certain of
7 that, but I think that's who it was.

8 Q. And you mentioned that you might see them
9 incidentally --

10 A. Yes.

11 Q. -- just at the courthouse?

12 A. Well, see, Ron Janes is a very good friend
13 of mine. We probably speak almost every single day
14 of the year, and so there's no doubt in my mind that
15 we had conversations about this case. But, frankly,
16 I don't really engage in a lot of conversation with
17 trial counsel when I'm doing an appeal, you know,
18 because everything is there in the record. You know,
19 I don't really need to sit there and talk to trial
20 counsel and say, why did you do this or why didn't
21 you do this? There may be some times I do that, but
22 for the most part, you know, my view is I'm also like
23 a radiologist. I'm looking at it, an MRI, a CT scan,
24 I'm not looking at why or how come or what ifs. I'm

1 reading the transcript and seeing what error I can
2 find.

3 But I'm certain I talked to Mr. Janes
4 about the case, and I know that I talked to Todd
5 Barstow on a number of occasions.

6 Q. Okay. Do you recall how it came to pass
7 that you were appointed on this case?

8 A. No, I do not. I think at the time there
9 weren't a lot of attorneys that were doing appeals of
10 capital cases. There are a lot of lawyers that were
11 doing the trial work, but there weren't a lot of
12 people doing appellate work. And I think that I had
13 done a number of these cases, and it seemed like
14 every time I did one, my name was in the paper,
15 either for good or bad. So as a result, I think the
16 judges just became kind of aware that, hey, Joe
17 Edwards does these. And I've always had a good
18 rapport and relationship with Judge Fais, who I
19 believe was the trial judge here. And I wouldn't be
20 surprised if Ron Janes asked the judge to appoint me.
21 I don't know that. But it was not unusual at that
22 time for me to be appointed to a death penalty
23 appeal.

24 Q. Actually, there is mention in the record,

1 if I recall correctly, of the trial judge having
2 suggested that you may be a suitable candidate. Do
3 you recall having any conversation with the judge
4 about that?

5 A. No.

6 Q. Do you recall having any conversation with
7 Mr. Janes about that?

8 A. No.

9 Q. Okay. Do you recall having -- so you have
10 no recollection at all of how you got appointed?

11 A. Well, I know that the judge appointed me.

12 Q. Right. Sure.

13 A. Again, I'm not trying -- I'm not trying to
14 be, you know, untoward or anything. I know I was
15 appointed. But, I mean, how, the exact mechanism, I
16 don't know.

17 It may have been as simple as the judge's
18 bailiff, who then and now is a person named Tim
19 Jackson, he may have just called me and said, hey, do
20 you want to take this appeal? Or they may have just
21 called me and said, the judge just appointed you.
22 So, I mean, the exact method on how I got the case --
23 you have to remember, I've received hundreds,
24 hundreds of calls or, you know, notices like that

1 over the years, so this specific one does not stick
2 out in my mind.

3 Q. Okay. And would that be unusual for you
4 to be appointed on a case like this without somebody
5 having contacted you first to see if you were at
6 least able to do it or willing to do it?

7 A. Well, no, because everybody -- I think all
8 the judges knew that I did those -- I did these types
9 of cases. So yeah. No. It was not unusual at all.
10 No.

11 Q. Okay. And in your experience, what is
12 the -- what's the judge's process in terms of
13 obtaining either the consent of the client -- of the
14 defendant to that appointment; is there any?

15 A. The consent of the defendant?

16 Q. Sure. Yeah. Does he consult with the
17 defendant on --

18 A. I have absolutely no idea. I think if the
19 defendant says he wants to appeal, then I think the
20 judge appoints him counsel. I'm not sure if most
21 criminal defendants are in a position to say, well,
22 I -- you know, they may not know attorneys. They may
23 not know who does appellate work in capital cases.
24 So I don't think there's any kind of give and take.

1 I think it's a situation where I'm
2 appointing you these attorneys, they're qualified
3 under whatever the rule was, whether it was Rule 65
4 or Rule 102, these are your attorneys. I don't think
5 it's a long consultation with the defendant.

6 Q. Okay. Do you recall whether there was any
7 distinction in that appointment as to yourself or
8 Mr. Barstow as lead counsel versus second chair?

9 A. For some reason, I thought I was the lead
10 counsel, but I really don't know. I think I was, but
11 I don't really look at that as any kind of -- I look
12 at it as somewhat of a subtle distinction in that
13 normally if I'm appointed, I'm lead counsel, I do all
14 the paperwork as far as filing the notice of appeal
15 and doing all the clerical type work, but once all
16 that's done, it's usually a team effort.

17 Q. Okay. Yeah. Would that distinction
18 translate into any difference or any meaningful
19 aspect of the working relationship as far as who has
20 final decisions over, for example, strategic
21 decisions?

22 A. Don't think so. No.

23 I want to make a point as an aside. I'm
24 almost certain that there was another case, State of

1 Ohio versus Michael Turner, T-u-r-n-e-r, Michael
2 Turner. For some reason, I believe that Mr. Barstow
3 and I -- these are like -- the Turner case and the
4 Jonathan Monroe case both, I think, came down with
5 death verdicts out of Franklin County about the same
6 time.

7 I was deposed on Michael Turner, I don't
8 know, maybe two or three years ago, but I think it
9 was Mr. Lazarow and then somebody from the A.G. was
10 there, but I don't know who from the A.G. was there.
11 But I think that case is probably still pending. So
12 I guess what I'm saying is I think that Todd Barstow,
13 he was also my co-counsel on that case. I think we
14 were doing two cases kind of sort of at the same
15 time. And I only say that in response to your
16 question about like, you know, was there any kind of
17 final say-so. I'm saying is that Todd and I have
18 always had a pretty good working relationship.

19 Q. Okay. Just since you have brought it up,
20 I will take an exhibit out of order here. I'm going
21 to hand you what's been marked as Exhibit 11, and,
22 you know, if you'll -- if you can just leave all your
23 exhibits there, she'll collect them at the end of the
24 day.

1 A. Oh, fine. Good for her.

2 Q. Because hers are the official ones.

3 A. Yeah. Those are the official exhibits.

4 Exhibit 11 is a letter that looks like I
5 drafted. It's going to Barbara Berry, who at that
6 time -- I'm not sure if she's still there -- but she
7 was like the secretary for death row, and so Todd and
8 I were planning to visit Mr. Monroe and Mr. Turner on
9 the same date, March 25 -- well, the letter is dated
10 March 25, 2003. I think we were asking to visit them
11 on May 1, 2003.

12 Q. Okay. Is that your signature or is that
13 your assistant's signature?

14 A. Yeah. That is my assistant's signature,
15 it is. Yes.

16 Q. And you authorized her to sign that on
17 your behalf?

18 A. Yes.

19 Q. Or him.

20 A. It's a she.

21 Q. Who's CH?

22 A. You know, it's Carrie, and I forget how to
23 pronounce -- I forget her last name. But yeah. I
24 remember. I know who that is now.

1 Q. Good thing she's not here.

2 A. Yeah. Yeah.

3 Q. And you faxed this. The second page is a
4 fax cover sheet.

5 A. Looks like it. Yes.

6 Q. Okay.

7 A. Yes. Faxed it to death row.

8 Q. Okay.

9 A. Mansfield. Yes.

10 Q. All right. So you and Mr. Barstow were
11 working on another case at the same time?

12 A. Correct.

13 Q. How many other cases have you worked with
14 Mr. Barstow on?

15 A. I'm thinking these two may have been the
16 only appeals that we worked on together. We've done
17 a couple co-counseling of death penalty cases at the
18 trial level, and then we've been on some federal
19 cases where we've represented some co-defendants in
20 those large, like, federal drug conspiracy type
21 cases. So we've had some cases together.

22 Q. Okay. Recently?

23 A. Recently? I would say not so much
24 recently. Maybe I think the most recent case was

1 maybe a year or two ago we had co-defendants in a
2 federal case.

3 Q. Okay. So you set up at least one meeting
4 with Mr. Monroe. Do you remember did you ever meet
5 with Mr. Monroe?

6 A. We did. Yes.

7 Q. Okay. Do you remember when it was?

8 A. No. I mean, I'm going to guess that it
9 was May 1 because that's what the letter says, but as
10 I sit here today, I can't specifically say it was
11 May 1.

12 Q. Do you ever recall having gone to the
13 prison to see Mr. Monroe and having him been
14 unavailable for any reason or having not come out to
15 see you, although you had, in fact, appeared at the
16 jail -- or, excuse me, at the prison or at the jail,
17 wherever he may have been?

18 A. I do not remember that. No. I'm not
19 saying -- it's possible, but I don't know. Because
20 at that time, I had a number of inmates that were on
21 death row. I mean, I have a number of clients now on
22 death row. So, you know, I would not be surprised if
23 maybe I was visiting someone else and maybe I asked,
24 hey, could I stop in and say hello to Mr. Monroe?

1 But I don't specifically remembering him ever denying
2 a visit, but I'm not saying it did not occur.

3 - - -

4 And thereupon, Petitioner Exhibit No. 28
5 was marked for purposes of identification.

6 - - -

7 BY MR. LINNEMAN:

8 Q. Mr. Edwards, I've handed you what's been
9 marked as Exhibit 28, and it appears to be a
10 handwritten note.

11 A. Yeah.

12 Q. And it suggests that at some point during
13 a visit to the prison, or to whatever place where
14 Mr. Monroe may have been held at the time, that he
15 wasn't feeling well and didn't come out to see you.
16 You still don't have any recollection of that?

17 A. Well, I'm not trying to be overly
18 technical with your question. You said he didn't
19 come out to see me.

20 Q. Right.

21 A. I thought this was in Mr. Barstow's file.

22 Q. It was. Yes.

23 A. Right. So maybe it was a situation where
24 he didn't go out to see Todd.

1 Q. Sure. And, again, that's fine. I'm not
2 trying to trick you here. I got it out of
3 Mr. Barstow's file. The question is just if you have
4 any recollection.

5 A. I'm saying as I sit here, I do not have
6 any memory of Mr. Monroe not coming out to see me.
7 But if he would say that, I wouldn't dispute it.

8 Q. Okay.

9 A. Just because at times, just so you
10 understand, I'm sure you've visited people on death
11 row, but at Mansfield, it was at times easy maybe to
12 squeeze in another visit. So maybe there was a time
13 when I went with another attorney to visit somebody,
14 that visit went real quickly, maybe the other
15 attorney was seeing somebody, so I would ask Barb
16 Berry, hey, could I stick my head in and see this
17 client of mine or that client of mine. And maybe
18 that's the situation where I wanted to see Mr. Monroe
19 and he was sick that day. But I don't, as I sit
20 here, remember him ever refusing a visit.

21 Q. Okay. Do you specifically recall having
22 met with him at all?

23 A. I do recall that. Yes. I remember
24 meeting with Mr. Monroe.

1 Q. Okay. Do you know how many times?

2 A. I believe I met with him one time, but it
3 may have been twice. I know for certain it was once.

4 Q. And do you remember when in the arc of
5 this appellate case the meeting took place?

6 A. I think it would have been before we filed
7 the brief and maybe when we were waiting for the
8 transcripts to be prepared. I actually remember
9 driving up to death row -- I shouldn't say up --
10 traveling north to death row with Mr. Barstow, I
11 remember that. So I do remember both the visits that
12 day, with Mr. Turner and with Mr. Monroe, because I
13 do have an independent memory of those visits.

14 Q. Do you recall any specific input that you
15 have -- that you received from Mr. Monroe?

16 A. No. I actually remembered the opposite.

17 Q. Okay. Could you clarify?

18 A. He was just -- we introduced ourselves.
19 We wanted to talk with him about the case. And, I
20 mean, from what I can recall, he was very friendly,
21 but he just was very noncommunicative, didn't appear
22 that he wanted to talk a whole lot about the appeal,
23 and just kind of reassured us that, look, I'm sure
24 you guys know what you're doing, just do what you can

1 to help me. So it was very -- I just -- from what I
2 recall, it was just a very, very short conversation,
3 which, frankly, from, you know, comparing it to other
4 conversations and meetings with clients on death row,
5 not what I would call unusual.

6 Q. So he didn't have substantive input into
7 the appeal?

8 A. Absolutely not. I don't know if he was
9 capable of that. I don't know if he was interested
10 in doing that. But it was, from what I can recall,
11 he seemed like a very friendly guy, kind of a big
12 guy. The conditions are not always the best to meet
13 there. They're shackled and chained to a big bolt in
14 the ground.

15 Frankly, now, at Chillicothe, although the
16 cell unit is pretty run down, it's a little bit -- it
17 seems a little bit of a better environment. I mean,
18 you know, they're handcuffed, but it just seems like
19 it's a little bit more comfortable.

20 But back up in Mansfield, it just was a
21 very difficult place to meet clients, I thought, and
22 I think that to this day. But I just remember that
23 he was very reticent, did not talk a whole lot and
24 just said, do what you can to help me.

1 Q. Okay. Did you speak with him on the
2 telephone at all?

3 A. I do not remember if I did.

4 Q. Okay. And did he write to you at all or
5 often?

6 A. I'm certain that he did not write often.
7 I believe that he may have written to me once or
8 twice. But no. He was not a client who seemed to
9 have a tremendous interest in input on his case.

10 Q. Okay. You talked about -- just so you're
11 aware, I don't want to make you feel like I'm going
12 to trick you later, I've got all your correspondence
13 here. We'll go through it later just to authenticate
14 most of that, and I do have a couple of his letters
15 to you, so I'll follow up on that point later.

16 A. Sure.

17 Q. Okay. Ordinarily, having done this a
18 couple times, do you ordinarily plan any kind of
19 meeting or strategy session or consultation or report
20 or any kind of meeting after, let's say, an
21 initial -- it sounds like there was an initial
22 meeting in order to introduce yourselves and maybe
23 get input. Do you ordinarily in your regular course
24 of this type of representation plan one for later,

1 whether it's after the filing of the brief or in
2 advance of oral argument, anything like that?

3 A. No.

4 Q. Okay.

5 A. Remember, aside from these briefs, I've
6 also done probably, I don't know, I would say two or
7 300 regular appeals in the 10th Appellate District.
8 But no. I have found clients on appeal have really
9 very little input in the appellate process.

10 Q. Okay. So if that was the only meeting, if
11 there was only one or two, that would be normal?

12 A. Yes.

13 Q. Okay. Then what about your -- what about
14 meetings with your co-counsel? You've touched on
15 that earlier. Is there -- in your ordinary process,
16 do you -- is there any sort of formal structure or
17 any plan or any ordinary course that you observe in
18 just sort of scheduling, in terms of putting stuff
19 together with your co-counsel? Like, do you plan --
20 like, do you plan a meeting at, for example, right
21 after the appointment, then after you've read the
22 transcript or after the notice of appeal or in
23 advance of the oral argument? Is there any schedule
24 that you do routinely follow?

1 A. No.

2 Q. Should have interrupted me about 10
3 minutes ago.

4 A. No. I wouldn't do that.

5 Q. That said, how many times did you meet
6 with Todd Barstow, if you remember?

7 A. Now, again, you know, it's how you define
8 meetings.

9 Q. Okay.

10 A. Todd and I would routinely see each other
11 at the courthouse. This is not a big place. I mean,
12 it's bigger now because there's a new courthouse.
13 But I'm saying is that, you know, Todd is somebody
14 who I would see -- I saw him this morning. So I
15 would see Todd, but I think most of our communication
16 was done over the telephone. Todd's office then and
17 now is in Whitehall on -- I believe it's on Yearling
18 Road.

19 Q. I think he's moved recently actually.

20 A. Maybe he's moved recently.

21 Q. Yeah.

22 A. And mine has always been kind of in the
23 downtown of Columbus, German Village area, so I think
24 just because of the nature of what we do, solo

1 practitioners, we're always on the go. It's
2 difficult, as you saw this morning, it's hard -- it's
3 difficult to plan things because you can get delayed
4 in court, a client can show up all of the sudden at
5 your office. So I think most of our communication
6 was done over the telephone.

7 Q. Okay.

8 A. But the one thing that I've always done in
9 these cases is I always will tell co-counsel is,
10 look, let's sit down and you have the full record, I
11 have the full record, let's sit down and let's read
12 the entire record from voir dire all the way down to
13 the verdict and the penalty phase, let's read it.
14 Let's not just -- we're not just going to read our
15 separate issues or whatever. Let's read the entire
16 record, and then let's talk about it and, you know,
17 come up with some ideas of what the issues are, and
18 then maybe we can do kind of a splitting of issues.

19 One of the ways that I like to split
20 issues in a capital case is maybe like one lawyer
21 will do all of the voir dire type issues, all the
22 pretrial issues and all the voir dire issues, and
23 then they'll also do like, say, the penalty phase
24 issues, and then the other lawyer will do the trial

1 phase issues.

2 Now, understanding that some lawyers are
3 more comfortable doing certain issues, you know, so
4 like maybe one lawyer really likes doing the
5 4th Amendment issue, they like doing penalty phase
6 issues, so I think that really varies from each
7 individual attorney.

8 But I would say as far as specific
9 meetings with Mr. Barstow, most of those, of what we
10 did, were communications over the telephone.

11 Q. Okay. And do you have a recollection of
12 how you divided the issues or the labor in this case?

13 A. You know, I knew you were going to ask me
14 that question, and I do not.

15 Q. You knew I was going to ask it right now
16 because you anticipated my last question actually.

17 A. Well, you're giving me way too much
18 credit. No. I -- unfortunately, I wish I remembered
19 specifically how we divided these issues, but I do
20 not remember how we divided these issues in this
21 case.

22 Q. Okay. And then, again, similarly, do you
23 have a recollection about who then -- those would be
24 the same, the way you divided it up, the way you just

1 articulated it with one attorney taking
2 responsibility for a couple segments, like, pretrial
3 motions, voir dire, and then the penalty phase, and
4 the other lawyer taking responsibility for the trial
5 phase, or the trial issues; then those lawyers, once
6 the issues are identified, they also do the drafting
7 of the brief, the writing of the brief?

8 A. Correct. Right.

9 Q. Okay.

10 A. But I think like within those issues, they
11 can be split up. I might say, hey, look, I'll do the
12 penalty phase issues, but let me do this
13 4th Amendment issue because I just did a brief on
14 that issue, or I feel really comfortable with that
15 issue.

16 So I'm working with someone like Todd and,
17 you know, Todd and I have relatively similar
18 experience levels. I mean, maybe I've been
19 practicing law a little bit longer than he has, but I
20 mean, he's a bright guy, and he's a good appellate
21 attorney, so I think here it was more we were kind of
22 more like co-equals, and but specifically how the
23 issues were divided, I do not remember.

24 Q. Okay. Can you tell me a little bit about

1 your understanding of the scope of issues that are
2 appropriately addressed on a direct appeal? And when
3 I say that, I distinguish between a direct appeal and
4 post-conviction relief.

5 A. Well, I think that the way I've always
6 explained it to clients is that -- or to other
7 attorneys -- is that to raise an issue on direct
8 appeal, it has to be an issue that is obvious, or
9 it's there on the -- in the appellate record, like,
10 it's the result of a pretrial motion or it's
11 something that occurred during the trial on the
12 record versus post conviction where you can go
13 perhaps -- not perhaps -- but you can go outside the
14 record with affidavits or other reports.

15 Now, I think that's the simple distinction
16 between the two issues. I have always when in doubt
17 tried to raise the issue on direct appeal because of
18 the concern that if you save that issue and you think
19 it's better litigated during post conviction, the
20 prosecutors will often argue that it's like
21 res judicata or -- I think it's like res judicata,
22 which means it should have been raised on direct
23 appeal. So often times in doubt, I think that
24 attorneys on direct appeal will be told, hey, look,

1 in doubt, raise it on direct appeal, make the State
2 say that it's outside the record, make the court make
3 that finding so then you're not precluded from
4 raising it in post conviction.

5 Q. With that said, do you -- did you consult
6 with the attorney in this case who was handling the
7 post-conviction request for relief?

8 A. Absolutely not.

9 Q. Okay. Do you know who --

10 A. I don't even know who it was.

11 Q. Okay.

12 A. No.

13 Q. Why not?

14 A. Well, first off, I mean, I think we're on
15 a slightly different time frame, I think. I mean, I
16 think it's a slightly different time frame. I mean,
17 I think that, you know, my understanding is the post
18 conviction has to be filed within six months of the
19 record being filed.

20 Now, on a capital case, I don't know if
21 that's the same rule. But no. I mean, I don't know
22 who the post-conviction attorneys are. I've never
23 really consulted with them. Probably somebody from
24 the State Public Defender's office. But I kind of

1 look at our roles as being somewhat different, you
2 know, they're going outside the appellate record,
3 whereas we are focused on what is within the four
4 corners of the record.

5 Q. Okay. I want to go -- I want to proceed
6 and authenticate some documents and see if I
7 understand what I'm looking at in some parts of your
8 file. This stuff that I've clipped together, just to
9 give you analytically maybe move us along faster
10 here, this is stuff I've categorized as work product.
11 You can correct me if I'm wrong. I'm going to hand
12 you this stuff as we go through, and you can just
13 tell me what it is. First is Exhibit No. 4.

14 A. This looks like a copy of a newspaper
15 article from the Columbus Dispatch dated 11-7-02
16 picturing Mr. Monroe with his attorney Brian Rigg.

17 Q. Okay. And you identified this -- you
18 found this in the -- you found this in the paper?
19 You saw it in the paper, I take it?

20 A. Either I saw it in the paper or someone
21 gave it to me or -- yeah.

22 Q. Okay.

23 A. Yes.

24 Q. So just for informational purposes, you

1 put it in the file?

2 A. Correct.

3 Q. If this -- maybe -- I don't know if this
4 will help or not, we don't have to make this an
5 exhibit, but just this is a copy of the entry
6 appointing you, which is dated November 6 -- or it's
7 signed November 6. It's dated November 7. This was
8 when? This is also November 7, this article in the
9 paper. Is that your handwriting on Exhibit 4 with
10 the date?

11 A. Oh, I have no idea. I mean, maybe. I
12 don't know. It's just a date. It's not really
13 handwriting.

14 Q. Okay.

15 A. But it might be.

16 Q. Okay.

17 MS. LEIKALA: Is this going to be an
18 exhibit then or no?

19 MR. LINNEMAN: Sure. Why don't we call
20 that Exhibit 29, I guess.

21 - - -

22 And thereupon, Petitioner Exhibit No. 29
23 was marked for purposes of identification.

24 - - -

1 MR. KOMP: Can we go off?

2 (Off the record.)

3 BY MR. LINNEMAN:

4 Q. What is that, 5? It should be in the
5 bottom corner.

6 A. Oh, Exhibit 5. Yeah.

7 Q. Mr. Edwards, I've handed you what's been
8 marked as Exhibit 5. Can you tell me what this is?

9 A. This looks like some random notes that I
10 took in reviewing the transcript -- I mean, random
11 notes that I prepared or random notes that I took
12 when reviewing the transcripts in the case.

13 Q. Okay. So these would be taken in the
14 early stage of the -- one of the early stages of the
15 process you described during your review of the
16 transcript, you were identifying issues here; is that
17 right?

18 A. Yes. Yes.

19 Q. Okay. I'm sorry. Did I ask you is
20 that -- that is your handwriting?

21 A. Yes, it is. Yes.

22 Q. Okay. I'm going to hand you what's been
23 marked as Exhibit 6. Do you recognize this?

24 A. No.

1 Q. Well, it appears to be an excerpt from
2 some sort of treatise. Do you have --

3 A. I have no idea where this came from. If
4 it was -- if you say it was in my file, I won't
5 dispute that, but I don't have any recollection of
6 seeing this before or making a copy of this.

7 Q. Okay. All right. This is the category of
8 documents that I have identified as, just for my own
9 shorthand purposes, as cut and paste. These are
10 pleadings that are captioned from another case. I'll
11 hand you Exhibit No. 19. I don't know how I got out
12 of order here. I'm sure it's my fault. I'm sure
13 it's not your fault.

14 MS. LEIKALA: 19?

15 MR. LINNEMAN: 19. Yeah.

16 BY MR. LINNEMAN:

17 Q. And it looks like you represented
18 previously someone named Kareem Jackson in another
19 capital case?

20 A. Yes.

21 Q. Do you know why you would have had
22 these -- actually, let me give you No. 20 also,
23 again, just a couple miscellaneous pleadings, but
24 they're from another case, and I think I have an idea

1 why they're in there. First of all, do you recognize
2 these? Have I described them correctly?

3 A. Yes.

4 Q. And then can you tell me what you did with
5 them or what your recollection is with why they would
6 have been maintained with your other materials?

7 A. Probably when I gave this information to
8 my secretary to prepare the documents in Mr. Monroe's
9 case, I gave her examples of what was prepared in a
10 different case so she could do it the correct way.

11 Q. Okay. So you modeled pleadings in the --

12 A. Right.

13 Q. -- Monroe case after things you filed in
14 previous cases?

15 A. Right. The notice of appeal. Yes.

16 Q. Okay.

17 A. It also looks like on the last page of
18 this motion for stay somehow one of my --

19 Q. I meant to ask you that. What is the last
20 page of -- which one is it, 19?

21 A. Of the motion for stay of execution,
22 somehow that got in there, you know, things kind of
23 creep into files. This is a workout. This is what I
24 probably was going to do at the gym that evening.

1 Q. Your rigorous routine, which I can say
2 delivers excellent results from the looks of you.

3 A. Thank you. I was doing chest and back or
4 chest and arms that day. So it's amazing what can
5 creep into a file. But yeah.

6 Q. I'll tell you that's in -- and I'm looking
7 for the original -- because that is on the back of
8 one of these.

9 A. Yeah. I'm not sure if I could still do
10 that workout now, but anyway, that was a few years
11 ago.

12 Q. Okay. I'm into the correspondence group
13 of documents at this point.

14 A. Okay.

15 Q. Here's Exhibit 7. This letter -- first,
16 this is -- is that your actual signature there on
17 that one?

18 A. That is my actual signature. Yes.

19 Q. Do you recall sending this letter to
20 Mr. Monroe?

21 A. No. I mean, I don't remember sending this
22 specific letter, but I am confident that this is a
23 letter that was sent by me to him.

24 Q. Okay. Do you recall whether you received

1 any response from Mr. Monroe?

2 A. I have no memory of that.

3 Q. Okay. Let me show you Exhibit 8, which
4 may refresh your memory. If you need to take a break
5 at any point.

6 A. This appears to be -- Exhibit 8 appears to
7 be a handwritten letter, which appears to be undated,
8 from Mr. Monroe to me. But it appears though it was
9 after -- "I received your letter on January 6, '03."
10 Okay. So yeah. It verifies that he received my
11 January 2 letter -- my January 2, 2003 letter. But I
12 think I remember -- I mean, I don't specifically
13 remember receiving this letter, Petitioner's
14 Exhibit 8, but if it was in my file which I gave to
15 you, I'm certain that he sent it to me and I received
16 it.

17 Q. Okay. In this letter, he seems to -- he
18 suggests that he is going to review the transcript of
19 the trial. Do you recall did you -- does this
20 refresh your memory at all about perhaps the sequence
21 of when you may have met with him with respect to
22 this initial -- I presume it would be -- any meeting
23 must have been after this letter since the tone of
24 the letter is one of introduction, right?

1 A. Frankly, what I think refreshes my memory
2 best, and I'm sure that death row has the specific --
3 I mean, I don't know. Maybe they don't maintain
4 records that long ago. But what refreshes my memory
5 best is Petitioner's Exhibit 11 where I sent a letter
6 to Barb Berry, and I'm almost certain we would have
7 met Monroe the same day we met Turner on May 1, 2003.
8 So it would have been about four or five months after
9 I sent him the January 2003 letter.

10 Q. Okay. And do you remember having a
11 conversation with him at that time about -- I mean,
12 did he have any thoughts -- you earlier said he had
13 very little input.

14 A. No thoughts.

15 Q. Do you know did he receive a copy of the
16 transcript? Do you have any recollection of whether
17 he, in fact, reviewed the transcript?

18 A. I have no idea. I mean, I would not
19 normally send a client a copy of a transcript. I
20 don't know if somebody from his family borrowed the
21 transcript and made a copy and gave it to him. I
22 don't know if State post-conviction counsel gave him
23 a copy of the transcript. But I would not normally
24 give a client a transcript until maybe the case was

1 over with and I was no longer representing them. But
2 I think especially someone like Mr. Monroe, I would
3 not give him a transcript.

4 Q. Okay. And if you had, there would be a
5 cover letter somewhere in your file saying, "Dear
6 Mr. Monroe, here's a copy of the transcript."?

7 A. Yes.

8 Q. Okay.

9 A. I'll be honest, I'm very leery of sending
10 transcripts through the prison system just because
11 the cost of the copies can be expensive. I always
12 worry, are they actually going to get to the person?
13 My policy has always been is either to deliver to
14 them in person or have a family member borrow the
15 transcript, make a copy, and then just take it to
16 them directly.

17 But Mr. Monroe, at least from the meeting
18 I had with him, just did not seem real interested in
19 reviewing any documentation in this case.

20 Q. Okay. This letter in the lower
21 paragraph -- I'm looking at Exhibit 8, his letter
22 again -- he says, "I would also ask that I be allowed
23 a copy of all briefs, appeals, et cetera before you
24 submit them to the courts." Did you, in fact, allow

1 him to review any materials that you filed in advance
2 of filing?

3 A. Absolutely unequivocally no. I find
4 that -- no. No possible way.

5 Q. Okay.

6 A. Again, I can't imagine that he would have
7 been any help whatsoever. From my meeting with him,
8 from reading the penalty phase, I can't imagine that
9 he would be of any help on appeal.

10 Q. Okay. Let's see. Here's another. I hope
11 to do a lot of this stuff -- I'm trying to fly
12 through it.

13 A. Yeah.

14 Q. Exhibit 9, this is another -- am I correct
15 that this is a letter from Mr. Monroe to you?

16 A. Yes.

17 Q. Any recollection of receiving this or
18 reading it?

19 A. No.

20 Q. Okay. Do you recall -- he raises the
21 subject in this letter of -- the last line -- letters
22 that his co-defendant wrote to him. Do you recall at
23 any time having a discussion with him about that
24 subject?

1 A. No.

2 Q. Okay. Did you ever talk to his mom during
3 the course of your representation?

4 A. I don't remember. You know, I don't
5 remember. There's so many over the years -- there's
6 so many mothers and girlfriends and grandparents, I
7 can't specifically recall having conversation with
8 his mother or not.

9 Q. Okay. Exhibit 10, this is to Mr. Barstow.
10 Let's see. So, first of all, that's actually your
11 signature, right?

12 A. It is.

13 Q. Your assistant does it the same way as is
14 the convention, if it's somebody else signing on your
15 behalf, they will put a slash and then the initials
16 of the person signing; is that right?

17 A. Yes.

18 Q. Okay. So it says you -- according to this
19 letter as of March 7, you did not yet have the
20 transcripts it sounds like.

21 A. Right. Yeah. The judge, his -- Greg
22 Goepfort was the judge's court reporter, he's just so
23 slow. I mean, nice guy, Steeler fan from Pittsburgh
24 but like --

1 Q. Maybe you could elaborate on the relevance
2 of that fact?

3 A. Let me just -- hold on a second. I
4 apologize. Excuse me just a second.

5 MR. LINNEMAN: Let's go off the record.

6 (Off the record.)

7 THE WITNESS: The point I'm making is Greg
8 Goepfort is a really nice guy, but he was just so
9 slow in getting transcripts done, so slow.

10 BY MR. LINNEMAN:

11 Q. Okay.

12 A. And as a result, just, it's going to
13 take -- it was going to take a while to get this
14 transcript done.

15 Q. Okay. This letter mentions, specifically
16 in the second paragraph, it says, "I don't think we
17 need a second copy of the voir dire, but we should
18 have copies of the trial mitigation hearing and any
19 pretrial motions."

20 Does that suggest your earlier division of
21 labor where one of you was doing voir dire and the
22 other one was not?

23 A. You know, possibly, possibly. I can't go
24 any further on that. I don't know.

1 Q. Okay. So you don't recall whether you
2 ordered that portion of the transcript or not?

3 A. I do not remember that. No.

4 Q. Okay.

5 A. Well, I mean, I know that we had the
6 voir dire. I'm certain that we did because my -- I
7 think my notes reflect that I reviewed whether or not
8 there were any Batson challenges, et cetera. But I'm
9 not certain if Mr. Barstow would have likewise had a
10 copy of that.

11 Q. Does that suggest then or do you remember
12 whether you took responsibility in the division of
13 labor?

14 A. I probably did the voir dire.

15 Q. Okay. Oh, actually, this says -- the next
16 sentence says, "I will handle any of the issues that
17 occurred during the voir dire. We can pick and
18 choose various issues as we read the briefs." That's
19 consistent with your memory?

20 A. Yes, sir.

21 Q. Okay. Here's Exhibit 12. Looks like
22 you're working off -- this confirms what we said
23 earlier. Although it looks like Mr. Barstow was
24 handling some of the filings; is that right? First

1 of all, that's your signature? Do you recall this?

2 A. That is my signature. Yes. It's like my
3 informal signature where I just sign Joe if it's
4 somebody that I know well. So yeah. Apparently, he
5 was doing something -- maybe I asked him to do that,
6 or he wanted to do it. I don't know why anybody
7 would want to do that. But I think I was sending
8 him -- because I remember going to the Supreme Court
9 one time and not having like the cover page and not
10 being able to file something, which I thought was
11 kind of funny. But anyway, so I think I was
12 emphasizing to him that, hey, make sure you have a
13 cover page to it. Does that make sense to you?

14 Q. Sure.

15 A. Yeah, of course it does. Yes.

16 Q. He's handling the filing, and you're
17 giving him a model to work off from a previous case
18 that you have worked on?

19 A. That's what it looks like. Yes.

20 Q. Okay. All right. Here's Exhibit 13.
21 This has got my highlighting on it because a lot of
22 Mr. Barstow's letters are kind of form letter-ish.

23 A. Yeah.

24 Q. Do you recall -- first of all, do you

1 recall receiving this letter, Exhibit 13?

2 A. No.

3 Q. Okay. But it would have been ordinary for
4 you and Mr. Barstow to have communicated in this
5 manner at that time, correct?

6 A. I think so. Yeah.

7 Q. Do you recognize his handwriting there at
8 the top where it says -- he's crossed out Mr. Edwards
9 and handwritten Joe?

10 A. No. I don't recognize his handwriting.
11 No.

12 Q. Okay. To the best of your recollection,
13 is it his custom to use a form letter where he just
14 puts an "X" next to the content that he wants to
15 highlight?

16 A. I guess so. I found it kind of funny.
17 But that's what he does. Yeah.

18 Q. Okay. So does this mean that he was in
19 charge of filing a motion for a stay of execution,
20 and he's providing you with the documentation after
21 the fact that it's been filed?

22 A. Yes. That's what it appears to be. Yes.

23 Q. Does that refresh your memory at all about
24 the division of labor in this case? Does that tell

1 us anything? Was he mostly in charge of the routine
2 filings and the actual bringing the documents to the
3 Supreme Court to ensure that they were file stamped
4 and of record?

5 A. No. I mean, there really aren't too many
6 routine filings. I think I filed all the notice -- I
7 filed the initial documents. I think the only other
8 documents after that would be the brief. It would be
9 a stay of execution perhaps and like an extension of
10 time. So I don't know if he was responsible. I
11 don't think any of this was, like, scheduled. I
12 think it was just telephone calls, we need this done,
13 you do it; you're going to do it, okay, you do it.

14 Q. Okay.

15 A. Yeah.

16 Q. So you just made those decisions as this
17 situation -- those situations arose?

18 A. Or we just agreed to do things.

19 Q. You collectively, right?

20 A. Right. Yeah. I did not like I ordered
21 him to do something. He's the one that's in the
22 military.

23 Q. Oh, really? He has a military background?

24 A. I don't know. Yeah. He does, something

1 like that. I don't know, I mean.

2 MS. LEIKALA: Is this 14?

3 MR. LINNEMAN: 14. Yes.

4 BY MR. LINNEMAN:

5 Q. I've handed you what's been marked as
6 Exhibit 14. This is unsigned. Do you recall whether
7 this was, in fact, sent?

8 A. No. I have no idea. I mean, I would
9 assume it was.

10 Q. Okay.

11 A. I mean, and I know you're not asking this,
12 but I would not normally have a habit of dictating a
13 letter and not sending it.

14 Q. And it says -- there's some handwritten
15 notes on the bottom that say --

16 A. There's a handwritten -- there's something
17 handwritten at the bottom of Petitioner's Exhibit 14
18 that says, "Sent 7/21/03 CH." CH was my secretary at
19 the time. And the only thing I can assume is that we
20 wanted to get this brief to him. I wasn't in the
21 office. I was gone somewhere, and she sent it out
22 and didn't sign my name with a slash maybe because
23 she had not read the letter to me. So it does appear
24 as if a brief was mailed to Mr. Monroe.

1 Q. Okay. And, again, this references your --
2 or excuse me -- Mr. Monroe's post-conviction
3 proceedings. Do I understand correctly though you
4 still, although you're advising him of that, you were
5 not in consultation with him in connection with the
6 representation?

7 A. There was no discussion with his
8 post-conviction attorneys.

9 Q. Okay. Here's Exhibit 16.

10 MS. LEIKALA: Did we use 15?

11 MR. LINNEMAN: Yes.

12 BY MR. LINNEMAN:

13 Q. This -- don't let me tell you what this
14 is -- but it appears to me that you received a fax
15 from Mr. Barstow, this looks like maybe it's a draft
16 of materials that he had taken responsibility for in
17 the -- after the delegation of duties that you
18 described, or the division of labor that you
19 described, and maybe he's sending it to you for
20 review?

21 A. That's what it looks like. Yes.

22 Q. Was that your custom in working with
23 Mr. Barstow, that you would collaborate in this way?

24 A. I would say yes.

1 Q. Okay. Do you recall did you make any
2 changes, any edits, any suggestions to this, the
3 material that he's provided for your review?

4 A. I do not know. I don't remember that.

5 Q. Do you remember receiving this?

6 A. I think I do remember receiving it. Yes.

7 Q. Would you have done the same thing to him,
8 that is, would you have sent materials to him for him
9 to review once you had completed them in draft form,
10 these being the materials that the two of you agreed
11 that you would take initial responsibility for?

12 A. Probably not. No.

13 Q. You don't think you would have had him
14 review your stuff?

15 A. I don't remember. I don't think I would
16 have sent something independent like this. I may
17 have had him review the brief in its entirety before
18 it was filed, so thereby, he would be reviewing some
19 of my stuff.

20 Q. So tell me about the mechanics of how that
21 would take place. You said earlier that it was
22 overwhelmingly telephone conversations, your actual
23 oral communication at least?

24 A. Correct.

1 Q. So how does this all -- how did it come
2 together?

3 A. I don't remember.

4 Q. Okay.

5 A. I mean, there have been so many of these
6 different kind of briefs like this. As I sit here
7 today, I don't know if his secretary combined my
8 information and his information or if it was combined
9 by my secretary. I don't know that.

10 Q. Okay.

11 A. If I looked at the brief, I might be able
12 to tell where it was combined, but as I sit here
13 today, I don't know.

14 Q. Okay. Well, let's start with what might
15 be some easy questions here. The first he's faxing,
16 according to Exhibit 16, he's faxing you text for
17 Proposition of Law No. 8, No. 9, No. 10, No. 11,
18 No. 12, and it seems to end clean at No. 12, and the
19 faxed signature pages are sequential, you know, these
20 ones at the top, and we have eight pages, and the
21 cover sheet says it's eight pages long. This looks
22 to me like I've got a complete copy of his drafts of
23 Propositions of Law of No. 8 through 12. Is that
24 consistent with your memory?

1 A. Yes, sir.

2 Q. Okay. So Mr. Barstow took those
3 propositions of law and did the initial drafting?

4 A. I believe so. Yes, sir.

5 MR. LINNEMAN: Off the record.

6 (Off the record.)

7 BY MR. LINNEMAN:

8 Q. Mr. Edwards, I'm going to hand you a copy
9 of the brief just to show you a point here. For the
10 record, we are not making this an exhibit to this
11 deposition, but this document is already part of the
12 record in the -- how do I say that?

13 MS. LEIKALA: The return of writ.

14 BY MR. LINNEMAN:

15 Q. In the appendix to the return of writ,
16 it's Document No. 63-5, page I.D. starting at 1,616.

17 So Mr. Edwards, I would just want to point
18 out that these propositions of law that we see here
19 in Exhibit 16, which are numbered 8 through 12, they
20 become, if you look, you can look just at the table
21 of contents in the brief that you filed in the
22 appeal, and those become Propositions 1 through 5.

23 A. Okay.

24 Q. You can take your time. Tell me if that's

1 right.

2 A. No. I think that is correct. Yes, sir.

3 Q. Okay.

4 A. So I think I can probably say, from
5 looking at this brief, it appears as if my office put
6 this brief together.

7 Q. What makes you say that?

8 A. Well, I mean, just the way -- I don't know
9 if the term is like the font, just the way it's laid
10 out, just looking at the typing. I mean, it just
11 looks like this is something that Todd was sending me
12 his stuff, his propositions of law, so that I would
13 put it together, I would put the brief together as a
14 whole. So I'm just having a feeling that I probably
15 put this together. That's just from looking at this,
16 and just thinking of this logistically, I probably
17 did this. In fact, it looks like I signed for
18 Mr. Barstow, so that gives me a better recollection
19 that I probably did put this together, or my office
20 put it together with me.

21 Q. Okay. Sure. How many staff members did
22 you have at this time, do you recall? So far we've
23 discussed one assistant that you had.

24 A. Well, it's interesting. At this time, I

1 was actually of counsel, if I can remember correctly,
2 I was of counsel with a firm called Twyfford and
3 Donehay, but my criminal stuff was like all my own
4 stuff. So I would have had like one secretary and
5 maybe like one paralegal. But it was mainly done by
6 myself and my secretary.

7 Q. Okay. I just also point out for you
8 Appendix A1 and A2 is the notice of appeal which you
9 earlier referenced. It's got your signature on the
10 certificate of service, so it looks like your memory
11 is correct there.

12 A. That's good for an old person.

13 Q. Not bad. Well, you stick to that rigorous
14 fitness routine, it keeps you young.

15 A. Just because I write it down doesn't mean
16 I do it.

17 Q. All right. Then here's what looks like
18 the last of the correspondence, this is Exhibit 18,
19 and this is --

20 A. Yeah. So this would have been almost two
21 years from the date that we visited him. We visited
22 him in May of '03, so almost two years and a month
23 from that date the Supreme Court affirmed his
24 decision. This is Exhibit 18 Petitioner. I'm

1 sending him a letter -- sending him a copy of the
2 decision and telling him that somebody will be
3 picking up his case in the federal habeas.

4 Q. Okay. So this was your last communication
5 to him then?

6 A. I would think so. Yes.

7 MR. LINNEMAN: Okay. Off the record.

8 (Off the record.)

9 THE WITNESS: But this -- I believe
10 Exhibit 18 contains, I believe, my last communication
11 with Mr. Monroe.

12 BY MR. LINNEMAN:

13 Q. Okay. Let's see. Why don't you -- what I
14 would like to do now is discuss some of the -- I want
15 to ask you some legal issues that you identified, you
16 and Mr. Barstow identified and argued to the Supreme
17 Court. So you've got that brief in front of you if
18 that will help.

19 A. Sure.

20 Q. I'm sure you're going to need to refresh
21 your memory.

22 A. Yeah.

23 Q. I'm not asking you to, first of all, to
24 read through any of this, but there are a couple

1 questions.

2 A. I will do my best.

3 Q. Sure. Well, let's start with the first.

4 I wanted to talk about the first proposition of law,
5 which is framed as ineffective assistance of counsel.

6 MS. LEIKALA: Just for the purposes of the
7 record, that's going to be Page I.D. 1,632.

8 MR. LINNEMAN: Thank you.

9 BY MR. LINNEMAN:

10 Q. Now, the basis that is offered for
11 ineffective assistance of counsel here is the fact
12 that trial counsel failed to object to certain
13 testimony at the trial.

14 A. Correct.

15 Q. There was testimony by a prosecutor, in
16 fact.

17 A. Yes. David DeVillers.

18 Q. Who I think you said in the oral argument,
19 it said you know him -- at least at the time you knew
20 him personally.

21 A. I know him very well. I know him to this
22 day. He currently works as an Assistance U.S.
23 Attorney here in the Southern District of Ohio.

24 Q. He's still at that job then?

1 A. Yes.

2 Q. That's what he was doing at the time of
3 this trial?

4 A. Correct.

5 Q. So the argument is trial counsel was
6 ineffective because they failed to object to this
7 testimony by Mr. DeVillers at the time that the
8 testimony was offered at trial?

9 A. Correct.

10 Q. Okay.

11 A. If we could just stop for a second. I
12 don't know if you have it. It's D-e-V-i-l-l-e-r-s.

13 Q. Now, that claim, you chose to frame that
14 as a grounds for appeal in terms of ineffective
15 assistance of counsel. Would you agree with me that
16 that set of occurrences in the trial court could
17 conceivably form grounds for appeal for other
18 reasons, for example, it could be offered as simply
19 an error of the trial court to allow the testimony,
20 or to fail to give the jury an instruction to
21 disregard the testimony if it was improper as you
22 seem to believe it was? Did I make that clear?

23 A. Oh, no. I understand your question.
24 That's a very interesting question. I don't know if

1 I would agree with that. I'm not going to challenge
2 you completely on that. But I think that the problem
3 with raising it as the trial court erred by allowing
4 Mr. DeVillers to testify, I think that becomes
5 problematic because that was never -- that was never
6 objected to.

7 So, see, as I sit here, I would think that
8 Mr. DeVillers' testimony, which I believe to this day
9 is improper, or was improper, I believe that had to
10 be raised as an IAC claim, ineffective assistance of
11 counsel. I'll refer to that from now on as an IAC
12 claim, so it's just a little bit easier. But I think
13 that is the best way to raise that claim. And,
14 again, I don't say that with complete certainty, but
15 I think that we determined that that's how it should
16 be raised.

17 Q. Okay. But I think I hear in there that
18 you recognize that there is -- that situation, that
19 set of facts as it occurred in the trial court, could
20 represent a different basis to present that claim as
21 grounds for some relief in the court of appeals,
22 whether it be simple trial court error or perhaps,
23 for example, prosecutorial misconduct.

24 A. Not in the Court of Appeals. In the Ohio

1 Supreme Court.

2 Q. Excuse me. I'm sorry. You're right.

3 A. It's all right. I'm not going to disagree
4 with your statement. I think that's one of the
5 inherent -- I don't want to say problems -- I think
6 it's one of the inherent delicacies of doing criminal
7 appellate work is that, you know, issues can be
8 framed in many different ways.

9 I think that inherently, although I think
10 sometimes the justices or appellate judges grow weary
11 of IAC claims, I always laugh when they look weary
12 because it seems often times that is one of the
13 issues that is the biggest basis for a reversal. I
14 mean, not always. There's some other issues.

15 But I think that IAC is always -- you have
16 to raise IAC, I think, in a capital case. I think
17 it's a rarity when you're not going to have that
18 claim raised, either during the trial phase or the
19 penalty phase. Even though I think Mr. Monroe had
20 two very experienced and very good attorneys, I
21 thought they made a mistake on this issue not
22 objecting.

23 Q. Okay. So you would agree that generally
24 speaking, the fact that an attorney is very

1 experienced, very seasoned, known to a particular
2 judge, doesn't preclude the fact that in a split
3 second in a given situation they can render
4 representation that is ineffective in constitutional
5 proportions?

6 A. Of course. Yes. Even the most
7 experienced attorney, and especially on a matter like
8 this, because this, you know, the State calling
9 DeVillers is so different, it was probably in many
10 ways unexpected.

11 Q. I think the record reflects that it was
12 unexpected. Yeah.

13 A. It was probably even the State perhaps
14 didn't know that they were going to do it until --

15 Q. Right.

16 A. -- the zero hour.

17 So I think that often times when things
18 unexpectedly occur, often times even the most
19 experienced attorney can forget to make that
20 objection.

21 Q. Right. Okay. So same subject, same part
22 of the trial. You raised it as IAC, and I will adopt
23 your abbreviation. Is there a strategic reason not
24 to raise it, for example, in the -- as simple trial

1 court error or as a matter of prosecutorial
2 misconduct?

3 A. Well, trial court error, I think, first
4 off, then you're -- see, the problem with trial court
5 error is it's not objected to, so it would almost
6 have to rise to the level of plain error I would
7 think. Prosecutorial misconduct, to me, is
8 extremely, extremely difficult to prove. I think
9 prosecutorial misconduct almost has to arise out of
10 like an obvious on the record Brady, B-r-a-d-y, claim
11 where there is clear, on the record, a failure to
12 disclose material evidence, or perhaps like during
13 closing arguments where the prosecutor is commenting
14 on the defendant's unwillingness to testify or, you
15 know, comments that become -- that build upon one
16 another.

17 I felt this claim was one where DeVillers'
18 testimony bolstered the testimony of this Boyd guy
19 who, I think, nickname was Killer Bunny.

20 Q. That's correct.

21 A. I think.

22 Q. I believe your recollection is correct.

23 A. So I felt that this bolstering testimony
24 was just extremely unfair, and I felt that it

1 affected the outcome of the trial, and I felt -- I'm
2 not going to sit here and say the case should be
3 reversed for that reason. I don't have everything in
4 front of me. But we felt that it was a substantial
5 constitutional claim.

6 Q. Now, when you talked about the effect of
7 the failure to object by the trial attorneys in the
8 moment when the testimony was offered, when -- the
9 decision to present -- the decision to present the
10 appellate arguments has -- can have a similar effect.
11 Is it not correct that there are some issues that
12 will be -- that if not raised on appeal, then might
13 be looked on by a later court, for example, the
14 District Court or a Federal Court, as being
15 procedurally defaulted because they weren't raised on
16 direct appeal; is that right?

17 A. Wow. Let me try to break that down.
18 There's no doubt that if appellate counsel -- like if
19 Mr. Barstow and I did not raise issues that should
20 have been raised, there's no doubt that, you know,
21 you guys can raise ineffective assistance of
22 appellate counsel. That's clear.

23 Q. Okay. Right.

24 A. Now, your next question, which I've always

1 found this procedural default to be extremely,
2 extremely complicated.

3 Q. I agree.

4 A. I don't even know if, frankly, I
5 understand it to this day. I find it very difficult,
6 and it's one of those things where the minute I file
7 something, it like leaves my mind.

8 Q. Let me just ask you --

9 A. Sure.

10 Q. I think we -- let me -- maybe I can
11 rephrase the question.

12 But you understood -- your understanding
13 as an appellate lawyer though is that there are
14 issues that are properly raised on appeal, direct
15 appeal, and if not raised on direct appeal, then they
16 are completed basically. They can't be raised later.

17 A. Yeah. I think the whole purpose of habeas
18 review is to review decisions by the State Appellate
19 and the State Supreme Courts. So to some degree, I
20 believe you have to get some type of merit ruling.
21 If you don't get a ruling and then you try to then
22 raise it in federal habeas, I think that the District
23 Courts, the Federal Courts can say, well, that's
24 procedurally defaulted.

1 Q. Okay.

2 A. That's probably a very simple, simple --
3 I'm sure Magistrate Judge Merz would laugh if he were
4 here and heard me describe it that way, but that's
5 the best I can do now.

6 Q. That's fine. He's fortunate never to have
7 had me try to explain it.

8 MS. LEIKALA: I just want to make a note
9 for the record. That as to the DeVillers' claim,
10 that that claim has already been dismissed by the
11 District Court on procedural default grounds.

12 MR. LINNEMAN: Okay.

13 MS. LEIKALA: So just note that.

14 MR. LINNEMAN: Understood. And I'll note
15 that I'm not sure we need to do this now, but let's
16 see -- that's fine. Thank you for that notation.

17 MS. LEIKALA: Sorry if that messed you up.

18 MR. LINNEMAN: No. That's fine.

19 BY MR. LINNEMAN:

20 Q. Your second grounds for -- the second
21 ground for relief -- excuse me -- Propositions of
22 Law, as they're phrased in the brief. I'll summarize
23 this by saying -- you know what, actually, let's skip
24 that one.

1 Let's go to the Proposition of Law No. 8.
2 Do you recall -- first of all, who -- which of the
3 two of you handled -- drafted this or was responsible
4 for this?

5 A. I may have, but I'm not certain.

6 Q. Okay. What makes you -- is there any
7 specific thing that you are looking at that makes you
8 believe that?

9 A. No. The only thing that makes me believe
10 that I may have done this is because it appears to me
11 that Mr. Barstow faxed the issues that he did in that
12 previous exhibit.

13 Q. And so all the remaining ones are yours?

14 A. I can't say that with any certainty, and I
15 wish I could, but I can't.

16 Q. Okay. But we can -- you can say with
17 certainty that the ones he faxed you were his, were
18 the ones that he drafted?

19 A. Correct.

20 Q. You're just not sure that every single
21 remaining one was definitely yours?

22 A. Correct.

23 Q. Okay. Well, one of the reasons I ask that
24 is Proposition of Law 8 does bear some -- it looks

1 like perhaps there's some overlap in the subject
2 matter with Proposition of Law No. 2.

3 A. Yeah. That's actually incorrect.

4 Q. How is it incorrect?

5 A. Well, because Proposition of Law No. 2
6 deals with admitting the photographs during the trial
7 phase. Proposition of Law 8 deals with submitting
8 the photos during the penalty phase, so those are
9 two, in my opinion, although subtle, I think they're
10 two completely different issues.

11 Q. No. Of course. Yes. I agree. Well,
12 although, I would say Proposition of Law 2 does
13 actually go further in the caption. It's -- I think
14 it goes both -- it goes to both. It says appellant's
15 right to a fair trial and a fair sentencing
16 determination.

17 A. Okay.

18 Q. So I think you're right that 8 makes a
19 specific argument as to the sentencing.

20 A. During the penalty phase, correct.

21 Q. Okay. Let's look at -- so does that -- I
22 guess that's my -- you've told us to the best of your
23 recollection just about the division of labor.
24 Unless you have anything else?

1 A. As I look at this brief, it appears to me
2 that I probably prepared the penalty phase arguments
3 just because this ineffective assistance of counsel
4 claim looks like something that I raised. It just
5 looks like that is -- because I think I felt more
6 comfortable because the one case that's cited quite a
7 bit is this State versus Ashworth, and I actually
8 represented Mr. Ashworth during his trial phase of
9 his case in Licking County, so I think that I
10 probably did do these mitigation -- these penalty
11 phase issues.

12 Q. Okay. Let's look now at Proposition of
13 Law No. 11.

14 A. Yes. That's the IAC claim during the
15 penalty phase.

16 Q. And one of the grounds -- one of the basis
17 that you offer is a failure to ask for a merger of
18 the aggravating circumstances in the sentencing; is
19 that right?

20 A. Yes.

21 Q. I can direct you to a -- do you have --
22 page 43, which is Page I.D. No. 1,667 in the Federal
23 case. Can you tell me a little bit -- can you give
24 me a little bit of background on the legal basis for

1 this, your understanding of it?

2 And by way of background, I am probably
3 much more familiar with the facts of this case at
4 this point than you were -- than you are, but so
5 you're aware that there were multiple different
6 capital specifications that were offered by the State
7 at the time of trial that had to do with -- in other
8 words, they had multiple rationales under which they
9 proposed that they could obtain a capital sentence.

10 A. Yes. Yeah. I think that the argument --
11 I think this is a very difficult argument to
12 understand, and I mean, I'll do a good job of it,
13 explaining it. But I think that what happens is when
14 you get into the penalty phase, you have the jurors
15 weighing the aggravating circumstances, which were
16 proven during the first phase, and you have them
17 weighing those against the mitigating factors, so you
18 have the aggravating circumstances against the
19 mitigating factors. And I know that you guys know
20 that.

21 The difficulty whenever you try a case
22 like this is the jury is not given any kind of
23 formula, nor could they be given one, as to how much
24 weight do you give each aggravating circumstance or

1 how much weight you give for mitigating factors.
2 Jurors I think, in fact, are told that they determine
3 that. So they're given a lot, a lot of discretion.
4 So I think that defense attorneys, we're always very,
5 very nervous whenever there are like four or five
6 different aggravating circumstances, especially if
7 they're duplicative, you know, like an aggravated
8 robbery and an aggravated burglary and a kidnapping,
9 that in theory, if you told the jury that some of
10 these duplicative aggravating circumstances should
11 merge, then as a result, they wouldn't be weighing
12 four against the mitigating factors. They might be
13 weighing two or one. And, again, it's -- I find it
14 to be a very complicated argument, but I think
15 that --

16 Q. And can you focus on -- tell me about your
17 understanding of the actual -- this concept of merger
18 as it relates to the aggregating -- or excuse me --
19 aggravating circumstances.

20 A. As I sit here, I'm not really sure that I
21 can without really sitting down and re-reading all
22 the cases. I think the case law for the defense on
23 this issue is very bad, as are a lot of issues in
24 capital litigation in the State of Ohio. But I think

1 that what we were trying to argue was in this case
2 there were so many aggravating circumstances, that we
3 felt that some of them should have merged. We
4 believed some of them were duplicative. And as a
5 result then, when the jury was being instructed,
6 rather than being instructed that there were four
7 aggravating circumstances, they might be instructed
8 that there were two or three. So, again, that's the
9 argument.

10 I don't know -- I don't think, at least
11 from my memory as I sit here, I don't know that
12 there's ever been a case reversed because of that.
13 I'm not suggesting there should have been cases
14 reversed. But I think that it --

15 Q. Let me ask you another -- maybe a focusing
16 question here again.

17 A. Okay.

18 Q. Do I understand correctly, no single
19 defendant can be -- can receive a death sentence more
20 than once, more than one death sentence for any
21 specific act that that defendant commits; is that
22 correct?

23 A. Well, I mean, I don't mean to be funny,
24 obviously, you can only be executed once.

1 Q. Right.

2 A. But, no, you can receive -- I think you
3 could receive multiple death sentences.

4 Q. Let me clarify, first of all. In this
5 case, there were two victims.

6 A. Two victims. Right.

7 Q. So is my understanding correct that the
8 defendant could receive one death -- one death
9 sentence per victim?

10 A. You know, I should know this, but I don't.
11 Meaning, for example, like -- well, first off, the
12 only thing that makes you death eligible in the State
13 of Ohio is if you commit an aggravated murder and
14 there are certain enumerated aggravating
15 circumstances.

16 So it would seem to me that if you kill
17 one person, that's going to be aggravated murder, and
18 if you kill them during the commission of an
19 aggravated robbery, kidnapping, aggravated burglary,
20 to escape detection, a rape, those are all going to
21 be aggravating circumstances that are going to be
22 what makes it a death case. Those are like the -- I
23 don't know if they're like A7 factors or somehow
24 they're something that sticks in my mind.

1 As I sit here now -- and I haven't gone
2 over this case law for a couple of years, because
3 there are so few death penalty cases that are
4 indicted now here in Franklin County, it's a rarity,
5 whereas at one time, there were many -- I probably
6 would agree with you. I think that for each murder,
7 you kill a person, you kill John Doe, I believe you
8 can only get one death sentence per person.

9 But within that aggravated murder, you can
10 have many aggravating circumstances, and it's my
11 understanding that when the jury is instructed, they
12 don't weigh the aggravated murder in the penalty
13 phase. They weigh the aggravating circumstances.

14 So I think that part of this argument was
15 that counsel should have objected and should have
16 asked that some of the aggravating circumstances,
17 because they were duplicative, they should have
18 merged. So as a result, when the jury was given the
19 final instructions, they weren't given four
20 aggravating circumstances, maybe they were given like
21 one or two. I mean, that's my understanding of the
22 argument. I mean, I wish -- I apologize for not
23 doing a better job at that.

24 Q. You do not have to apologize, sir.

1 A. Yeah. Just my memory just isn't that good
2 on that issue.

3 Q. Okay. Proposition of Law No. 12, and
4 we're still generally in the subject of merger of
5 aggravating circumstances, this is at Page I.D.
6 1,670.

7 Do you recall that in the transcript of
8 this case, there's a reference to the fact that there
9 was a discussion in chambers concerning either the
10 discussion of merger within the context of the jury
11 instructions?

12 A. I do not remember that.

13 Q. Okay. Do you recall whether you or
14 Mr. Barstow made any efforts to discover what had
15 happened in that discussion in chambers? Just for
16 the record here, I'm going to state that the
17 reference to the discussion in chambers can be found
18 at -- this is -- will that be Page I.D. 1,489?

19 MR. KOMP: That's a transcript page
20 number.

21 BY MR. LINNEMAN:

22 Q. The reference is to the transcript at
23 page 1,489.

24 So do you recall -- you told me you

1 weren't aware that -- or you don't remember in this
2 moment, I believe, that there was a reference to this
3 discussion in chambers; is that right?

4 A. As I sit here, I do not remember that.
5 No.

6 Q. Okay. So I'll ask a couple obvious
7 follow-ups. Did you make -- do you recall whether
8 any efforts were made by either yourself or
9 Mr. Barstow to discover more about what happened in
10 that conversation in chambers?

11 A. I do not remember.

12 Q. Okay. And among those efforts that could
13 have been made, maybe this would jog your memory, I
14 suppose, but one thing you could have done, I
15 suppose, was speak to the trial counsel, either
16 Mr. Janes or Mr. Rigg. Do you remember if you spoke
17 to either of them at any point, whether specifically
18 for this reason or in any other -- at any other time
19 during the appeal to obtain information?

20 A. No. No. We did not do that with regard
21 to -- I mean, I'm certain we never went back and
22 tried to ask them questions about that issue.

23 Q. Okay.

24 A. I think for one reason maybe is I'm not

1 sure that it would have done any good.

2 Q. Why not?

3 A. Well, because it was not on the record.

4 Q. The discussion held in chambers was not on
5 the record?

6 A. Correct.

7 Q. Okay.

8 A. But I do think there is a method in which
9 perhaps you can maybe -- I thought there was some
10 method of perhaps recreating like sidebar
11 conversations or other conversations that are not on
12 the record. But I'll be honest, as I sit here today,
13 I don't know exactly now how to go about doing that,
14 if there is a time limitation, I don't know that, if
15 it can be recreated.

16 Q. Tell me, based on your knowledge of the
17 Franklin County Courts of Common Pleas at that time,
18 what was the -- is the method of court reporting just
19 the court reporter, the person themselves recording?
20 For example, is there a contemporaneous recording,
21 whether audio or video, that supplements the record
22 that the court reporter themselves creates?

23 A. Back at the time this case was tried,
24 there was no audio, there was no video.

1 Q. Has that changed now, do you know?

2 A. I do not believe it has changed.

3 Q. Sure. Some counties, each county is
4 different, it seems to me --

5 A. Right.

6 Q. -- at least in my experience. Okay.

7 So there's no backup. To the best of my
8 knowledge, there's no backup to the transcript itself
9 in terms of an audio, a video, anything like that?

10 A. Correct.

11 Q. Okay. And is there any reason to believe
12 that there would have been, for example, any media,
13 any news reporters present during the course of any
14 part of this trial that might have had an independent
15 record, whether it be a video, you know, whether news
16 footage, anything like that?

17 A. No idea. I mean, there was obviously a
18 cameraman in the courtroom at some point in time, but
19 I don't think this case, as serious as it was, I
20 don't think this case received a lot of public
21 publicity. I don't think this was like a case where
22 there was a filming going on with witnesses'
23 testimony.

24 Q. I thought I heard you open that -- your

1 answer to that question with you don't know; you
2 don't remember?

3 A. Well, of course, because I wasn't at the
4 trial. Yeah. I didn't sit and watch the trial.

5 Q. Okay.

6 A. But I'm just saying is that this -- there
7 are a few cases in the last 10 or 15 years which
8 receive a lot of publicity, but this was not one of
9 them.

10 Q. Right. Okay. Okay. Are you aware of any
11 request, whether by the trial court or for any
12 resource -- excuse me -- any request by trial counsel
13 for any resource that was needed in the defense of
14 the case that was either denied by the court or
15 limited in any way?

16 A. I'm unaware of that.

17 Q. Okay. Did you make any requests or did
18 you have any need for any resource to adequately
19 carry out this appeal that you didn't have access to?

20 A. No.

21 Q. Okay. Were you able to adequately carry
22 out the work that you needed to do in this appeal
23 within the time limits that were imposed by the
24 court's rules?

1 A. Yes.

2 Q. I think we -- I think you said it's your
3 recollection that you took responsibility for issues
4 related to voir dire?

5 A. I believe so. Yes.

6 Q. Do you recall did you have access to any
7 jury questionnaires?

8 A. No. I mean, could we have --

9 Q. I asked that question poorly. I started
10 by saying do you recall. So let me ask the question
11 again.

12 Did you have access to jury questionnaires
13 as part of the review of the record that you had?

14 A. The answer -- I'm going to answer it, no,
15 I did not, and I do not believe jury questionnaires
16 are made part of the record.

17 Q. Is that a problem?

18 A. I mean, you're asking me do I think that's
19 a problem?

20 Q. Yes.

21 A. Well, I think that any time you're doing
22 an appeal, the more that's in the record, the better.
23 If you're trying to explore, if you want to raise a
24 potential Batson challenge on a particular juror,

1 maybe, yeah, I think any extra information is going
2 to be helpful.

3 I think I know why the court does not make
4 those questionnaires part of the record, because they
5 contain a lot of personal information about the
6 individual jurors, where they work, maybe areas where
7 they live, family members, work histories. So is it
8 a problem? It could possibly be. Yes.

9 Q. Okay. Did you do anything in particular
10 to prepare when you began work on this case? Is
11 there any special -- anything you do to prepare for
12 undertaking an appeal?

13 A. No.

14 Q. Okay. Here's Exhibit 21. I think this is
15 just a pleading that you'll -- that I believe you
16 filed. I would call this a praecipe to prepare the
17 record, the transcript; is that right?

18 A. Yes, sir.

19 Q. So filed that on December 31, 2002. And
20 then --

21 A. I'm working on New Year's Eve. That's
22 pretty good. That's amazing.

23 Q. Wonder what time? Or your runner was.
24 Yeah.

1 MS. LEIKALA: Did you skip 20?

2 MR. LINNEMAN: Yeah. I haven't
3 necessarily used -- I have pulled a couple out.

4 MR. KOMP: 20 was used earlier.

5 MS. LEIKALA: Okay. Found it.

6 BY MR. LINNEMAN:

7 Q. Okay. Here's 22, this is a copy of the
8 transcript and the record. Excuse me. I should say
9 am I right that this is the certification of the
10 filing of the transcript and record?

11 A. Looks like it. Yes.

12 Q. Okay. So how do you -- once the record is
13 filed, how do you -- what steps do you take
14 ordinarily in -- I'm going to start over.

15 I'll ask this question two ways, or I'll
16 say it's got two components. First, once the record
17 is filed when you're working on an appeal such as
18 this, what are the steps that you normally take -- or
19 what was the -- or what is your ordinary practice in
20 just ascertaining the completeness and correctness of
21 the record; and then, second, if there was anything
22 that was done differently in the Monroe case, what
23 did you do differently?

24 A. There's nothing done differently in the

1 Monroe case that I am aware of. I think when the
2 record is filed, normally go up to the Ohio Supreme
3 Court, go to their clerk's office, review the record
4 to see if there's anything there that's unusual, and
5 supplement the record, if needed, after reading the
6 transcript.

7 Q. Okay. Did you go to the Supreme Court in
8 this case?

9 A. I'm certain I did. Yes.

10 Q. Okay. You don't -- do I take that to mean
11 you don't personally -- you don't recall it as you
12 sit here now, but that would be your ordinary
13 practice?

14 A. I recall going to the Ohio Supreme Court
15 on many different occasions to review the record
16 because they bring it out in a big box, you sit at
17 some little cubicle. But do I specifically remember
18 doing that in this case? I don't specifically
19 remember looking through the Jonathan Monroe record.
20 Don't remember that.

21 Q. Okay. But it would be your ordinary
22 practice --

23 A. Yes, sir.

24 Q. -- is that what I understand?

1 Okay. As someone with some experience in
2 this, how do you figure out whether there's anything
3 missing or whether there's some defect?

4 A. It doesn't really become a big issue, to
5 be honest with you. I just don't foresee that to be
6 a huge issue.

7 Q. Why not?

8 A. Well, because, I mean, you're going to --
9 my job is to do the direct appeal. So I'm looking
10 for legal issues. I'm looking for a search issue, a
11 Miranda issue, ineffective assistance of counsel,
12 prosecutorial misconduct, 404B issues, that's what
13 I'm looking for.

14 Q. 404B?

15 A. Yeah. A 404B.

16 Q. Could you enlighten me? What do you mean
17 by that?

18 A. It's a rule of evidence. You know, it's
19 like letting in prior bad acts.

20 Q. Sure. Okay.

21 A. It's one issue that causes reversals on
22 many occasions. So that's what I'm looking for. I'm
23 not sitting there like a clerk and sitting there and
24 reading to see if everything was admitted. I'll be

1 honest with you, I've done over 200 appeals. It's
2 not relevant. It's not that important.

3 What's in the -- I mean, the record --
4 when I think of the record, I think of the
5 transcript, what the court reporter takes down. The
6 fact that some exhibit is not in there, like some
7 hammer or some knife that my client used to zap
8 somebody, I don't care if it's there. I wish that it
9 wasn't, but it becomes meaningless, in my opinion.

10 Q. Sure.

11 A. Yeah. I'm just trying to look at
12 pragmatics of it.

13 Q. Right. Understood. Okay. But so you
14 didn't -- in this case, you did not ascertain that
15 there was anything missing? Your review was for --
16 at that time was for legal. Well, now, let me just
17 understand a sort of nuts and bolts issue here.

18 You go to the Ohio Supreme Court, you go
19 to the building and actually look at the original
20 copy that's been produced here, but you also obtain
21 your own -- all your research is not done in the Ohio
22 Supreme Court. You obtain a copy of the
23 transcript --

24 A. Of course.

1 Q. -- that you take back to your office?

2 A. Well, yes. Of course. Yes. Yeah. You
3 got to remember, when I'm looking at the record at
4 the Ohio Supreme Court, I don't have some chart and
5 I'm sitting there going through the record, oh, okay,
6 this is here, this is here. I don't do that.
7 That's -- to me, it's not an important component of
8 what I'm trying to do. It's this guy is on death
9 row, if I want to get this case reversed, it's got to
10 be something more than some hammer wasn't admitted
11 into evidence or they misplaced sign. It's got to be
12 some really good issue, and that's going to be in the
13 transcript. So that's really what my focus is.

14 Q. Sure. Here's Exhibit 23. This was a
15 motion that was filed by the State to correct the
16 record. And maybe I can refresh your memory here a
17 little bit. What did I say that was, is that 23?

18 A. 23.

19 Q. After -- you correct me if I'm wrong. I'm
20 just going to try to give you a little context here.
21 After the appellant brief was filed, this motion was
22 filed because based on the one argument was raised in
23 the appeal that had to do with a jury instruction.
24 And then in response to that -- I noticed this in

1 oral argument -- the prosecutor said something about
2 having then been alerted to some portion of the
3 transcript where there appeared to be an omission.
4 Does this -- is any of this familiar to you?

5 A. No. No.

6 Q. Okay. You have no recollection of it?

7 A. No recollection at all. No.

8 Q. Okay. Well, this motion suggests that the
9 transcript of the trial was incorrect and that the --
10 because of the fact that the jury instructions
11 themselves were different from the way the transcript
12 reads, during the time the judge was reading the jury
13 instructions to the jury. And it suggests that it
14 was -- that the transcript must be in error and
15 the -- but the proceedings were actually corrected --
16 were actually conducted according to the jury
17 instructions. So you don't have any specific
18 recollection of this issue?

19 A. Nope. No. I do not.

20 Q. Okay. Do you remember did -- now, there
21 was this motion to correct the record. On my review,
22 I don't see that -- it originated first -- before
23 they filed it in the Supreme Court, they filed it
24 with the trial court. Do you remember -- do you have

1 any recollection of that, of ever filing -- did you
2 ever file anything in the trial court?

3 A. No. I mean, no, I don't think we did.
4 No, because I was not his trial counsel.

5 Q. And, well, that's one question.

6 Exhibit 23, again, they indexed -- the prosecutor
7 indexed to the motion a copy of the entry of the
8 trial court. No. It's not there. Let's see. Oh, I
9 see. No. I've given you the common pleas motion.
10 Exhibit 23 is the common pleas motion.

11 A. Okay.

12 Q. And it identifies -- it does identify you
13 as being served with a copy of it.

14 A. Okay.

15 Q. So you never -- you didn't file -- you
16 weren't -- you considered that you were not trial
17 counsel at that time?

18 A. Well, I was not trial counsel for
19 Mr. Monroe ever. I was always appellate counsel.
20 But this was a motion to correct the record. I
21 don't -- this would have been filed -- this looks
22 like it was filed October of 2003, so we were
23 appellate counsel at the time, but it appears we did
24 not respond to this motion. I'm not sure any reason

1 why we would.

2 Q. Was there -- let's start with the issue of
3 just who was representing -- you know, who actually
4 represented Monroe in the Court of Common Pleas at
5 that time, do you know?

6 A. Well, no. I think I just said, I mean, we
7 were his appellate counsel at the time, so this
8 motion deals with to correct the record for purposes
9 of appeal, so we would have been his counsel, but we
10 didn't respond to the motion because I assume we
11 probably thought it was unimportant.

12 Because I think what my understanding
13 is -- I mean, this is not -- again, you're asking a
14 question. What I'm saying is that the transcript and
15 the jury instructions differed. So the State's
16 position was there's no way that the judge skipped
17 over reading paragraphs of the jury instructions
18 because nobody objected, trial counsel's both there
19 with their copies. So as a result, the State's
20 correcting the record. They're saying that the
21 record should read the way the jury instructions
22 read.

23 I think the jury gets the jury
24 instructions. The jury instructions are taken back

1 to the jury. So they're sitting there -- I don't
2 know if they get like 12 separate copies, but I'm
3 almost certain that jury instructions are going to go
4 back in a capital case. So all the State's doing is
5 they're asking to correct the transcript so that the
6 transcript reads like the jury instructions do, which
7 is what the jury had. So I have no understanding why
8 we would ever even think of opposing that motion. I
9 don't understand how it could ever be the basis of an
10 appeal, any kind of significant issue.

11 Q. Okay. Well, I mean, if there was an error
12 in the jury instructions, could that be the basis
13 of --

14 A. That's not what the motion says. The
15 motion doesn't say that there was an error in the
16 jury instructions. I thought what the motion said,
17 as I read it real quickly here, was that the
18 transcript -- apparently as the court reporter is
19 taking it down, that the -- that the jury
20 instructions the court was reading, that two
21 paragraphs -- either a paragraph or two were omitted
22 from the trial transcript. So as the court reporter
23 is taking it down, there's two things that could have
24 occurred, either the judge skipped reading the two

1 paragraphs by accident or the court reporter, when he
2 did the transcript, lost those two paragraphs.

3 That's my understanding.

4 What the State's arguing is, which I think
5 actually is correct, because every once in a while
6 the State does make correct arguments, not very
7 often, but every once in a while, they made an
8 argument saying it's highly unlikely that two
9 prosecutors and two defense attorneys, who we can
10 assume were both awake, that they would have allowed
11 the judge to skip over important sections of the jury
12 instructions. So the State just wanted to correct
13 the transcript.

14 And probably what Mr. Barstow and I did
15 was re-read this, and our view was, yeah, that's
16 probably right. But however it happened, it doesn't
17 matter, because these jury instructions go back, so
18 the jury had these already. So it seems to me much
19 ado about nothing.

20 Q. Okay.

21 A. Unless I'm misunderstanding the motion.

22 Q. I mean, again, your recollection -- you
23 didn't -- you don't have a recollection of this --
24 I'm doing a bad job here.

1 Do you have a specific recollection of
2 this series of events or not? I mean, am I just ---
3 do you remember, when it happened, your thought
4 processes at the time, any conversations with
5 Mr. Barstow at the time?

6 A. No.

7 Q. Okay.

8 A. No. I mean, I will say this, you know,
9 I'm not trying to be so carefree or whatever saying
10 if this motion came in on a capital case, I have no
11 doubt that we both reviewed it, but what I'm saying
12 is that there's no rule, nor is there any common
13 sensical theory that we have to respond to every
14 single thing that goes on in a capital case.

15 As I said earlier, sometimes the State
16 makes requests and they file motions that maybe
17 sometimes they make sense. And we felt that even if
18 this was incorrect, like, let's say the judge skipped
19 over these two paragraphs, how would that give any
20 relief to Mr. Monroe, because the jury had these jury
21 instructions?

22 Q. Well, could the jury have taken an
23 implication or could the jury have taken the judge at
24 his word at the time he's reading the jury

1 instructions if, in fact, the judge omitted a not
2 guilty instruction? Let's say the State is wrong. I
3 agree -- I won't take issue with your proposition
4 that sometimes the State can offer an argument in
5 which it is correct. I'll give you that for the
6 moment.

7 A. Okay.

8 Q. But is it also true that if, for example,
9 the judge by some manner failed to read the not
10 guilty instruction, which is the one that was omitted
11 here --

12 A. Right.

13 Q. -- and the attorneys failed to object
14 because everybody had been reading a set of jury
15 instructions that's 40 or 50 pages long, nobody
16 noticed it, and as a result, a not guilty instruction
17 was not given to this jury, would that have -- could
18 that have -- could that have affected their mindset,
19 affected their perception?

20 A. First off, the jury instructions here are
21 12 pages long, they're not 40 or 50 pages long. I
22 have no ability, as I sit here today, to hypothesize
23 what could or could not have happened in an
24 individual juror's mind.

1 However, I think that -- maybe it's
2 suffice to say that we did not file a response to the
3 State's request, and I can only surmise as to why we
4 did not was because the jury had the jury
5 instructions. The jury had verdict forms that said
6 not guilty, so obviously they had -- they could have
7 circled NG. I wish they would have, we wouldn't be
8 here. So, again, as I sit here today, I find no
9 reason as to why we should have responded to this
10 motion.

11 Q. Okay. So it wasn't a strategic reason.
12 It was based on -- you felt it was just a loser on
13 the merits, that the State was probably correct?

14 A. I believe either, A, the State was
15 correct, or if the State was -- whatever reason, I
16 felt that it was nothing that would assist Mr. Monroe
17 in having some relief from his death sentence.

18 Q. Okay. He just wasn't likely to get -- it
19 wasn't likely to change the outcome?

20 A. That's my opinion then -- I assume that
21 was my opinion then. That's my opinion now. I mean,
22 I could be wrong. Frankly, I hope I am. I hope he
23 gets off death row.

24 MR. LINNEMAN: Sure. That's fine. Let's

1 see if there's anything else I should give you for --
2 no. I think that's fine.

3 Does anybody need to take a break?

4 MS. LEIKALA: Off the record.

5 (Off the record.)

6 BY MR. LINNEMAN:

7 Q. Let's see. These are in, at this point,
8 in no particular order, so hang with me.

9 Let's see. All right. Now, am I right
10 though that in the course of the -- in the course of
11 the appeal, the -- you took on the issue of review of
12 voir dire, right?

13 A. Yes.

14 Q. Okay. And I don't see that any issues,
15 any propositions of law relate to voir dire; is that
16 right?

17 A. Correct.

18 Q. Now, can you pull out your Exhibit 5 --

19 A. Sure.

20 Q. -- which is your notes from -- some notes
21 out of the file.

22 A. Yes, sir. I have it right here.

23 Q. Okay. And I can see that -- I can follow
24 along pretty easily here. You've got Volume 1 and

1 then page 2 is Volume 2, and I know from my review
2 that 1 and 2 are entirely voir dire. It looks like
3 you've got two places on that first page there, you
4 have the word "issue" blocked out or underlined.

5 Does that reflect your attempting to highlight that
6 for later consideration at that time or your belief
7 that it was an issue?

8 A. Can you show me what you're referring to?

9 Q. Yeah. Right here on this first page, I
10 see the word "issue," and then I see the word "issue"
11 all the way at the bottom. Does that mean you
12 considered those to be grounds for relief initially?

13 A. I understand your question now. I think
14 it was something that I highlighted so that I could
15 maybe reflect upon it at a later date. You know, I'm
16 always one that I like to -- sometimes I don't even
17 like to take notes when I'm reading through something
18 the first time. I think it's better just to have a
19 free reading of it. Here, I think I was just taking
20 some notes. I probably blocked it off just to go
21 back and review it, you know, that it caught my eye,
22 but I wasn't sure if it was going to be raised.

23 Q. And both of these, it looks like, are to
24 jurors who were challenged, right?

1 A. Yes.

2 Q. One of them, it looks like, is excused.

3 A. Yeah. It looks like Juror Thompson was
4 excused per State. It looks like it was something
5 about life, maybe she was someone who was caught up
6 on whether or not she could give -- could return a
7 death sentence. It looks like right above her the
8 defendant challenged somebody, and it was sustained
9 by the court. ADP is my initial for automatic death
10 penalty.

11 Q. Meaning the person is predisposed to --

12 A. Oh, yeah. I mean, yeah.

13 Q. -- a capital sentence?

14 A. Yeah. They would participate in it if
15 they could. Yes.

16 Q. Right. Okay. What about in your review
17 of the transcript, if you recall, do you recall that
18 at one point at the beginning of the trial there was
19 a sample, a DNA sample that became available
20 suddenly, or that the defense had been previously
21 unaware would be available?

22 A. No. I have no memory of that. From my
23 memory, I believe there was DNA evidence linking
24 Mr. Monroe to this case, to these homicides. I don't

1 know if I have this confused with another case. I
2 don't know if there was like a bloody -- if there was
3 maybe even a bloody fingerprint. I don't know if
4 that's this case or I'm confusing it with another
5 case. But I think there was some blood evidence in
6 this case.

7 Q. I think you're right. And, well, do you
8 recall anything about -- and this would -- really the
9 issue I'm going to here would have to do with the
10 defense being surprised by the fact that the DNA
11 evidence became available for testing.

12 A. I don't remember that.

13 Q. Okay. What about the disclosure to the
14 defense of the existence of a witness who was a
15 neighbor of the victim?

16 A. I have no recollection of that.

17 Q. Okay. Again, the issue was -- or excuse
18 me -- the way it's shown in the record -- the way it
19 came up in the record was that the defense attorneys
20 had only recently learned of the existence of a
21 witness who had given an indication that they saw two
22 people entering the apartment much earlier in the
23 night.

24 A. I have no memory of that. And, again, I

1 think it's mainly -- I'm trying to think of my --
2 yeah. I mean, I would have been reading this
3 transcript over nine years ago.

4 Q. Sure.

5 A. I think portions of my memory are good on
6 some things. Nine years, I probably read the
7 transcript sooner than that because I prepared for
8 the oral argument, but seven years ago, I wish I
9 could remember that specifically, but I can't.

10 Q. Okay. No. That's fine. Do you recall
11 anything about a prosecution witness in the
12 transcript who offered testimony that suggests why a
13 witness -- or excuse me -- suggests that his belief
14 that somebody was lying?

15 A. No.

16 Q. Okay. Any recollection of a detective's
17 explanation of why he believed that the defendant
18 actually committed the crime in this case?

19 A. No.

20 Q. Okay. Do you recall any testimony in the
21 record about a witness offering the opinion that
22 one -- that a person who was seen fleeing the scene
23 of the crime looked scared at the time that he was
24 observed?

1 A. No.

2 Q. Okay. Do you remember there being an
3 issue in this case or there being evidence in this
4 case at the trial that a subpoena to a grand jury was
5 found at the crime scene?

6 A. No.

7 Q. Okay. Do you remember the component --
8 the time in the transcript when trial counsel
9 informed the court that they were withdrawing a
10 notice of alibi?

11 A. No.

12 Q. How about the review -- excuse me -- the
13 portion of the transcript -- or the portion of the
14 case in which the court was advised that Mr. Monroe
15 had decided not to make his family members testify in
16 mitigation?

17 A. I remember that. Yes.

18 Q. Okay. Do you think there could be a
19 connection between that testimony -- or excuse me --
20 that decision -- well, tell me your recollection of
21 that component of the trial.

22 A. Oh, I just remember that I think that
23 there were some family members that had been brought
24 up from some like really rural area. I don't know if

1 it was like Virginia or West Virginia or Kentucky
2 somewhere, some godforsaken place, and they were just
3 very rural, poor, and they were brought up for
4 mitigation. And I thought -- I can remember it would
5 have been something like pretty good mitigation.
6 They could have really shed some light on how the
7 defendant was raised and maybe could have really
8 engendered some sympathy on behalf of the defendant
9 for the jury.

10 But then I remember that something
11 happened where he wanted to -- he didn't want them to
12 testify. And I just remember it caused a big
13 commotion in the courtroom, like something happened.
14 I don't know if the witnesses were in the courtroom.
15 I just remember the judge -- Judge Fais, who I know
16 very well, but he just seemed like he just went off.
17 He seemed like -- you could tell from reading the
18 transcript he was very upset with defense counsel. I
19 think it's the same issue. But it just seemed like
20 the mitigation collapsed.

21 And I found it to be very problematic
22 because after handling the Herman Dale Ashworth case,
23 I really don't think that a defendant should have the
24 right to waive mitigation. I don't think the

1 defendant should have the right to pick and choose
2 what's presented. So that was my concern. And I
3 think if he's going to do that, I think there should
4 be some kind of a psychological done on him to make
5 sure that he's waiving it, he's doing it knowingly,
6 intelligently, and voluntarily. So that was one of
7 my concerns. I felt that was handled poorly by all
8 involved.

9 Q. And, yes, I recall your discussion of
10 that. That was one of the issues that you identified
11 and argued in the oral argument, right?

12 A. Yes.

13 Q. There was a lot of time spent, if I recall
14 correctly, in your oral argument.

15 A. I don't think a defendant should be
16 allowed to sabotage his own mitigation. I don't
17 think a defendant should be allowed to pick, you
18 know, I want the death penalty. I don't think this
19 is like the old let's make a deal, I'm taking what's
20 behind Curtain No. 3. I think that the jury should
21 hear all relevant mitigation, and they should then
22 make a decision, because there has to be a narrowing.
23 Everybody who commits aggravated murder with death
24 penalty specifications does not automatically get the

1 death penalty. The jury should hear all relevant
2 mitigation, whether the defendant wants it presented
3 or not.

4 Q. Did you sense in that -- in your view, was
5 that -- did that have to do with the relationship
6 between the attorneys and the defendant at that time?

7 A. I don't know. I felt -- or at least from
8 my memory that it was more the fact that Mr. Monroe,
9 aside from the allegations in this case, appeared
10 that he did not want his family members to have to
11 beg the jury for his life. So I thought it was more
12 of a sense of honor or concern for his family on his
13 part than it was that the attorney relationship had
14 broken down. But, again, that's based upon a reading
15 that was done seven or eight years ago, but that's
16 the impression I have as I sit here now.

17 Q. Okay. I got a couple more of these to get
18 through. Let's see. Here's Exhibit 27. This is a
19 notice of additional authorities. Can you -- I
20 assume you know more than me about this. What is
21 the -- what is the procedure and the rule about
22 additional authorities? How did this come up?

23 A. This is just Steve Taylor -- this is just
24 Steve Taylor being Steve Taylor. That's all this is.

1 I mean, I don't know. Steve likes to, you know, tell
2 the Supreme Court that he's found new authority. I
3 don't know. I've known Steve for 20 years, and he
4 probably does this in almost every case. You know,
5 he reads -- he's head of the appellate section in the
6 prosecutor's office. He comes across different
7 cases, and he thinks every case is on his side. So I
8 think that's all this is. They may be on his side.
9 I'm not in any way suggesting he's misrepresenting
10 anything. I'm just saying that's just what Steve
11 does. I think he takes -- when he goes on a
12 vacation, I think he reads case law.

13 Q. Okay. And there's no argument here.
14 These are just --

15 A. I don't think you're allowed --

16 Q. -- notice of relevant authority --

17 A. Yeah.

18 Q. -- reportedly relevant.

19 A. I didn't mean to interrupt. I apologize
20 for that. But I don't think you're allowed -- once
21 all the briefs are in, I don't think you're allowed
22 to argue. I think you submit additional authority.
23 I can't cite you the rule, but that's kind of like
24 my -- I think that's what -- you just submit

1 additional authority without argument.

2 Q. Okay. And there's a time limit, right,
3 you have to within some period of time before -- it
4 has to be in time for oral argument that you can
5 submit additional authorities; is that right, do you
6 know?

7 A. I have no idea. I suspect if it deals
8 with our Ohio Supreme Court, there has to be a time
9 limit. Yes. There's a time limit for everything,
10 except for when they have to render their decision,
11 then there's no time limit.

12 Q. You did not submit any additional
13 authorities, right?

14 A. Did not. No. No.

15 Q. Okay. This I neglected to do before.
16 This is Exhibit 25. I'll just ask you am I right
17 that this is the -- we talked about this before -- I
18 think the way this went is that the prosecutor first
19 filed a motion to supplement the record, and the
20 trial court, once it was -- then the trial court, in
21 fact, granted the motion, then the trial court
22 proceeded to supplement the record in the Supreme
23 Court; does that sound right? Did I understand just
24 in terms of the sequence of the way that worked?

1 A. Yes, sir.

2 Q. Okay. The State filed -- tell me what you
3 usually do in terms of preparation for -- once you
4 filed your brief, how do you normally -- how do you
5 normally take the case from there, and tell me if you
6 did anything different from the point in time where
7 you file the appellant's brief going forward.

8 A. You file the brief, and then obviously
9 you're off doing other things. State files its
10 brief. You review it. Sometimes we file a reply.
11 Sometimes we don't. I think in this case, we did
12 not. And then you just wait for the court to
13 schedule oral argument.

14 Q. Why didn't you file a reply?

15 A. Sometimes we do. Sometimes we don't. In
16 this case, I don't know if there was any particular
17 reason as to why we did not. I felt that any reply
18 to State's argument could be made at oral argument.
19 I mean, sometimes we do and sometimes we don't.

20 Q. Is there some specific set of criteria
21 that you're looking at when you make that decision?

22 A. Well, I think if maybe the State would --
23 maybe we felt that they -- I don't want to say
24 misrepresent, that sounds like too intentional, that

1 sounds bad. Maybe if the State -- maybe if we felt
2 that they misinterpreted some case law, or if we felt
3 that the State omitted some facts or something like
4 that, you know, something that obvious, something
5 that we needed to address in a reply brief. And I
6 think that -- I mean, I don't recall reading the
7 State's brief in this case. I'm sure we did.

8 Q. So if there's not something that jumps out
9 at you that needs to be addressed in writing, you
10 ordinarily reserve it for oral argument?

11 A. Yeah. Right. All you're basically going
12 to be doing in a reply brief is reiterating the
13 arguments you already made. And I'll be honest with
14 you, I just didn't think that there were many good
15 issues in this case. You know, I just didn't think
16 there were a lot of -- I mean, it was a tough one,
17 you know. I thought there were a couple good issues
18 in the case, but it was tough because I thought for
19 the most part, the trial judge was really fair, and I
20 thought the defense counsel, all in all, did a fairly
21 good job.

22 And if I can remember correctly, although
23 I don't remember all the pieces of evidence, I think
24 that there was at least some pretty strong evidence

1 of his involvement in this. I think -- I don't know
2 if there was like a jail -- I think there was a
3 jailhouse informant, and Shannon Boyd testified, I
4 just felt that -- I was not overly optimistic about a
5 reversal in this case.

6 Q. Okay. So then that gets you to -- so you
7 get to oral argument. Any particular criteria or
8 magic as to the decision of who handles oral argument
9 or whether you split it or anything like that? In
10 this case, I believe you, to my review --

11 A. I did.

12 Q. -- review of the video, at least, you
13 handled the oral argument.

14 A. Yeah, because Mr. Barstow had never done
15 an oral argument. He did the Michael Turner oral
16 argument.

17 Q. Did that come before or after this one?

18 A. I don't remember.

19 Q. Okay.

20 A. I think -- I don't remember that. I mean,
21 but for some reason, I just told him I would do this
22 argument because he was going to do the Michael
23 Turner. So I did it. And I think the preparation is
24 you just pick, you know, you have, I believe, 30

1 minutes, but that 30 minutes goes really fast. You
2 don't think it's going to, but it really does. And
3 you just pick three or four issues, but you have to
4 be prepared for everything, and you just go up and
5 give it your best shot.

6 Q. Okay. After you got the decision, we saw
7 that you sent a copy to Mr. Monroe. What do you
8 do -- same question -- what is your -- what is the
9 ordinary set of options that's available to a
10 defendant after an adverse decision, and then what
11 did you do to either pursue those options or what did
12 you do differently than what you normally would have,
13 if anything?

14 A. First of all, I didn't do anything after
15 we sent him the decision. My understanding is his
16 avenues would be that he could appeal the Supreme
17 Court, the Ohio Supreme Court's decision to the U.S.
18 Supreme Court. Frankly, I don't know how often
19 that's done in capital cases. I think sometimes it's
20 done, sometimes it's not. I think often times it's
21 not.

22 And then my understanding is within a year
23 of the Supreme Court of Ohio's decision, I think he
24 has to file a habeas petition. But we don't -- I

1 don't do anything because I know that the State
2 Public Defender's office then takes over the case,
3 and then they petition the court to either appoint
4 counsel for federal habeas or they co-counsel the
5 case, because I know they have their death penalty
6 unit monitors all that, or at least it did then. Now
7 I don't know what's going on because the Federal
8 Public Defender has their own unit. I don't know.
9 But at the time, I didn't do anything. I sent the
10 client a letter, here's your decision, people will be
11 contacting you, and best of luck.

12 Q. Okay. Well, what about like a -- I mean,
13 do the Supreme Court's rules allow for something like
14 a request for reconsideration or request for
15 rehearing?

16 A. I'm sure they do. I'm sure they do. But
17 they affirm, as you know, 97 to 98 percent of death
18 penalty cases. So yeah. I mean, it's not going to
19 work. I mean, if you're going to get relief, you're
20 probably going to have to get relief somewhere else.

21 Q. Then did you -- so you mentioned the
22 prospect of petitioning for a writ of certiorari to
23 the U.S. Supreme Court. Did you actively consider
24 that in this case?

1 A. No. I'm done. Once the -- I mean, I'm
2 not appointed to do anything else. I'm appointed to
3 represent him in the Ohio Supreme Court. Once that
4 decision is rendered, I'm done.

5 Q. Okay.

6 A. Because I know that the State Public
7 Defender's office, they're going to pick the case up,
8 so they do that.

9 Q. We saw the very simple order that
10 appointed you. Is there any other document? You
11 don't have a contract or anything like that?

12 A. Contract with whom? With whom?

13 Q. Well, who pays you?

14 A. Who was that submitted to? I'm not
15 trying --

16 Q. Right. I'm just wondering.

17 A. No. There's no contract.

18 Q. Okay.

19 A. No.

20 Q. Okay. So that's it.

21 A. But you do do it because you're doing the
22 federal habeas appointed, correct?

23 Q. Sure.

24 A. So it's the same thing, just like you're

1 appointed, we're appointed by the trial judge, but
2 the bill goes to the Ohio Supreme Court.

3 Q. Right.

4 A. But like once that's over with, we don't
5 bill for anything else. So I don't mean to sound
6 cold and callous, but if I can't bill for this U.S.
7 Supreme Court, why would I -- I'm not going to do it.

8 Q. Sure.

9 A. Because I know the State Public Defenders,
10 and they know it much better than I do because that's
11 what they do. They have a whole unit that does
12 nothing but death penalty appeals, and I mean, that's
13 their thing.

14 Q. Right. I just wondered if there was some
15 other thing out there that would -- that tells us
16 anything more about your representation. I haven't
17 seen it yet.

18 A. No. There's nothing else. There's the
19 appointment from Judge Fais, and there's my bill.
20 There's no contract with the defendant.

21 MR. LINNEMAN: Right. No. Sure.

22 Do you have anything else? Oh, yes.

23 BY MR. LINNEMAN:

24 Q. I have -- I think this is a series of

1 quick questions. You're aware that in this case, the
2 last thing on the Supreme Court's docket was a motion
3 for -- a motion that was filed by David Stebbins, and
4 it was after your -- it was after the completion of
5 the oral argument, after the decision, and he raised
6 several arguments. Did you ever read Mr. Stebbins'
7 argument? It was basically a motion for
8 reconsideration.

9 A. Probably not.

10 Q. I have that somewhere. Let's see.

11 MS. LEIKALA: Petitioner's Exhibit 2.

12 MR. LINNEMAN: Petitioner's Exhibit 2.

13 MS. LEIKALA: Do you want me to find it?

14 BY MR. LINNEMAN:

15 Q. I think I've got it. It's an application
16 for reopening is what it's called, on January 17,
17 2006. Do you recall whether you reviewed that motion
18 or not?

19 A. Can't even recall receiving it. Probably
20 if I did receive it, wouldn't have looked at it. No.

21 Q. Okay. I'm just going to ask you -- he
22 raised a number of grounds in that motion -- so my
23 question to you each time -- this was -- I think this
24 is what you would call a Murnahan brief -- I'm just

1 going to ask you if there was a tactical reason why
2 you chose not to raise one of these things, each one
3 of these items that he raised in his subsequent
4 motion.

5 A. Could I correct you on something?

6 Q. Sure.

7 A. You said this is -- I thought Murnahan was
8 under Appellate Rule 26B.

9 MS. LEIKALA: It's application to reopen.

10 A. To reopen in the Ohio Supreme Court. I
11 didn't know that that would be fought under 26B, but
12 if that's what he raised. Who is he working for at
13 the time? I mean, do you mind me -- was it with the
14 State Public Defender? Because the Federal Public
15 Defender, they weren't in existence at the time.

16 MR. KOMP: Let's go off real quick.

17 (Off the record.)

18 BY MR. LINNEMAN:

19 Q. Then my question to you will be for each
20 one of these, I've got about 10 of these I'll just
21 ask you.

22 A. Sure.

23 Q. Is there a strategic reason why you
24 avoided raising any of these grounds.

1 A. Okay.

2 Q. First, that Mr. Monroe was deprived of the
3 effective assistance of counsel in the pretrial
4 investigation and motion practice in his trial.

5 A. I don't even know if you could raise -- I
6 mean, I think you could raise on appeal why a certain
7 motion was not filed possibly, but I think those are
8 outside the record.

9 Q. Okay. So you think that's a
10 post-conviction relief question?

11 A. I would think so. Yes.

12 Q. Okay. Was there a strategic or tactical
13 reason why you avoided raising the issue of a failure
14 or ineffective assistance of counsel in the
15 investigation and preparation or lack thereof for the
16 penalty and mitigation phases?

17 A. Again, outside the record because you're
18 saying defense counsel should have investigated
19 something better. Okay. If I raise that on direct
20 appeal, they're going to look at me and say,
21 investigate what? So you need something that they
22 didn't investigate. So to me, that's like the
23 mother's milk on either a State post conviction or
24 what you guys are doing, federal habeas.

1 Q. Okay. Was there a strategic or tactical
2 reason why you avoided raising any international law
3 claims?

4 A. Because I have never read a single case in
5 my adult life that reversed a death sentence from the
6 State of Ohio or any other state in the United States
7 for that reason. I think it's almost laughable.
8 It's an embarrassment to attorneys to even raise
9 that.

10 Q. So you considered it doomed to fail on the
11 merits?

12 A. No. I considered it laughable.

13 Q. On the merits?

14 A. It's ridiculous. Yes.

15 Q. Okay. Is there a strategic or tactical
16 reason why you avoid raising any Brady, or that is, a
17 failure to disclose disculpatory information grounds?

18 A. Again, what did they fail to disclose?
19 I'm not asking you a rhetorical question. That,
20 again, that sounds to me like Mr. Stebbins was doing
21 the post conviction or he had the post-conviction
22 petition, but you need to know what evidence they
23 failed to raise to raise that, so it seems to me,
24 again, that's something in State post conviction,

1 that's something that you guys would do, or maybe
2 that's motion for a new trial. But I was unaware of
3 any evidence that came out during the trial of
4 Mr. Monroe's case that defense was not made aware of
5 and did not adequately allow them to prepare his
6 defense.

7 Q. So to your read, there were none of those
8 issues on the record?

9 A. No. There were no -- no reason. No.

10 Q. Was there a strategic or tactical reason
11 why you avoided raising the adequacy of a
12 proportionality review by the Ohio Supreme Court in
13 the course of the -- in the course of its review?

14 A. I'm not even sure if I know what that was.
15 Proportionality review, I'm not really sure I
16 understand that.

17 Q. Is there a strategic or tactical reason
18 why you avoided raising a challenge to the trial
19 court's sentencing entry?

20 A. No. There's no -- I didn't -- I read the
21 trial court's sentencing entry. I don't think I saw
22 any reason to question the trial court's sentencing
23 entry.

24 Q. Is there any strategic or tactical reason

1 why you avoided a challenge of the weighing of the
2 aggravating circumstances against the mitigating
3 factors --

4 A. Could you say that again?

5 Q. -- in the sentencing phase?

6 A. Well, of course, that's in the sentencing
7 phase, of course. That's not during the trial phase.
8 That's obvious. Just to challenge the weighing --
9 well, I think we kind of did sort of in a way when we
10 argued about the duplicative aggravating
11 circumstances. I'm not really sure what he means by
12 that specifically. But yeah.

13 Q. Okay. Was there any tactical or strategic
14 reason why you avoided raising a challenge to
15 improper arguments that may have been made by the
16 prosecutor during the course of the trial, that is,
17 appeals to the prejudices and passions of the jury?

18 A. I don't think that existed.

19 Q. You didn't see that within the four
20 corners of the record?

21 A. No.

22 Q. Okay.

23 A. I mean, there may have been -- I mean,
24 there may have been some arguments about -- there may

1 have been something, but was it enough to allege
2 prosecutorial misconduct? I mean, I've done that in
3 the past, but I don't remember seeing it in this
4 case.

5 MR. LINNEMAN: Okay. That's all I have.
6 Thank you for your time. Although --

7 THE WITNESS: You're welcome.

8 MR. LINNEMAN: -- it sounds like you're
9 not done yet.

10 THE WITNESS: Not done yet. That's okay.

11 MS. LEIKALA: No. I only have a few.

12 MR. LINNEMAN: Do you want to switch
13 places or anything?

14 MS. LEIKALA: No.

15 MR. LINNEMAN: You can see and everything
16 all right.

17 MS. LEIKALA: I'm fine.

18 EXAMINATION

19 BY MS. LEIKALA:

20 Q. Going back to Exhibit 28 is one of the
21 first exhibits that we had. It's probably at the
22 bottom of your pile.

23 A. Yeah. Do you know what it is?

24 Q. It's the one-page handwritten note from

1 Mr. Monroe.

2 A. Okay. Hold on a second. Let me see if I
3 can find that. The problem is I didn't put these in
4 order.

5 Q. It's probably right at the bottom.

6 A. It's not. Can you just show it to me.
7 Okay. Yes.

8 Q. That does not have a date on it; is that
9 correct?

10 A. That is correct.

11 Q. And it doesn't say who that is addressed
12 to, whether it was you or Mr. Barstow, correct?

13 A. That is correct. Yes.

14 Q. You don't know if that was after the May 1
15 meeting or some other time that you had gone to the
16 prison?

17 A. Correct.

18 Q. Okay. Do you recall if you created an
19 issue list with Mr. Barstow when you were going
20 through to write the brief and come up with the list
21 of issues and determine which ones you were going to
22 raise and which ones you weren't?

23 A. I'm sure that we did. I'm sure we
24 discussed issues over the telephone. I'm not sure if

1 we ever really sat down and wrote down an issues
2 list, per se. I think we more discussed issues over
3 the telephone and then split up the tasks.

4 Q. Looking at Exhibit No. 9, that is also
5 another letter from Mr. Monroe, one-page letter.
6 Taking a look at that, you agree that also is
7 undated?

8 A. Yes.

9 Q. And have no idea -- it is addressed to
10 you?

11 A. Yes, it is.

12 Q. But there's no indication of when that was
13 sent to you, and that's the letter that talks about
14 going and talking to his mom?

15 A. Yes.

16 Q. Okay. And I'm correct that that's also
17 undated?

18 A. Correct.

19 Q. I think you answered this question
20 already, but you don't file a writ of cert; your
21 appointment is not for that; is that correct?

22 A. That is correct. Yes.

23 Q. And at that time, do you then transfer
24 your file to State Public Defender or communicate

1 with them in some way that you're done with your
2 representation?

3 A. I don't think there's really, to my
4 knowledge, there's really any communication. I mean,
5 I know that they're keeping -- you know, my
6 understanding is that they have people that follow
7 all these cases. I mean, every time a case comes
8 out, the Supreme Court decides it, they know it.
9 And, obviously, you have the attorneys that are doing
10 the post-conviction petition who are normally from
11 the State PD's office, and it's just always been -- I
12 think this was maybe the 7th or 8th capital case that
13 I had done on appeal, and it's just the way, that
14 it's a natural transition, they take the case over.

15 Q. Okay. Now, you had -- one of the claims
16 in the appeal was the waiver of mitigation, and you
17 said you wrote that; is that correct?

18 A. Yes.

19 Q. Okay. And that was kind of an Ashworth
20 claim; is that correct? That's the Ohio Supreme
21 Court case about waiver of mitigation?

22 A. Correct.

23 Q. Okay. And you said you represented
24 Ashworth at the trial?

1 A. At the trial phase. Yes, I did.

2 Q. Mr. Monroe's case was different than
3 Ashworth; is that correct? In Ashworth, he didn't
4 allow any mitigation; is that accurate?

5 A. He did not allow any mitigation. Correct.

6 Q. Okay. And in Monroe's case, there was
7 some mitigation. There was one witness and his
8 unsworn statement.

9 A. Obviously, I think you are correct on
10 that. Yes.

11 Q. So this is not analogous or not exactly
12 the same as Ashworth factually.

13 A. I would agree with that.

14 Q. And just this is something that we've kind
15 of touched on a few times. It's your understanding
16 that direct appeal is only for issues that are within
17 the four corners of the transcript or of the trial
18 court record, correct?

19 A. Correct.

20 Q. Anything that would need to be
21 supplemented is more properly and another avenue
22 would be at a post conviction or motion for new
23 trial; is that accurate?

24 A. I think the supplemental material like

1 witnesses that could have testified, things like
2 that, is normally going to be part of post
3 conviction.

4 Q. And, in fact, it cannot be decided in
5 direct appeal; is that correct?

6 A. That's my understanding. Yes.

7 MS. LEIKALA: I don't have anything else.

8 MR. LINNEMAN: All right. Thank you very
9 much for your time.

10 THE WITNESS: You're welcome. I know that
11 I have a right to review the transcript. However, I
12 believe you probably are one of the greatest court
13 reporters ever. You've gotten down all my answers
14 correctly. If you could strike all the um's and ah's
15 and make me appear somewhat intelligent, although I
16 know that will be difficult, I will waive my
17 signature.

18 (Signature waived.)

19 - - -

20 And, thereupon, the deposition was
21 concluded at approximately 4:32 p.m.

22 - - -

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CERTIFICATE

State of Ohio :
County of Knox :
SS:

I, Ann Ford, Notary Public in and for the State of Ohio, duly commissioned and qualified, certify that the within named W. JOSEPH EDWARDS was by me duly sworn to testify to the whole truth in the cause aforesaid; that the testimony was taken down by me in stenotypy in the presence of said witness, afterwards transcribed upon a computer; that the foregoing is a true and correct transcript of the testimony given by said witness taken at the time and place in the foregoing caption specified.

I certify that I am not a relative, employee, or attorney of any of the parties hereto, or of any attorney or counsel employed by the parties, or financially interested in the action.

IN WITNESS WHEREOF, I have set my hand and affixed my seal of office at Columbus, Ohio, on this 26th day of July, 2013.

ANN FORD, Notary Public
in and for the State of Ohio
and Registered Professional
Reporter

My Commission expires: April 18, 2016.



Dear W. Joseph Edwards

I received your letter on January 6-83 and I can't begin to express to you how grateful I am for your and all assistance pertaining to my legal issues, "Thank you".

I understand the importance of my direct appeal and am requesting a copy of my transcripts so I can review and admit any and all mistakes to you as I am sure it is just as important to you as it is to me. That there are no mistakes also it may help jog my memory pertaining to relevant issues for my Direct appeal, upon receiving the transcripts if there are no errors, I will submit to you all issues I believe are relevant to Direct appeal, A.S.A.P

I would also ask that I be allowed a copy of all Briefs, appeals, ect before you submit them to the courts.

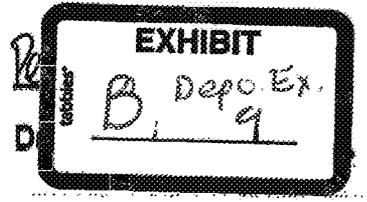
Please understand I am in no way questioning your judgement or your expertise, I am however hoping that by reading them before hand it will give me a chance to speak with you about anything I feel may be important pertaining to that brief ect

I hope your holidays were filled with joy

if it is not possible please inform me A.S.A.P.

I look forward to meeting you.

Sincerely
John Monroe



Mr. Edwards

I hope things are going well. As for me things are ok. I'm writing this short letter, very short letter to inform you that my Mom is expecting a call from you and to let you know she has moved and her number has been changed. Her number is 614-718-0280.

I hoped that you could call her when you have a little free time because she has the letters that my co-defendant wrote me.

Thanks for your time and the effort you will put into helping me

Jonathan
Monroe

LAW OFFICES
W. JOSEPH EDWARDS
BREWERY DISTRICT
485 S. HIGH STREET
COLUMBUS, OHIO 43215-5058

(614) 224-8168
FAX: (614) 224-8340

OF COUNSEL
TWYFORD & DONAHEY

March 7, 2003

Todd W. Barstow, Esq.
4185 East Main Street
Columbus, OH 43213

Re: State of Ohio v. Jonathon D. Monroe

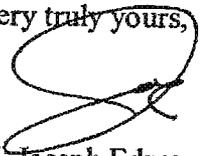
Dear Todd:

Enclosed you will find the official notice from the Ohio Supreme Court that the record was filed on Jonathon Monroe on March 3, 2003. I calculate from the court rules that we have 90 days or until June 3, 2003 to file the brief for this case. Please take a look at the Ohio Supreme Court rules of practice to see if I am correct on that date. We are allowed under the rules one stipulated, 20-day extension to file the brief in this case.

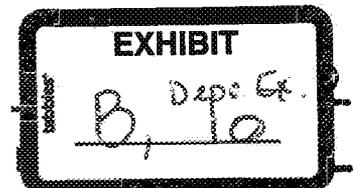
I am in the process of obtaining the transcripts from the court reporter, Greg Goefert. I will make copies of relevant portions of the transcript. I do not think that we need a complete second copy of the voir dire, but we should have copies of the trial mitigation hearing and any pretrial motions. I will handle any of the issues that occurred during the voir dire and we can pick and choose various issues as we read the briefs.

Let me know your thoughts and whether the date I calculated is correct.

Very truly yours,


W. Joseph Edwards

WJE/ch
Enclosure



BRIAN J. RIGG - October 30, 2013

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Jonathan D. Monroe, :
Petitioner, :
vs. : Case No.
Warden, Ohio State : 2:07CV258-MHW-MRM
Penitentiary, :
Respondent. :

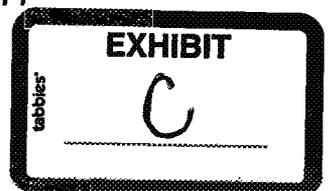
DEPOSITION OF BRIAN J. RIGG

Wednesday, October 30, 2013
8:55 o'clock a.m.
Ohio Attorney General's Office
150 East Gay Street
16th Floor
Columbus, Ohio 43215

ANN FORD
REGISTERED PROFESSIONAL REPORTER

ANDERSON REPORTING SERVICES, INC.
3242 West Henderson Road
Columbus, Ohio 43220
(614) 326-0177
FAX (614) 326-0214

Anderson Reporting Services, Inc. (614) 326-0177



BRIAN J. RIGG - October 30, 2013

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1 at the motion day. You had a day on a Friday when
2 you ran through a bunch of motions and got jury
3 questionnaires, and then the transcript ends with the
4 sentencing, not included is any pretrial proceedings.
5 Are you aware of whether pretrial proceedings were
6 held in the presence of a court reporter?

7 A. No, I don't. A lot of times -- you can
8 probably look it up on the Court View is we had a lot
9 of court dates and a lot of times we would just
10 continue the case. And I remember now because
11 Jonathan was incarcerated in a State institution, it
12 got to the point where towards -- from Dr. Eshbaugh's
13 records -- it got to the point where we had Jonathan
14 stay in Franklin County, and we told the bailiff,
15 don't have the sheriff or have the judge ship him
16 back to the institution. We need him here. And I
17 remember Jonathan didn't like that because of the
18 conditions at the Franklin County Jail. But I don't
19 recall any hearings other than the ones that you are
20 referring to on that Friday.

21 Q. Well, in the course of the case, you know,
22 from the indictment on, there are a number of
23 filings, for example, you mentioned that you got an
24 order from the judge giving Dr. Eshbaugh access. I

BRIAN J. RIGG - October 30, 2013

105

1 think there's also one on the record giving
2 Mr. Crates access to the defendant. So, in other
3 words, we know from the fact that the judge is
4 signing orders that there are some things happening.
5 And can I presume that for each of those events, you
6 actually showed up in court, addressed the court
7 about pretrial matters, if nothing else, just
8 scheduling and stuff like that; is that correct?

9 A. That's correct. Pretrial matters,
10 scheduling. I think probably every six, seven weeks
11 maybe we would continue the case out maybe longer.
12 It's a little more difficult when you have a client
13 that's incarcerated in the institution, you have to
14 do a Governor's warrant or a writ -- not a writ --
15 that's federal -- bring them back to court, and
16 there's a little more paperwork involved. So I don't
17 know how many court hearings we had before the one
18 you just referred to on that Friday.

19 Q. Okay. Is it the custom in Franklin County
20 that those proceedings are transcribed, that a record
21 is kept?

22 A. No. It's not always.

23 Q. Okay.

24 A. Usually, what is transcribed or what is

MOTION ENTRY AND CERTIFICATION FOR APPOINTED COUNSEL FEES AND EXPENSES
 Case: 2:07-cv-00258-MRM Doc #: 65-4 Filed: 12/08/11 Page: 152 of 256 PAGEID #: 1424

In the Common Pleas Court of Frank County, Ohio
 Plaintiff: State of Ohio Current Case No. 01CR 2118
 V. Reference Case No. (if app.) _____
 Defendant / Party Represented Jonathon D. Monroe
 Capital Offense Case (check if this is a Capital Offense case)
 Guardian Ad Litem (check if appointed as GAL)
 In re. 9/13/02 B Judge Fals

MOTION FOR APPROVAL OF PAYMENT OF APPOINTED COUNSEL FEES AND EXPENSES

The undersigned having been appointed counsel for the party represented moves this Court for an order approving payment of fees and expenses as indicated in the itemized statement herein. I certify that I have received no compensation in connection with providing representation in this case other than that described in this motion or which has been approved by the Court in a previous motion, nor have any fees and expenses in this motion been duplicated on any other motion. I, or an attorney under my supervision, have performed all legal services itemized in this motion.

Periodic Billing (check if this is a periodic bill)

As attorney/guardian ad litem of record, I was appointed on June 15, 2001. This case terminated and/or was disposed of on August 22, 2002. I am submitting this application on September 10, 2002. 24511001 2012 V-101867

Name: Brian J. Rigg Signature: _____
 Address: 755 South High Street, Columbus, OH, 43206 SSN/Tax ID: _____
 Address City/State/Zip OSC Reg. No. 0038805

SUMMARY OF CHARGES, HOURS, EXPENSES, AND BILLING

OFFENSE/CHARGE/MATTER	ORG/CITY CODE	DEGREE	DISPOSITION
1.) Agg. Murder With Death Specs	2903.01WS	F	Trial-Guilty
2.) Aggravated Burglary	2911.11	F1	Trial-Guilty
3.) Aggravated Robbery	2911.01	F1	Trial-Guilty

*List only the three most serious charges beginning with the one of the greatest severity and continuing in descending order.

Grand Total Hours From Other Side:	IN-COURT			GRAND TOTAL
	OUT-OF-COURT	PRE-TRIAL HEARINGS	ALL OTHER IN-COURT	
	367.90	4.70	95.90	468.50

Flat Fee Hrs.In 100.60 X Rate \$45.00 = \$4,527.00 Total Fees \$15,564.00
 Min. Fee Hrs.Out 367.90 X Rate \$30.00 = \$11,037.00 Expenses \$13,299.32 Total \$28,863.32 25,799.32

JUDGMENT ENTRY

The Court finds that counsel performed the legal services set forth on the itemized statement on the reverse hereof, and that the fees and expenses set forth on this statement are reasonable, and are in accordance with the resolution of the Board of County Commissioners of Franklin County, Ohio relating to payment of appointed counsel, that all rules and standards of the Ohio Public Defender Commission and State Public Defender have been met.

IT IS THEREFORE ORDERED that counsel fees and expenses be and are hereby approved, in the amount of \$25,799.32. It is further ordered that the said amount be, and hereby is, certified by the Court to the County Auditor for payment.

Extraordinary fees granted (copy of journal entry attached)

Judge [Signature] Date 9-23-02

CERTIFICATION

The County Auditor, in executing this certification, attests to the accuracy of the figures contained herein. A subsequent audit by the Ohio Public Defender Commission and/or Auditor of the State which reveals unallowable or excessive costs may result in future adjustments against reimbursement or repayment of audit exceptions to the Ohio Public Defender Commission.

County Number 25 Warrant Number _____ Warrant Date ix

EXHIBIT
 C, Depo. Ex. 1

302
303
[Signature]

IF CAPITAL OFFENSE CASE, LIST CO-COUNSEL'S NAME HERE: Ronald Janes

ITEMIZED FEE STATEMENT

I hereby certify that the following time was expended in representation of the defendant/party represented:

DATE OF SERVICE	OUT-OF-COURT TOTAL	IN-COURT			DAILY TOTAL
		PRE-TRIAL HEARINGS	ALL OTHER IN-COURT	IN-COURT TOTAL	
6/18/01	1.0	0.0	0.0	0.0	1.0
6/25/01	0.0	1.4	0.0	1.4	1.4
6/26/01	2.3	0.0	0.0	0.0	2.3
6/28/01	3.5	0.0	0.0	0.0	3.5
7/18/01	4.5	0.0	0.0	0.0	4.5
7/19/01	3.5	0.0	0.0	0.0	3.5
7/22/01	5.0	0.0	0.0	0.0	5.0
8/2/01	2.4	0.0	0.0	0.0	2.4
8/8/01	6.5	0.0	0.0	0.0	6.5
8/30/01	1.0	0.0	0.0	0.0	1.0
9/4/01	3.5	0.0	0.0	0.0	3.5
9/9/01	2.0	0.0	0.0	0.0	2.0
9/10/01	3.5	0.0	0.0	0.0	3.5
9/12/01	2.3	0.0	0.0	0.0	2.3
9/28/01	3.2	0.0	0.0	0.0	3.2
10/1/01	1.0	0.0	0.0	0.0	1.0
10/3/01	2.3	0.0	0.0	0.0	2.3
10/4/01	3.0	0.0	0.0	0.0	3.0
10/6/01	2.3	2.0	0.0	2.0	4.3
10/12/01	3.0	0.0	0.0	0.0	3.0
10/14/01	3.0	0.0	0.0	0.0	3.0

Continue at top of next column.

DATE OF SERVICE (continued)	OUT-OF-COURT TOTAL	IN-COURT			DAILY TOTAL
		PRE-TRIAL HEARINGS	ALL OTHER IN-COURT	IN-COURT TOTAL	
10/15/01	4.8	0.0	0.0	0.0	4.8
10/16/01	2.3	0.0	0.0	0.0	2.3
10/22/01	5.2	0.0	0.0	0.0	5.2
10/23/01	4.0	0.0	0.0	0.0	4.0
11/6/01	1.2	0.0	0.0	0.0	1.2
11/7/01	0.3	0.0	0.0	0.0	0.3
11/9/01	2.3	0.0	0.0	0.0	2.3
12/5/01	0.0	1.3	0.0	1.3	1.3
12/6/01	0.8	0.0	0.0	0.0	0.8
12/7/01	6.0	0.0	0.0	0.0	6.0
12/31/01	2.3	0.0	0.0	0.0	2.3
1/30/02	0.3	0.0	0.0	0.0	0.3
2/1/02	0.3	0.0	0.0	0.0	0.3
3/4/02	2.3	0.0	0.0	0.0	2.3
3/5/02	2.4	0.0	0.0	0.0	2.4
3/15/02	2.0	0.0	0.0	0.0	2.0
3/20/02	2.3	0.0	0.0	0.0	2.3
3/23/02	2.4	0.0	0.0	0.0	2.4
3/25/02	2.0	0.0	0.0	0.0	2.0
4/2/02	1.3	0.0	0.0	0.0	1.3

Continued on a separate sheet

Time is to be reported in tenth of an hour (6 minute) increments.

I hereby certify that the following expenses were incurred:

Use the following categories for Type: (1) Experts (2) Postage/Phone (3) Records/Reports (4) Transcripts (5) Travel (6) Other

TYPE	PAYEE	AMOUNT
6	Witness lodging	\$596.16
1	Dr. Dennis Eshbaugh	\$3,600.00
3	James Crates	\$6,503.16
3	Gary Phillips	\$2,600.00
	TOTAL	\$13,299.32

Clearly identify each expense and include a receipt for any expense over \$1.00. See Section (P)(1)(c) for privileged information.

ITEMIZED FEE STATEMENT CONTINUATION SHEET

DATE OF SERVICE	OUT-OF-COURT TOTAL	IN-COURT			DAILY TOTAL
		PRE-TRIAL HEARINGS	ALL OTHER IN-COURT	IN-COURT TOTAL	
4/10/02	1.0	0.0	0.0	0.0	1.0
4/11/02	0.3	0.0	0.0	0.0	0.3
4/12/02	0.0	0.0	0.4	0.4	0.4
4/13/02	1.0	0.0	0.0	0.0	1.0
4/18/02	1.2	0.0	0.0	0.0	1.2
4/23/02	3.0	0.0	0.0	0.0	3.0
5/2/02	0.3	0.0	0.0	0.0	0.3
5/6/02	2.0	0.0	0.0	0.0	2.0
5/10/02	2.0	0.0	0.0	0.0	2.0
5/15/02	3.5	0.0	0.0	0.0	3.5
5/16/02	4.0	0.0	0.0	0.0	4.0
5/30/02	3.2	0.0	0.0	0.0	3.2
5/31/02	0.3	0.0	0.0	0.0	0.3
6/3/02	2.3	0.0	0.0	0.0	2.3
6/5/02	5.0	0.0	0.0	0.0	5.0
6/6/02	0.6	0.0	0.0	0.0	0.6
6/13/02	2.3	0.0	0.0	0.0	2.3
6/17/02	2.0	0.0	0.0	0.0	2.0
6/21/02	3.3	0.0	0.0	0.0	3.3
6/23/02	0.3	0.0	0.0	0.0	0.3
6/24/02	4.0	0.0	0.0	0.0	4.0
6/25/02	3.0	0.0	0.0	0.0	3.0
6/26/02	2.5	0.0	0.0	0.0	2.5
6/27/02	2.5	0.0	0.0	0.0	2.5
6/30/02	3.5	0.0	0.0	0.0	3.5
7/1/02	3.0	0.0	0.0	0.0	3.0
7/8/02	6.0	0.0	0.0	0.0	6.0
7/10/02	2.0	0.0	0.0	0.0	2.0
7/14/02	3.0	0.0	0.0	0.0	3.0
7/15/02	3.0	0.0	0.0	0.0	3.0
7/16/02	3.0	0.0	0.0	0.0	3.0
7/17/02	2.3	0.0	0.0	0.0	2.3

OPD-1027R (1/00)

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DATE OF SERVICE (continued)	OUT-OF-COURT TOTAL	IN-COURT			DAILY TOTAL
		PRE-TRIAL HEARINGS	ALL OTHER IN-COURT	IN-COURT TOTAL	
7/18/02	4.0	0.0	0.0	0.0	4.0
7/19/02	3.5	0.0	0.0	0.0	3.5
7/20/02	4.5	0.0	0.0	0.0	4.5
7/21/02	15.0	0.0	0.0	0.0	15.0
7/22/02	8.3	0.0	0.0	0.0	8.3
7/23/02	5.0	0.0	0.0	0.0	5.0
7/24/02	4.0	0.0	0.0	0.0	4.0
7/25/02	8.0	0.0	0.0	0.0	8.0
7/26/02	3.0	0.0	6.0	6.0	9.0
7/27/02	4.0	0.0	0.0	0.0	4.0
7/28/02	4.2	0.0	0.0	0.0	4.2
7/29/02	3.0	0.0	6.5	6.5	9.5
7/30/02	4.3	0.0	6.0	6.0	10.3
7/31/02	4.5	0.0	6.0	6.0	10.5
8/1/02	12.0	0.0	0.0	0.0	12.0
8/2/02	3.0	0.0	5.5	5.5	8.5
8/3/02	4.0	0.0	0.0	0.0	4.0
8/4/02	4.0	0.0	0.0	0.0	4.0
8/5/02	3.0	0.0	7.0	7.0	10.0
8/6/02	3.0	0.0	4.0	4.0	7.0
8/7/02	5.0	0.0	5.5	5.5	10.5
8/8/02	5.0	0.0	5.0	5.0	10.0
8/10/02	3.0	0.0	0.0	0.0	3.0
8/11/02	4.3	0.0	0.0	0.0	4.3
8/12/02	8.3	0.0	0.0	0.0	8.3
8/13/02	5.0	0.0	6.5	6.5	11.5
8/14/02	2.0	0.0	10.0	10.0	12.0
8/15/02	0.5	0.0	10.0	10.0	10.5
8/16/02	10.0	0.0	0.0	0.0	10.0
8/17/02	8.0	0.0	0.0	0.0	8.0
8/18/02	6.5	0.0	0.0	0.0	6.5

Continued on a separate sheet

Time is to be reported in tenth of an hour (6 minute) increments.

FIN. STATE DISCLOSURE/AFFIDAVIT OF L. GETTY

I. PERSONAL INFORMATION					
Name	Jonathan D. M... ..		Case No.	2118	
Mailing Address	Kass Commercial / F.C.C.S.		City	State	ZIP
Residence (if different from above)					Message Phone (within 48 hours)

II. OTHER PERSONS LIVING IN HOUSEHOLD					
Name	Age	Relationship	Name	Age	Relationship
1)			3)		
2)			4)		

III. MONTHLY INCOME/EMPLOYMENT INFORMATION				
Type of Income	Self	Spouse	Household Members	Total
Employment (Gross)	N/A			
Unemployment	UNEMPLOYED			
Worker's Comp.				
Pension				
Social Security				
Child Support				
Work First/TANF				
Disability				
Food Stamps				
Other				
Employer's Name (for all household members)				
			SUBTOTAL A	\$
Address				Phone

IV. ALLOWABLE EXPENSES	
Type of Expense	Amount
Child Support Paid Out	
Child Care (if working only)	
Transportation for Work	
Insurance	
Medical/Dental	
Medical & Associated Costs Of Caring for Infirm Family Members	
SUBTOTAL B	\$

V. TOTAL INCOME	
Total Monthly Income - Total Allowable Expenses = Total Income:	
SUBTOTAL A	\$
SUBTOTAL B	\$
GRAND TOTAL C	\$

VI. ASSET INFORMATION		
Type of Asset	Describe / Length of Ownership / Make Model, Year (where applicable)	Estimated Value
Real Estate / Home	Price \$ Date Purchased: Equity:	
Stocks / Bonds / CD's		
Automobiles		
Trucks / Boats / Motorcycles		
Other Valuable Property		
Cash on Hand		
Money Owed to Applicant		
Other		
Checking Acct (Bank / Acct. #)		
Savings Acct (Bank / Acct. #)		
Credit Union (Name / Acct. #)		

GRAND TOTAL D \$

EXHIBIT D

In the Supreme Court of Ohio

STATE OF OHIO,)	Supreme Ct. Case No. 02-2241
)	
Respondent-Appellee,)	
)	
-vs-)	Trial Ct. No. 01-CR-04-2118
)	
JONATHON D. MONROE,)	
)	
Petitioner-Appellant.)	Death Penalty Case

AFFIDAVIT OF KIMBERLY S. RIGBY

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, Kimberly S. Rigby, after being duly sworn, hereby state as follows:

1. I am an attorney licensed to practice law in the state of Ohio, and I have been an assistant state public defender since 2004. My sole area of practice is capital litigation.
2. I am Rule 20 certified to represent indigent clients in death penalty appeals.
3. 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.
4. 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).
5. 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).

6. After ensuring that the record 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 trial motions, exhibits, jury questionnaires, jury pool reports, and special jury questionnaires.
7. A fundamental part of appellate representation also includes a duty to consult with the client. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). Appellate counsel must not only meet with their client, but must provide the client with a copy of the transcript and allow the client to assist in issue spotting and in the preparation of the brief.
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 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.
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 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.
10. 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.
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. 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). 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 of the United States Constitution in each proposition of law to avoid any exhaustion problems in federal court.
12. 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.

13. Based on the foregoing standards, I have identified the following issues that should have been evaluated by appellate counsel and fully presented to the Ohio Supreme Court:

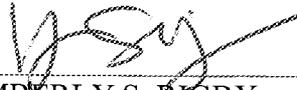
- **Proposition of Law #1: Appellate Counsel are Constitutionally Ineffective When They Fail to Ensure a Complete Record, Including Pretrial Proceedings and Side Bars.**
- **Proposition of Law #2: Appellate Counsel Are Constitutionally Ineffective When They Fail To Ensure That a Defendant Is Represented In Post-Trial Proceedings in a Trial Court to “Correct” the Record.**
- **Proposition of Law #3: Appellate Counsel Are Constitutionally Ineffective When They Fail to Consult With Their Client On Direct Appeal.**
- **Proposition of Law #4: Appellate Counsel are Constitutionally Ineffective Where They Fail to Raise Meritorious Arguments to the Defendant’s Prejudice, Including:**
 - **Proposition of Law No. 1: A capital defendant is denied the right to a fair trial and due process when the jury instructions given to the jury at trial failed to include the life with parole eligibility verdict option.**
 - **Proposition of Law No 2: A trial court violates a capital defendant’s constitutional rights to a fair trial and due process when the court substantively amends the record without first conducting a hearing. U.S. Const. Amends. VI, XIV.**
 - **Proposition of Law No. 3: A capital defendant is denied his substantive and procedural dueprocess rights to a fair trial and reliable sentencing as guaranteed by U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, §§ 9 and 16 when a prosecutor commits acts of misconduct during his capital trial and trial counsel are constitutionally ineffective in failing to object to the misconduct.**
 - **Previously Raised Propositions of Law in Appellant’s Motion for Reopening, filed January 17, 2006.**

14. These issues are meritorious, should have been raised, and warrant relief. Thus, appellate counsel’s failure to present these errors amounts to ineffective assistance of appellate counsel in this case.

15. Also, had appellate counsel raised these issues, each error would have been properly preserved for federal-court review.

16. Therefore, Appellant Jonathan Monroe was detrimentally affected by the deficient performance of his former appellate counsel.

Further affiant sayeth naught.

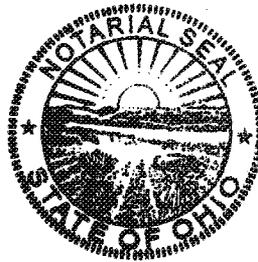


KIMBERLY S. RIGBY
Counsel for Appellant Monroe

Sworn to and subscribed before me on this 9th day of September, 2014.



Notary Public



Jessica Leigh Carrico, Attorney At Law
NOTARY PUBLIC - STATE OF OHIO
My commission has no expiration date
Sec. 147.03 R.C.