ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Supreme Court Case No. 2010-1373
-vs-	:	**This is a capital case.**
ASHFORD L. THOMPSON,	:	
Defendant-Appellant.	:	

ON APPEAL FROM THE SUMMIT COUNTY COURT OF COMMON PLEAS, CASE NO. 2008-07-2390

APPELLANT ASHFORD THOMPSON'S APPLICATION FOR REOPENING PURSUANT TO S. Ct. Prac. R. 11.06

Sherri Bevan Walsh, #0030038
Summit County Prosecutor

Richard Kasay, #0013592
Assistant Prosecuting Attorney

Summit County Prosecutor's Office
Summit County Safety Building
53 University Avenue
Akron, Ohio 44308
(330) 643-7459

COUNSEL FOR APPELLEE

Angela Wilson Miller, #0064902
Attorney at Law

322 Leeward Drive
Jupiter, Florida 33477
(561) 529-0545
(561) 422-4820 (Facsimile)
awmillerlaw@gmail.com

COUNSEL FOR APPELLANT

FILED
APR 27 2015
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Supreme Court Case No. 2010-1373
-vs.-	:	
ASHFORD L. THOMPSON,	:	**This is a capital case.**
Defendant-Appellant.	:	

ON APPEAL FROM THE SUMMIT COUNTY COURT OF COMMON PLEAS, CASE NO. 2008-07-2390

APPELLANT ASHFORD THOMPSON'S APPLICATION FOR REOPENING PURSUANT TO S.Ct. Prac. R. 11.06

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

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

The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on a criminal appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). Appellate counsel must act as an advocate and support the cause of the client to the best of their ability. *See, e.g.*, *Anders v. California*, 386 U.S. 738 (1967); *Penson v. Ohio*, 488 U.S. 75 (1988). After a review of the direct appeal filed on Thompson's behalf, it is apparent that his appellate attorneys were prejudicially ineffective for failing to raise meritorious issues that arose during his capital trial.

Because appellate counsel were prejudicially ineffective in this case, this Court must re-open Thompson's appeal. *State v. Murnahan*, 63 Ohio St.3d 60 (1992) and S.Ct. Prac. 11.06. Here, Thompson was denied the effective assistance of appellate counsel as guaranteed by the Fifth,

Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution when his appellate counsel failed to include certain critical claims in Thompson's direct appeal.

II. Appellate counsel were ineffective for failing to raise meritorious issues.[1]

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

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

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

A. Trial counsel did not request a competency evaluation for Thompson.

Appellate counsel did not raise as error trial counsels' failure to request a competency evaluation for their client. The United States Supreme Court has long held that an incompetent person may not be subjected to trial. *Drope v. Missouri*, 420 U.S. 162, 171 (1975). To be competent, a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding as well as a factual understanding of the proceedings against him." *Dusky v. United States*, 420 U.S. 162, 171 (1975). The record reflects that

[1] Thompson is unable to fully brief the issues not raised by prior appellate counsel due to the page limitation of S. Ct. Prac. R. XI. As such, the failure to fully brief every single point should not be construed as a waiver of that issue/point.

Thompson should have had a competency evaluation prior to trial.

Counsel was aware, or should have been aware, that Thompson had difficulties understanding the legal proceedings against him. From the start, the court had to enter "a technical not guilty plea" on Thompson's behalf because he stood mute and refused to speak at arraignment. (8/4/2008, Arraignment Entry, Ex. B). The court specifically noted that even after the charges were read in their entirety Thompson refused to participate. Additionally, Thompson was unable to work with the numerous attorneys that were appointed to assist him. Thompson was on his fifth set of attorneys at the time of trial. (See e.g. Tr. 8/13/08 status conference p.3; Tr. 11/12/08 status conference pp. 5-7; Tr. 11/5/09 status conference p. 45; Tr. 1/27/10 status conference pp. 10-13). One of the motions to withdraw filed by defense counsel detailed the inability to work cooperatively with Thompson and the total breakdown of the attorney-client relationship. (11/10/09, Motion to Withdraw, Ex. C).

Thompson also expressed displeasure with O'Brien and Greven, the attorneys that eventually represented him at trial. "Your Honor, just execute me then, because I can't get any kind of justice. I'm tired of it. I'm at the end of my rope. What can I do?" The trial court replied, "I can't respond to that statement. You need to talk to your lawyers." (Tr. 1/27/10, p. 14). Earlier, the court made it clear that it "was finished" and the O'Brien/Greven team would be the last set of attorneys that would be appointed. (Tr. 11/17/09, p. 3).

Thompson's continued distrust of his attorneys, statements from defense counsel in motions to withdraw, and court entries noting Thompson's behavior, were all red flags that a competency evaluation was needed. If, however, these indicators were not enough, Thompson's inability to understand the nature and objective of proceedings against was evident at allocution. Rather than use this opportunity to speak to the judge, Thompson began quoting scripture that did not pertain

to his case and preaching in the courtroom. (Mitigation Vol II, pp. 17-27). At one point, the judge interrupted and asked Thompson if he wanted to speak to her. (Mitigation Vol. II, p. 27). Thompson responded by quoting Biblical passages.

Without doubt, a competency evaluation was needed to protect Thompson's due process rights. Thompson's answers and behavior was not appropriate or coherent. The one occasion Thompson did behave appropriately was when he was very carefully guided through his unsworn statement and shielded from cross-examination. *Compare State v. Kacmaink*, 2014-Ohio-2264 (Counsel was not ineffective for failing to request a third competency evaluation where defendant testified on his own behalf and withstood cross examination). Here, Thompson was deprived of due process of law when his attorneys did not request a competency evaluation despite evidence that raised sufficient doubt as to his competence to stand trial.

B. Trial counsel did not request an evaluation of Thompson's mental condition at the time of the offense or make any effort to pursue an NGRI plea.

There was strong evidence prior to trial that suggested a mental health evaluation should be conducted to determine Thompson's mental condition at the time of the offense. Counsel, however, never pursued an NGRI plea.

Ohio Revised Code §2901.01(A)(14) provides that: "[a] person is 'not guilty by reason of insanity' relative to a charge of an offense only if the person proves, in the manner specified in section 2901.05 of the Revised Code, that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts." Thus, a court may determine a person is competent to stand trial but that person is not precluded from asserting an insanity defense. *State v. Tenace*, 121 Ohio App.3d 702 (1997), 700 N.E.2d 899.

Basic discovery revealed that a state's witness would bring Thompson's mental state (at the time of the offense) into question. Steven Bartz, a bar patron, provided testimony that showed

Thompson was very agitated and paranoid the evening of the offense. Bartz stated that he heard Thompson making comments such as "there's demons in me" and "I will kill any one fucker that threatens me." (Vol. XI, Tr. 1270). The testimony provided by Bartz was a sharp contrast to the mild-mannered, attentive LPN portrayed by Thompson's family and friends. Additionally, a second witness for the state, Detective Kline, testified that he listened to a phone call between Thompson and his girlfriend. Thompson was trying to grasp what happened the night of the offense and stated, "It was just everything man, I had enough, man. I had enough with life, man, you know." (Vol. XVIII, Tr. 2300).

In *State v. Cihonski*, 2008-Ohio-5191, 178 Ohio App.3d 713, the Third District Court of Appeals determined that counsel's failure to pursue an NGRI plea constituted ineffective assistance of counsel. Like Thompson, Cihonski had different attorneys through the course of his trial proceedings. Prior counsel, however, filed a written plea of NGRI for Cihonski that had never been withdrawn. Neither the court nor counsel instructed Cihonski's jury on NGRI.

In *Cihonski*, evidence was presented that showed he had difficulty with panic attacks and was easily agitated. Specifically, Cihonski's altercation with a Van Wert police officer was due to his perception that the officer was threatening him with his flashlight. Id. at ¶ 7. In Thompson's case, the state's witnesses showed that Thompson's actions may not have been voluntary. Indeed, Thompson appeared paranoid the evening of the offense and the officer that stopped him was perceived as snide, profane, and threatening. (Vol. XVIII, Tr. 2020-2022, 2124). Without doubt, Thompson's attorneys should have raised the insanity defense and defined it for the jury. Without it, there was simply no explanation for Thompson's actions and the jurors could not understand why Thompson would have shot the police officer. Counsel's failure to pursue NGRI on Thompson's behalf fell below objective standards of reasonable representation.

C. Counsel was ineffective for failing to exercise a peremptory challenge or challenge for cause to excuse Juror Eberhardt.

Questions on voir dire must be sufficient to identify prospective jurors who hold views that would prevent or substantially impair them from performing the duties required of jurors. *Morgan v. Illinois*, 504 U.S. 719, 734-35 (1992). Moreover, the fact that the defendant bears the burden of establishing juror partiality makes it all the more imperative that he conducts a meaningful examination. *Wainwright v. Witt*, 469 U.S. 412, 423, 105 S. Ct. 844.

Defense counsel was on notice that at least one prospective juror (Eberhardt) was a county employee and had a brother who served as a lieutenant with a nearby police department. (Juror questionnaire #50, Ex. D). Rather than explore this area of potential bias, defense counsel sat back and allowed the court to ask Eberhardt if this close tie to law enforcement would impact her ability to be impartial. Defense counsel asked no questions regarding Eberhardt's ability to remain impartial. Eberhardt stated she could be impartial and remained on the jury. (Vol. III, Tr. 524).

The greater the probability of bias, "the more searching the inquiry needed to make reasonably sure that an unbiased jury is impaneled." *Oswald v. Bertrand*, 374 F.3d 475 (C.A. 7, 2004). Here, Thompson was charged with killing a young police officer in a small town. Police officers are afforded special status in Ohio and the fact that the victim is an officer and serving in that capacity alone is a factor that will trigger the death penalty. R.C. 2903.01(E).

Many people harbor strong feelings and emotions whenever a person in law enforcement is a victim of violent crime and strongly identify with law enforcement, particularly when a family member serves. Indeed, the state was keenly aware of this connection as it repeatedly argued in closing that the case was not about Officer Miktarian "but what he represented" and that it was time "to stop honoring the Defendant and start honoring the law." And, in a statement that would be particularly poignant to Eberhardt, the state argued" He [Miktarian] represented every single man

and woman that puts on one of these badges and goes into harm's way." (Mitigation Tr. p. 213).

The possibility that one juror might not have fairly considered sentencing options and may have voted for the death penalty solely because Thompson murdered an officer "is a risk too great to ignore." *Compare State v. Jackson*, 2005-Ohio-5981, 107 Ohio St.3d 53. Indeed, in *State v. Jackson*, this Court found that when a case involves the murder of a young child a careful and searching voir dire needs to be conducted to uncover biases on this sensitive point. The trial court's failure to allow this searching voir dire was reversible error. *Id.* Ohio Revised Code §2903.01 carves out a special status for law enforcement as it does for children - segments of society seen as deserving extra protection. Children because of their inability to protect themselves and officers because they put themselves into harmful situations to protect others. Defense counsel was obligated to ask the in-depth questions necessary to reveal bias, particularly with Juror Eberhardt.

D. Trial counsel were ineffective in failing to use the booking video for impeachment purposes.

Trial counsel should have been aware that Thompson was assaulted by a Twinsburg officer after his arrest, while handcuffed in the back of a police cruiser. The booking video shows Officer Fenske going into the car where Thompson is and other officers pulling Fenske out of the car. Fenske threatens Thompson yelling, "I'll rip your fucking face off." (Booking video at 16:00). This incident is also reported in Detective Klein's report for the Summit County Sheriff's Office. Trial counsel stated at a pretrial hearing that he and Thompson watched the videos included in discovery, including the booking video. (Tr. Mar. 24, 2010, Pretrial 15).

Officer Quinn, a Twinsburg Police Officer, testified on the topic of "continuum of force." Officer Quinn was used by the state to suggest that if police are trained on the "continuum of force" (i.e., you respond to a certain level of force with you own certain level of force) they will always follow it and respond accordingly. (Tr. 1406-07). Presenting Officer Fenske's behavior

would show that Officer Quinn was making an overly broad statement and give counsel the opportunity to argue that despite training officers can and do respond with excessive force. That, in turn, would have given support to Thompson's argument that Officer Miktarian yielded more force necessary the night of the incident and that Thompson's mental state was one of fear.

E. Trial counsel failed to discredit the state's blood spatter "expert" with readily available research.

Blood stain pattern analysis (BPA) draws on the scientific disciplines of biology, chemistry, mathematics and physics. A report released by The National Academy of Sciences calls for more standardization within the field. Strengthening Forensic Science in the United States: A Path Forward, Committee on Identifying The Needs of the Forensic Sciences Community, National Research Council, Doc. No. 220091 (August 2009). The report highlights the ability of blood spatter analysts to overstate their qualifications and the reliability of their methods in the courtroom. Specifically, The National Academy of Sciences lists seven minimum requirements for an analyst to be able to interpret and integrate bloodstain patterns into a crime scene reconstruction. They include: 1) an appropriate scientific education; 2) knowledge of the terminology employed (e.g., angle of impact, arterial spurting, back spatter, castoff pattern); 3) an understanding of the limitations of the measurement tools used to make pattern measurements (e.g., calculators, software, lasers, protractors); 4) an understanding of applied mathematics and use of significant figures; 5) an understanding of the physics of fluid transfer; 6) an understanding of the pathology of wounds and; 7) an understanding of the general patterns blood makes after leaving the human body.

In Thompson's case, the state wrapped John Saraya, a BCI employee, in a cloak of expertise and reliability that he did not have. Saraya was an investigator with the agency and stated that he had 40 hours of "blood spatter school." (Vol. XVI, Tr. 1962). The purpose of Saraya was to give a heightened level of indifference or depravity to Thompson. Saraya testified that "staining like this is

relatively close; I would say it was probably no more than a foot away from the source of the blood..". (Vol. XVI, Tr. 1975). And, that "[the spatters] here again, stronger on the left, 12 to 16 inches. I wouldn't expect more than that." (Vol. XVI, Tr. 1983). Further, Saraya was able to use a mannequin for dramatic re-enactment of the crime scene to further emphasize the close proximity of Thompson to his victim and the cold, indifference of the crime. (Vol. XVI, Tr. 1981, 1989).

Here, defense counsel did little to discredit Saraya. No questions were asked about the calculations Saraya used to come up with his distance measurements. Indeed, the court referred to Saraya as an "expert" despite the fact he was never formally qualified as one and that his testimony directly conflicted with another state's witness, Dale Laux. (Vol. XVI, Tr. 1997) (Saraya testified about close proximity and blood on the gun where Laux found minimal blood on the front and very edge of the barrel). The state shook off this direct conflict as a mere difference of opinion. The jury, however, had no way of knowing that Saraya was not the expert that he purported to be.

Counsel's investigative decisions must be reasonable. *Mason v. Mitchell*, 320 F.3d 604, 622 (6th Cir. 2003). Here, trial counsels' actions were "outside the wide range of professional competent assistance." *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

F. Counsel failed to present evidence of his ability to adapt to prison life as a mitigating factor under 2929.04(B)(7).

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

Defense counsel in a capital case has a duty to investigate all possible mitigating factors,

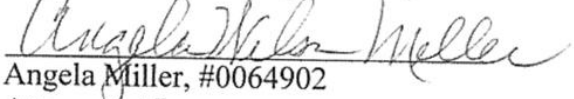
including a thorough review of the defendant's background. *Williams v. Taylor*, 529 U.S. 362 (2000). Thompson's counsel were ineffective and Thompson was prejudiced when counsel failed to investigate and present readily available evidence of his ability to adjust and behave appropriately, while incarcerated. Counsel only presented very general testimony about the length of life sentences. (Mitigation Vol. I, p. 105).

At sentencing, the trial court never mentioned Thompson's ability to adapt to prison life because defense counsel spent no time developing this mitigating factor. Consideration and weight could have been given to this mitigating factor had Thompson's very minimal criminal record been put into context with the assistance of a qualified expert. As a result of this omission, counsel acted unreasonably and failed to meet the prevailing standards of practice.

III. Conclusion.

Appellant Thompson requests that this Application for Reopening be granted and that he be afforded an opportunity to file a new appellate brief with supporting materials. S.Ct. Prac. 11.06 and *State v. Murnahan*, 63 Ohio St.3d 60 (1992). Thompson has shown that there is a genuine issue as to whether he was deprived of the effective assistance of counsel on appeal, with respect to each of the Propositions of Law.

Respectfully submitted,



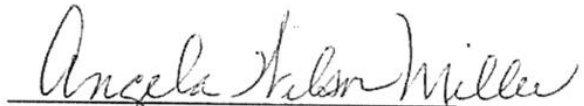
Angela Miller, #0064902
Attorney at Law
322 Leeward Drive
Jupiter, FL 33477
(561) 529-0545
awmillerlaw@gmail.com

Counsel for Appellant Thompson

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2015, I served a copy of the foregoing Application for Reopening by regular U.S. mail addressed to:

Mr. Richard Kasay
Assistant County Prosecuting Attorney
Summit County Safety Bldg.
53 University Ave.
Akron, OH 44308



Angela Wilson Miller, #0064902
Counsel for Appellant Thompson

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 2010-1373
-vs-	:	On Appeal from the Court of Common Pleas of Summit County, Ohio Case No. 2008-07-2390
ASHFORD THOMPSON,	:	
Defendant-Appellant.	:	This is a capital case.

AFFIDAVIT OF ANGELA WILSON MILLER

STATE OF FLORIDA,)
) ss:
COUNTY OF PALM BEACH)

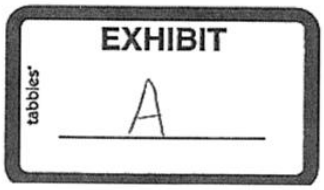
I, Angela Wilson Miller, after being duly sworn, hereby state as follows:

1) I am an attorney licensed to practice law in the State of Ohio and I have practiced law for 19 years. I worked as an Assistant State Public Defender for 11 years and was assigned to the Death Penalty Unit. I am certified to practice in the United States District Court for the Southern District of Ohio, the United States District Court for the Northern District of Ohio, the Sixth Circuit Court of Appeals and the Supreme Court of the United States. I am currently in private practice and I am Rule 20 certified for appellate work.

2) Due to my focused practice of law and my attendance at several death penalty seminars, I am aware of the standards of practice involved in the appeal of a case in which the death penalty was imposed.

3) I was appointed by this Court to represent Mr. Thompson and prepare an Application for Reopening (S.Ct. 11.06) on March 2, 2015.

4) I have read this Court's opinion, as well as the transcripts, record and appellate briefs filed on Mr. Thompson's behalf. I also consulted with appellate counsel and Mr. Thompson to prepare the Application for Reopening in this case.



5) The Due Process Clause of the Fourteenth Amendment guarantees the effective assistance of counsel on an appeal as of right. *Evitts v. Lucey*, 469 U.S. 587 (1985).

6) The initial responsibility of appellate counsel, once the transcript is filed, is to make sure that the entire record is filed with the Supreme Court of Ohio. When appellate counsel files only a partial transcript on appeal, the defendant is deprived of the due process of law guaranteed by the Fourteenth Amendment of the United States Constitution. *Entsminger v. Iowa*, 386 U.S. 748 (1967).

7) After making sure that the transcript is complete, counsel must then review the record for purposes of issue identification. This review of the record not only includes the transcript but also the pleadings and exhibits.

8) For counsel to properly identify issues, they must have a good working knowledge of criminal law in general. Many trial issues in capital cases will be decided by criminal law that is applicable to non-capital cases. As a result, appellate counsel must be informed as to the recent developments in criminal law when identifying potential issues on direct appeal. Counsel must remain knowledgeable about recent developments in the law after the merit briefs are filed.

9) Since the reintroduction of capital punishment in response to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the area of capital litigation in general has become a recognized specialty in the practice of criminal law. Numerous substantive and procedural areas unique to capital litigation have been carved out by the United States Supreme Court. As a result, anyone who litigates in the area of capital punishment must be familiar with these issues in order to raise and preserve them for appellate and post-conviction review.

10) Appellate representation of a death-sentenced individual requires a recognition that the case will most likely proceed to the federal courts at least twice: first on petition for Writ of Certiorari in the United States Supreme Court, and again on a petition for Writ of Habeas Corpus filed in a federal district court. Appellate counsel must preserve all issues throughout the state court proceedings on the assumption that relief is likely to be eventually sought in federal court. The issues that must be preserved are not only issues unique to capital litigation, but also case and fact-related issues unique to the case that impinge upon federal constitutional rights.

11) It is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be exhausted in the state courts. To exhaust an issue, the issue must be

presented to the state courts in such a manner that a reasonable jurist would have been alerted to the existence of a violation of the United States Constitution. The better practice to exhaust an issue is to cite directly to the relevant provisions to the United States Constitution in each proposition of law and in each assignment of error to avoid any exhaustion problems in the federal courts.

12) Based on the foregoing standards, I reviewed the opinion, record and appellate briefs, and communicated with former appellate counsel.

13) I have identified additional ineffective assistance of trial counsel issues and numerous sub-claims that should have been evaluated by appellate counsel and presented to the Supreme Court of Ohio. Thus, appellate counsels' failure to present these errors raises a genuine issue as to whether or not Mr. Thompson was denied the effective assistance of appellate counsel.

14) For example, appellate counsel failed to raise the issue of trial counsels' failure to request a competency evaluation for Mr. Thompson. From arraignment to allocution Thompson had difficulty following court proceedings and understanding what was expected of him. For example, at arraignment Thompson stood mute during the hearing and a technical plea of not guilty had to be entered by the court. (Entry, 8/4/2008). At allocution, Thompson could not grasp the concept of speaking to the judge on his own behalf despite attempts to redirect him by the court. (Mitigation Vol. II, pp. 17-27). Finally, going through five sets of attorneys, at minimum, is indicative of a much deeper problem. The docket, transcript and motions to withdraw reflect Thompson's inability to trust and work with his lawyers. Trial counsel should have requested a competency evaluation prior to trial.

15) Defense counsel also did not request an evaluation of Thompson's mental condition at the time of the offense. No effort was made to pursue an NGRI plea. Evidence offered by the state suggested that Thompson was very agitated and paranoid the evening of the offense. It was questionable whether Thompson understood the wrongfulness of his conduct. No explanation was given to the jury as to how a traffic stop could have suddenly escalated into a murder.

16) Appellate counsel did not raise trial counsel's failure to exercise a peremptory challenge or challenge for cause to excuse Juror Eberhardt. Eberhardt revealed in the juror questionnaire her close ties to law enforcement – her brother was a lieutenant. Defense counsel merely asked if Eberhardt if she could be impartial and she responded, "Yes." (Vol. III, Tr. 524). Counsel had a duty to ask the jury probing questions regarding bias towards law enforcement, particularly of Eberhardt. Many in society harbor very strong

feelings for law enforcement and a searching inquiry is needed to make sure an impartial jury is impaneled. That was not done in Thompson's case.

17) Trial counsel were ineffective for failing to use the booking video for impeachment purposes. Thompson was attacked and threatened by a Twinsburg officer (Fenske) after his arrest and handcuffed in back of the police cruiser. This attack was documented on video and in a police report. And the record reflects that this booking video was provided to defense counsel before trial. The state produced Officer Quinn to provide testimony on the professionalism of the Twinsburg Police Department and that officers were trained in the "continuum of force" (i.e., officers respond with the level of force they are facing). The booking video would have supported Thompson's argument that Officer Miktarian may have yielded more force that necessary that night. Seeing Thompson assaulted by another Twinsburg officer may have also helped to explain Thompson's mindset to the jury and why he reacted the way he did to Officer Miktarian.

18) Trial counsel did not discredit the state's "blood spatter expert" with readily available research. John Saraya, an investigator with BCI, testified that he had "40 hours of blood spatter school." (Vol. XVI, Tr. p. 1962). According to the National Academy of Scientists, 40 hours of blood spatter school falls far short of the qualifications needed to testify as an expert in the area. There are seven basic requirements that a person should meet before testifying in this area (appropriate science background, knowledge of terminology, an understanding of the limits of tools used to make pattern measurements, an understanding of applied mathematics and use of significant figures, understanding of fluids transfer, an understanding of the pathology of wounds, an understanding of the general patterns of blood upon leaving the body). The National Academy of Sciences warned in its report that some "blood spatter experts" overstate their credentials and reliability of their methods and that this is a problem in the courtroom. Strengthening Forensic Science in the United States: A Path Forward, Committee on Identifying The Needs of the Forensic Science Community, National Research Council, Doc. No. 220091 (August 2009). This report was available and could have been obtained by defense counsel. The report would have also assisted defense counsel when they pointed out that Saraya's testimony conflicted with another witness for the state, Dale Laux. Basically, Saraya detailed a close-range shooting with blood on several different areas of the gun where Laux found no blood except for a small amount of the front and very edge of the barrel. (Vol. XVI, Tr. 199-97). The state shook off the conflict as a mere difference of opinion. The added information regarding the basic qualifications of blood spatter experts (that Saraya did not have) would have shown the jury that Saraya was not the expert he purported to be.

19) Appellate counsel also did not raise the issue of trial counsel's failure to present evidence of adaptability to prison life. Thompson had a very minimal criminal record and was a law abiding citizen prior to this offense. He was a nurse that was loved by his patients and well respected by his colleagues. These factors make him a good candidate for life without parole. Adaptability to prison life is a recognized mitigating factor. *Skipper v. South Carolina*, 476 U.S. 1 (1986); *State v. Simko*, 71 Ohio St.3d (1994). The jury could have considered this mitigating factor had Thompson's minimal criminal record been put into evidence and into context by a qualified expert.

20) An appellate court has an independent duty to read the transcript and identify errors that are plain even if they are not presented on appeal. R.C. §2929.05. As a practical matter, however, appellate courts rely almost exclusively on appellate counsel to identify errors and the applicable law.

21) Therefore, Ashford Thompson, was detrimentally affected by the deficient performance of his former appellate counsel.

Further affiant sayeth naught.

Angela Wilson Miller

Angela Wilson Miller, #0064902
Counsel for Appellant, Ashford Thompson

Sworn and subscribed in my presence this 27th day of April, 2015.

Notary Public

COPY

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

DANIEL M. HORRIGAN

THE STATE OF OHIO 2008 AUG -4 AM 9:03 **Case No. CR 08 07 2390**

vs. SUMMIT COUNTY CLERK OF COURTS **JOURNAL ENTRY OF ARRAIGNMENT**

ASHFORD L. THOMPSON

Indictment for AGGRAVATED MURDER (2) W/SPECIFICATIONS 1 THROUGH 5 TO COUNTS 1 AND 2 (2); ESCAPE (2) W/FIREARM SPECIFICATIONS 1 AND 2 TO COUNTS 3 AND 4 (2); RESISTING ARREST (2) W/FIREARM SPECIFICATIONS 1 AND 2 COUNT 5; RESISTING ARREST (1); TAMPERING WITH EVIDENCE (2) W/FIREARM SPECIFICATION TO COUNTS 7 AND 8 (2); CARRYING CONCEALED WEAPONS (1) W/FIREARM SPECIFICATION (1)

THIS DAY, to-wit: The 25th day of July, A.D., 2008, the Prosecuting Attorney on behalf of the State of Ohio, and the Defendant, ASHFORD L. THOMPSON, being in Court without counsel, and arraigned upon said indictment, having been read in its entirety, stood mute, the Court entered a technical plea of NOT GUILTY for him.

IT IS HEREBY ORDERED that defense counsel reserves the right to challenge the Indictment until three (3) working days prior to the pretrial.

Upon due consideration of this Court and for good cause shown, IT IS HEREBY ORDERED that the secret Grand Jury capias/warrant issued on July 22, 2008, be WITHDRAWN, as to the said Defendant, ASHFORD L. THOMPSON.

Upon recommendation of the Prosecutor, on behalf of the State of Ohio, IT IS HEREBY ORDERED that no bond be set in this matter.

And it appearing that said Defendant is in indigent circumstances and unable to employ counsel, the trial Court will appoint counsel for the Defendant.

IT IS FURTHER ORDERED that this case be assigned to **JUDGE STORMER, due to administrative assignment.**

Defendant was remanded to the Summit County Jail to await pretrial set for August 6, 2008 at 1:30 P.M.

APPROVED:
July 29, 2008
dcs

for
JOHN H. SHOEMAKER, Magistrate
General Division
Court of Common Pleas
Summit County, Ohio

cc: Prosecutor Sherri Bevan Walsh
Criminal Assignment
Registrar's Office
(Warrants – EMAIL)
Defendant, Inmate, Summit County Jail - **CERTIFIED**

EXHIBIT
B

COPY

DANIEL M. HORRIGAN
2009 NOV 10 PM 12:49
SUMMIT COUNTY
CLERK OF COURTS

SUMMIT COUNTY COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO	)	**Case No: CR-2008-07-2390**
	)	
Plaintiff,	)	
	)	**JUDGE ELINORE MARSH STORMER**
vs.	)	**JUDGE BRENDA UNRUH**
	)	**JUDGE PAUL GALLAGHER**
	)	
ASHFORD L. THOMPSON	)	
	)	
Defendant	)	**MOTION TO WITHDRAW AS**
	)	**RETAINED COUNSEL**
	)	

Now come Attorneys, EDDIE SIPPLEN and ANNETTE POWERS, who respectfully inform the Court that they can no longer effectively represent Mr. Thompson under the Sixth Amendment of the United States Constitution for the reasons stated below.

Respectfully submitted,

EDDIE SIPPLEN, Attorney
159 S. Main Street, Suite 812
Akron,OH 44308
(330) 374-5600
Reg. No. 0076712

ANNETTE L. POWERS, Attorney
1655 W. Market St., Suite 420
Akron, Ohio 44313
(330)836-5110
Reg. No. 0031855

EXHIBIT
tabbies
C

COPY

BRIEF

Mr. Thompson is charged with capital murder specifications. On Thursday, November 5, 2009, Mr. Thompson stated in Court that his attorneys had not informed him of his constitutional rights on a very lengthy written plea dated April 13, 2009. This was a total surprise to counsel and untrue. At this hearing Mr. Thompson also made a number of other complaints and objections about counsel on the record.

Additionally, Mr. Thompson stated at the November 5, 2009, hearing he wanted to keep Attorneys Sipplen and Powers as his attorneys. However, his jail calls and conduct are contradictory to his statements in court and are a ruse. Consequently, Mr. Thompson has made it ethically impossible for counsel to continue to represent him.

Mr. Thompson has totally undermined the attorney/client relationship. A jail conference with Mr. Thompson on November 9, 2009, fully explored the magnitude of the total breakdown of the attorney/client relationship, which cannot be repaired. Counsel informed Mr. Thompson that because of his words and actions, including threats of filing a bar grievance and other legal actions, that the attorney/client relationship is irrevocably damaged.

Based on the foregoing, counsel cannot effectively represent Mr. Thompson under the Sixth Amendment of the United States Constitution on a matter as serious as this one wherein his life is at stake.

Counsel respectfully asks the Court to inquire of Mr. Thompson whether he or his family can afford other retained counsel or whether the Court should appoint counsel for him.

Neither the State nor Mr. Thompson would be prejudiced by counsels' withdrawal.

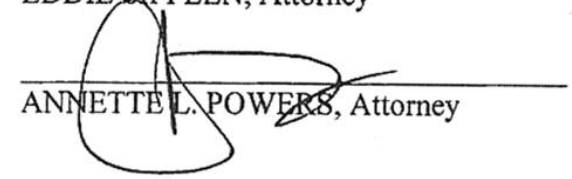
COPY

Prosecutor Brian LoPrinzi, the Court, and Mr. Thompson and his family were notified of counsels' intention to withdraw prior to the filing of this motion.

WHEREFORE, in the interest of justice and for good cause shown, counsel respectfully ask permission to withdraw as retained counsel.

Respectfully submitted,

EDDIE SIPPLEN, Attorney



ANNETTE L. POWERS, Attorney

TO: ALL PROSPECTIVE JURORS. Please answer the following questions fully and truthfully to the best of your ability. If necessary, use the back of the page to complete your answer, indicating the question number. PLEASE PRINT IN INK.

I, the undersigned prospective juror, having been first duly sworn by the Court in this case, do hereby swear or affirm that the answers set forth below are true to the best of my knowledge, information, and belief.

1. Juror number: 50

2. Age: 48

3. Address – **City and zip code only:** UNIONTOWN 44685

4. Do you (please check one):

   (a) own your own home ____
   (b) rent ✓
   (c) live with parents or relatives ____
   (d) other (explain) ____

5. Length of time in Summit County: 2 yrs

6. Place of birth: HOT SPRINGS, ARK.

7. Where did you grow up? HOT SPRINGS ARKANSAS, ST. LOUIS, MO., AKRON, OHIO

8. What type of area was it?

   Rural ____ City ✓ Small Town ____

9. Please list all previous addresses you have lived at in the last 15 years besides your present one; state the number of years at each residence **(City and zip code only)**

AKRON, OHIO 44319 — 1.5

JAMAICA 05343 — 5

CANAL FULTON 44614 — 5

AKRON 44319 — 17

10. Marital status (please check one):

    Single ____
    Married ____
    Divorced ✓
    Widow or Widower ____

EXHIBIT

tabbies

D

COPY

11. What is your level of education: (high school degree, some college, college degree, graduate school, or other training or certification)

SOME COLLEGE

12. Please list areas of study, degrees received, and the schools from which you received them.

ACCOUNTING

13. Have you ever served in the military? NO

Is so, list the branch, years of service, rank attained.

14. What is your present occupation? (Include job title, name of your employer and length of employment. If retired, list the same information for previous employment):

CERTIFIED PHARMACY TECHNICIAN

Have you had any previous occupations? If so, please list:

BANKING, TEACHING, LANDSCAPING.

What is your fiancée, partner's or spouse's occupation?

N/A

COPY

11. What is your level of education: (high school degree, some college, college degree, graduate school, or other training or certification)

SOME COLLEGE

12. Please list areas of study, degrees received, and the schools from which you received them.

ACCOUNTING

13. Have you ever served in the military? NO

Is so, list the branch, years of service, rank attained.

14. What is your present occupation? (Include job title, name of your employer and length of employment. If retired, list the same information for previous employment):

CERTIFIED PHARMACY TECHNICIAN

Have you had any previous occupations? If so, please list:

BANKING, TEACHING, LANDSCAPING

What is your fiancée, partner's or spouse's occupation?

N/A

COPY

If widowed or divorced, what was your former spouse's occupation?

MACHINIST

15. List the gender, ages, and occupations of your children:

Gender	Age	Living with you?	Occupation/ Employer
MALE	13	yes	
MALE	11	yes	

16. Are you now or have you ever worked in a law enforcement or security field (including federal, military, state, county, city, auxiliary, or volunteer)? yes

If so, describe the position and dates worked (in detail):

DEPUTY CLERK OF COURTS, BARBERTON, OHIO 1988

17. Do you have a friend or relative who is now, or has ever been, a law enforcement or security officer? yes

If so, state who, person's relationship to you, what position and when held:

BROTHER, IN, RETIRED, BARBERTON POLICE DEPARTMENT

COPY

18. Have you or a friend, relative or anyone you know ever been the victim of a crime? No

If so, state who, what, and when:

_____

_____

_____

19. Have you ever been arrested or convicted of any offense other than minor traffic offenses? No

Please give complete details

_____

_____

_____

20. Have you or a member of your family ever been a party to or a witness in a trial? No

In what Court? _____

Date: _____

Case name and description: _____

_____

21. Have you ever previously been called or selected as a juror? No

If so, was the case civil or criminal: _____

Did you reach a verdict? Yes: _____ No: _____

Date: _____

Case name or description: _____

_____

22. Have you ever served on a grand jury? No

When: _____

If so, check whether: Federal Court: _____ State Court: _____

COPY

23. To what clubs or organizations do you belong and what positions have you held, if any?

N/A

24. What do you like to do most in your spare time?

READ NOVELS, PLAY WITH MY CHILDREN, GARDEN

25. Which sections of the newspaper do you regularly read?

DON'T

26. What books, magazines and newspapers do you subscribe to and/or read?

N/A

27. Do you regularly watch television? Yes: _____ No: ✓

If so, do you watch news programs? Yes: _____ No: ✓

If so, which networks do you watch? _____

28. Do you have any ethical, moral and/or religious beliefs that would prevent you from sitting in judgment of a case in court? Yes: _____ No: ✓

If yes, please explain: _____

COPY

29. Do you know of any reason why you could not sit as a juror in this case and be absolutely fair to both the Defendant and the State, and render a verdict based solely upon the evidence presented to you? Yes: _____ No: ✓

If yes, please explain: _____

In this case, the defendant is presumed innocent. No issue about the potential penalty could possibly arise unless the government first proves beyond a reasonable doubt that the defendant is guilty of a capital murder crime. In any case where a *possible* punishment may be the death penalty, the law requires that jurors answer questions regarding their thoughts, feelings and opinions about the death penalty. You must not assume from any of the questions asked that the Defendant is in fact guilty of anything.

30. Please describe your views on the death penalty.

IT MUST FIT THE PROVEN CRIME.

COPY

31. Have you ever held a different view on the death penalty? YES ____ NO ✓

If "Yes", what caused you to change your view?

_____

_____

_____

_____

_____

_____

_____

_____

32. Which of the following statements best reflects your view of using the death penalty (Check One)

____ Appropriate in every case where someone has been murdered.

____ Appropriate with very few exceptions where someone has been murdered.

✓ Appropriate in some murder cases.

____ Opposed with very few exceptions.

____ Opposed in all cases.