

IN THE SUPREME COURT OF OHIO

Case No. 99-1152

STATE OF OHIO,)	Appeal taken from Mahoning County
)	Common Pleas Case No. 97-CR-66
Appellee,)	
)	Death Penalty case
v.)	
)	Application for Reopening Pursuant to
SCOTT GROUP,)	S. Ct. Prac. R. 11.06
)	
Appellant.)	

**APPELLANT SCOTT GROUP'S APPLICATION FOR REOPENING
PURSUANT TO S. CT. PRAC. R. 11.06**

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**APPELLANT SCOTT GROUP’S APPLICATION FOR REOPENING
PURSUANT TO S. CT. PRAC. R. 11.06**

Scott Group, pursuant to S. Ct. Prac. R. 11.06, applies to reopen his appeal on grounds of ineffective assistance of appellate counsel set out in the below Propositions of Law. *State v. Group*, 98 Ohio St. 3d 248 (2002). As set out in the Propositions of Law, below, appellate counsel failed to raise meritorious claims on Mr. Group’s behalf in his direct appeal of right to this Court.¹ The Propositions of Law contained herein achieve the “threshold showing obtaining permission to file new appellate briefs” by “put[ing] forth a colorable claim[s] of ineffective assistance of appellate counsel.” S. Ct. Prac. R. 11.06. The following Propositions of Law are sufficient to demonstrate deficient performance by appellate counsel and prejudice, meaning a reasonable probability of a different outcome in this appeal. *See Strickland v. Washington*, 466 U.S. 668, 695 (1984); *Evitts v. Lucy*, 469 U.S. 387 (1985).

Scott Group shows “good cause” for the untimely filing of his application to reopen.

The Court’s judgment affirming Mr. Group’s conviction and death sentence was journalized on December 30, 2002. Thus, this Application for Reopening has not been filed within the ninety-day time limit imposed by S. Ct. Prac. R. 11.06. There is, however, good cause within the meaning of this rule meriting consideration of the underlying constitutional claims.

The ineffective assistance of Mr. Group’s post-conviction counsel is cause and prejudice for his failure to file an Application for Reopening Pursuant to S. Ct. Prac. R. 11.06.

Proceedings to reopen an appeal based on ineffective assistance of appellate counsel are collateral post-conviction proceedings, not part of the direct appeal. *Morgan v. Eads*, 104 Ohio St. 3d 142 (2004). Because Mr. Group never had counsel appointed for him for this remedy, he was unrepresented at this post-conviction stage, the first opportunity he has had to raise

¹ The page limit imposed by Practice Rule 11.06 prevents adequate development of Mr. Group’s claims. Mr. Group requests that the Court permit full briefing and argument after this appeal is reopened.

ineffectiveness of appellate counsel. *State v. Murnahan*, 63 Ohio St. 3d 60 (1992). Thus, his lack of representation is analogous to the situation in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), in which, denied counsel in post-conviction, he can establish cause and prejudice for failing to assert his claims in a timely manner.

Mr. Group was never informed of his right to file an Application for Reopening Pursuant to S. Ct. Prac. R. 11.06.

On July 30, 2013, undersigned counsel was appointed by the district court to represent Mr. Group as federal habeas counsel in *Group v. Robinson*, Northern District Case No. 4:13CV1636. Upon appointment, counsel reviewed the transcripts and record of Mr. Group's state litigation. Counsel discovered several errors not raised by appellate counsel before the Ohio Supreme Court. Mr. Group was not informed of this remedy by his previous counsel and was not aware that this remedy was available to him. Attached, Ex. A, Affidavit of Scott Group. It is only now, with counsel, that Mr. Group can raise these issues. Therefore, there is good cause for review of the underlying constitutional errors. S. Ct. Prac. R. 11.06.

Proposition of Law 1: Appellate Counsel is ineffective for not raising the ineffective assistance of trial counsel where trial counsel failed to present an expert witness to develop evidence about the unreliability of eyewitness identifications.

Sandra Lozier had been shot twice in the head when she identified Scott Group as the assailant. The trial court appointed an expert eyewitness on defense motion in April 1999. On April 7, 1999, counsel proffered the testimony of Dr. Solomon Fulero by phone. Attached, Ex. B, Transcript of Hearing. Dr. Fulero proffered that he would testify about memory and factors that enter into identification. *Id.* at 4-5. In this case he would testify regarding unconscious transference and various other factors influencing memory. *Id.* at 7-8.

The proffer of Dr. Fulero's testimony was necessary because the state filed a motion in limine to bar his testimony. Yet the record reflects no determination of the state's motion. As the

State's motion was not granted by the trial court, there was no reason for Mr. Group's counsel not to have called him to testify. Certainly anything that would have raised questions about Sandra Lozier's identification, the most damaging evidence in the trial, would have been helpful to Mr. Group. This case is not similar to *State v. Madrigal*, 87 Ohio St. 3d 378 (2000), in which there was no record evidence as to what the eyewitness expert would have testified to, so the Court found that it was not appropriate for direct appeal. Here trial counsel was professionally unreasonable to Mr. Group's prejudice in failing to call Dr. Fulero and appellate counsel was ineffective in failing to raise the ineffectiveness on direct appeal. *See, Evitts v. Lucy*, 469 U.S. 387 (1985); *Strickland*, 466 U.S. 668.

Proposition of Law 2: Appellate counsel is ineffective for not alleging the ineffective trial counsel based on trial counsel's prejudicially deficient opening statement.

In opening statements, trial counsel repeatedly made promises to the jury regarding what the evidence would show that were never fulfilled by the evidence presented at trial. These false promises misled the jury and undercut any credibility that counsel had in presenting Mr. Group's case. A defendant in a criminal trial, especially when he is on trial for his life, is entitled to have his counsel accurately present in opening statement the evidence as he knows it to be. *State v. Freeman*, No. 41190, 1980 WL 354906 (Ohio App. 8 Dist. 1980).

Counsel's first misleading statement involved the testimony of Bonnie Donatelli. Ms. Donatelli testified against Mr. Group at trial, and counsel stated in opening that Ms. Donatelli had "an ax to grind" because she "wanted to date Scott in the past." TR. 2531. Ms. Donatelli testified on cross examination that she did not have an ax to grind with Mr. Group. TR. 2681. She testified that she never had a relationship with him and never wanted to have a relationship. TR. 2683, 2685. Counsel further stated in his opening that Mr. Group's Fila gym shoes, which were seized from him by the police on January 18, 1997, sat in a police storage locker for seven

months before being sent out for testing to BCI. In fact, the shoes were sent to the BCI lab just five days after being taken from Mr. Group. TR. 3710. Counsel also asserted that there would be evidence that Adam Perry had been bragging to various people in the county jail that he “was going to set Scott up.” TR. at 2536. In fact, no testimony supported this assertion. TR. 3001-02; 3017-18; 3849-51. Finally, counsel stated that the evidence would show that the third bullet found at the crime scene was a .22 caliber. TR. 2541. This bullet was found by the bartender, Mark Thomas, and immediately turned over to the police at the scene. TR. 2948-49. However, Nancy Bulger with BCI testified that all three bullets came from the same weapon, and they were all either .38, .357, or 9mm. TR. 3072.

The cumulative effect of counsel’s opening was to give the jury the sense that it could not trust counsel, and that counsel was attempting to mislead the jury. Counsel’s false promises in his opening statement were professionally unreasonable and prejudicial to Mr. Group. *Strickland*, 466 U.S. 668. Counsel’s failure to raise trial counsel’s ineffectiveness amounted to ineffective assistance of appellate counsel. *Evitts*, 469 U.S. 387.

Proposition of Law 3: Appellate counsel is ineffective when counsel fails to challenge the admission into evidence of prejudicial “other acts” evidence.

Over objection from defense counsel, Patty Nellis, an employee of Ohio Wine, was permitted to testify about money that had come up missing from Mr. Group’s route. She testified that when she counted Mr. Group’s cash from the route, it was approximately \$1,300.00 short. TR. 2789. The police were called, a police report was made, but no one was ever charged with the theft. TR. 2802. Mr. Group was not fired or otherwise disciplined for the theft. The incident happened in December of 1996, a month prior to the murder at the Downtown Bar.

Counsel objected and was permitted to put the objection on the record after Ms. Nellis had finished her testimony. Counsel argued that the testimony was neither relevant nor probative,

but was highly prejudicial. TR. 2851. In fact, Ms. Nellis's testimony made it seem like Mr. Group would have a motive for the robbery to replace the missing money.

The state never articulated why it was presenting the testimony of Ms. Nellis. The prosecutor simply stated that "It's no coincidence that the theft occurred . . . on a Thursday, which is a day for deliveries to the Downtown Bar," and argued it was not prejudicial. TR. 2852. However, it occurred on a delivery day more than a month before the crime happened, so the connection between the missing money and the crime at the Downtown Bar, even to show absence of mistake, was tenuous at best.

This Court has reasoned that, "because R.C. 2945.59 and Evid. R. 404(B) codify an exception to the common law with respect to evidence of other acts of wrongdoing they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict." *State v. Broom*, 40 Ohio St. 3d 277 (1988). The sole reason for presenting this evidence was to show that Mr. Group was a "bad guy," acting in conformity with his bad character. *State v. Jamison*, 49 Ohio St. 3d 182, 184 (1990). This violated Mr. Group's Due Process right to a fair trial. U.S. CONST. amend. XIV. The trial court was unreasonable in admitting that evidence and appellate counsel was ineffective in failing to raise the claim on direct appeal. *Evitts*, 469 U.S. 387.

Proposition of Law 4: Appellate counsel is ineffective for failing to raise error from trial counsel's prejudicially deficient cross-examination of a State's key witness.

In the cross-examination of lead Detective Martin, trial counsel repeatedly challenged the shortcomings of the police investigation. Specifically, counsel pointed out that Mr. Group's apartment was never searched. In doing so, counsel also suggested through his questioning that the reason items such as money and the murder weapon were not found was because the apartment was never searched, that is, that the missing items could have been found in Mr.

Group's apartment. TR. 3224-25. Counsel asked, "Isn't it true that for all we know, had a gun been there, had bloodstained clothing been there, had \$1,300 been there, well, we might have missed it." TR. 3226. Strangely, this line of questioning made it seem as though there was indeed incriminating evidence in Mr. Group's apartment that was never found by the police because of their incompetent investigation. Counsel's cross-examination was unreasonable under the circumstances and was prejudicial to Mr. Group. *Evitts*, 469 U.S. 387; *Strickland*, 466 U.S. 668.

Proposition of Law 5: Appellate counsel is ineffective for failing to raise the ineffective assistance of trial counsel where trial counsel's preparation of the defendant's testimony was prejudicially deficient.

Mr. Group wanted to testify on his own behalf, and trial counsel permitted him to do so. However, Mr. Group's counsel never prepared him for cross examination. This led to disastrous effects on Mr. Group's credibility with the jury. Mr. Group testified on direct examination that he had "never robbed anybody in [his] life." TR. 3432. In fact, Mr. Group had pled guilty to conspiracy to commit aggravated robbery, which the prosecutor was only too happy to point out on cross-examination. TR. 3450. This led to Mr. Group arguing with the prosecutor trying to explain himself and looking dishonest and evasive in front of the jury.

It is elementary trial tactics that when an attorney is presenting a witness with a criminal background, he must bring the fact of the conviction or criminal record out on direct examination, so that it can be presented on the witness's own terms. Counsel's failure to prepare Mr. Group and put his conviction out in the open under direct examination was unreasonable, and made Mr. Group less believable to the jury, which was devastatingly prejudicial. *Evitts*, 469 U.S. 387; *Strickland*, 466 U.S. 668.

Proposition of Law 6: Appellate counsel is ineffective where counsel fails to allege the ineffective assistance of trial counsel based on trial counsel's failure to develop testimony about an alternate suspect.

Ann Marie Agee was the mother of Charity Agee, a young girl who was abducted from the Downtown Bar on New Year's Eve, 1997. Sandra Lozier testified that the man who killed her husband stated, "This isn't about money," TR. 2496, and said that he was the brother of the girl that was missing. Id. Mr. Group met with Charity Agee's mother Ann Marie, and Ms. Agee told Mr. Group in a letter that Charity and a young man named Brian Ferguson were very close. TR. 3549. In fact, Ms. Agee told trial counsel's investigator that Ferguson considered Charity to be like a sister to him. Attached, Ex. C, Felicia Crawford Affidavit at Paragraph 8. Mr. Group testified that Ferguson was in the county jail and was bragging that he had information about the Lozier murder. TR. 3523. Ferguson was another possible suspect in the crime because of his close relationship with Charity Agee.

Counsel, however, never inquired about the relationship between Brian Ferguson and Charity Agee when Ann Marie Agee was on the stand. Instead, she asked Ms. Agee whether she knew Mr. Group and whether Charity knew him. Had she asked Ms. Agee about Ferguson, there would have been some corroboration to Mr. Group's testimony and her testimony would have underscored the possibility of another suspect. Counsel's failure to elicit testimony about Ferguson from Ms. Agee was unreasonable under the circumstances and was prejudicial to Mr. Group, and appellate counsel's failure to raise the issue was unreasonable. *Evitts*, 469 U.S. 387; *Strickland*, 466 U.S. 668.

Proposition of Law 7: Appellate counsel is ineffective where counsel fails to raise serious defects in the culpability phase instructions as error.

The trial court gave an instruction for "purpose" in the aggravated murder charge that was very much like a strict liability definition, as in, "The defendant's responsibility is not limited to the immediate or most obvious result of the defendant's act. The defendant is also responsible for the natural and foreseeable consequences or results that follow, in the ordinary

course of events, from the act or failure to act.” TR. 4158. The court further instructed, “When the central idea of the offense is a prohibition against and forbidding of conduct of a certain nature, a person acts purposely if his specific intention was to engage in conduct of that nature, regardless of what he may have intended to accomplish by his conduct.” TR. 4156-57. Not only is the utility of this type of instruction is questionable, and has the potential to mislead jurors, *State v. Burchfield*, 66 Ohio St. 3d 261, 263 (1993), but the instruction shifts the burden of persuasion to the defendant on the mens rea element of the aggravated murder charges in violation of the Due Process Clause. *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979).

In addition, the trial court did not give any instruction on either of the capital specifications; which must be proved at the culpability phase to elevate murder to capital murder. TR. 4147-77. The aggravating circumstance in a capital case must meet two requirements. First, it may not apply to every defendant convicted of murder; it must apply only to a sub-class of defendants convicted of murder. Second, the aggravating circumstances must not be constitutionally vague. *Tuilaepa v. California*, 512 U.S. 967 (1994). The narrowing function of aggravating circumstances ensures that the death penalty is not imposed in an arbitrary and capricious fashion. *Carter v. Mitchell*, 693 F.3d 555 (6th Cir. 2012). Without any instruction at all, Mr. Group’s jury was unconstitutionally left “with untrammelled discretion to impose or withhold the death penalty,” *Gregg v. Georgia*, 428 U.S. 153, 196, at fn.47 (1976), in violation of the Eighth Amendment.

Proposition of Law 8: Appellate counsel is ineffective where counsel fails to raise trial counsel’s ineffectiveness based on the failure to challenge flawed jury instructions.

Trial counsel was ineffective in failing to object to the trial court’s erroneous instructions for aggravated murder. *See* Part VII, above. A defendant in a criminal trial has an absolute right

to expect the trial court will give the jury complete and correct instructions of the law, which will provide it with all the information it requires to deliberate and reach a verdict. *State v. Williford*, 49 Ohio St. 3d 247, 251 (1990). Because trial counsel failed to object and appellate counsel failed to raise the issue, the error was not reviewed by this Court. Thus Mr. Group was prejudiced by counsels' failures. *Strickland*, 466 U.S. 668.

Proposition of Law 9: Appellate counsel performs ineffectively where counsel fails to adequately brief issues to this Court on appeal.

Appellate counsel raised an ineffective assistance of counsel claim on direct appeal, but the claim was raised in such a way that it was a nullity. Counsel listed, in a summary manner, five instances of counsel's ineffectiveness and further stated in a footnote that the claim in its entirety was only being raised because Mr. Group insisted. *See* Appellant's Brief, p. 30-31 & n.1. Appellate counsel did not develop the legal or factual basis for those Sixth Amendment claims. *Group*, 98 Ohio St. 3d at 269 ("Since Group does not explain what he means by 'ballistic DNA', we cannot evaluate this claim."). The claims appearing on the record were meritorious should have been fully briefed and argued on appeal. *See Strickland*, 466 U.S. at 688 (counsel has duty to advocate client's cause). Some of those claims required evidence beyond the record for post-conviction review. Appellate counsel thus had a duty to advise Mr. Group how to raise those claims to comply with state law. *See id.* (duty to consult with client and keep client informed).

One such issue was trial counsel's failure to request a jury view until mid-way through trial. The court asked at the beginning of trial whether any of the parties wanted a jury view and neither did. TR. 3139. Counsel believed that the request was not resolved. TR. 3137. Counsel went on to argue how important the jury view would be, as the jury could still see the bare wall where the shooting occurred and the office, which was still arranged the way it had been at the time of the shooting. TR. 3137-38. In addition, showing the distances of where the shooting

occurred would have shown that Mr. Group would have been covered in blood had he been the shooter. Failure to make a timely request for a jury view may constitute ineffective assistance of counsel. *State v. Biggers*, 118 Ohio App. 3d 788, 791 (10th Dist. 1997); *Strickland*, 466 U.S. 668.

Additionally, appellate counsel was ineffective for not arguing why trial counsel's cross-examination of the State's DNA expert, Jennifer Reynolds was professionally unreasonable. *See* Attached, Ex. D, supporting affidavit of counsel. In opening statements, trial counsel promised the jury it would hear evidence of "contamination" that would render the State's DNA evidence moot. Without a defense expert, it was left to trial counsel to develop such evidence during cross-examination of Reynolds, but trial counsel's cross-examination was feckless. Appellate counsel's failure to raise trial counsel's ineffectiveness on direct appeal unreasonable under the circumstances and prejudicial to Mr. Group. *Evitts*, 469 U.S. 387.

Conclusion

For these reasons, this Court should reopen Scott Group's appeal to this Court with full briefing and argument. *See* Attached, Ex. D, supporting affidavit of counsel.

Respectfully submitted,

/s/ Joseph E. Wilhelm

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **APPELLANT SCOTT GROUP'S APPLICATION FOR REOPENING PURSUANT TO S. CT. PRAC. R. 11.06** was sent by ordinary U.S. mail, postage prepaid, to Paul Gains, Mahoning County Prosecutor, Mahoning County Administration Building, 21 West Boardman Street, 6th Floor, Youngstown OH 44503, on this the 3rd day of June, 2015.

/s/ Joseph E. Wilhelm
JOSEPH E. WILHELM (0055407)
Assistant Federal Public Defender

Counsel for Appellant

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 APPELLEE : **CASE NO. 99-1152**
 :
 vs. : **DEATH PENALTY CASE**
 :
 SCOTT GROUP, :
 :
 APPELLANT :

**AFFIDAVIT OF SCOTT GROUP
IN SUPPORT OF APPELLANT SCOTT GROUP'S
MOTION TO REOPEN APPEAL**

STATE OF OHIO)
) ss:
COUNTY OF ROSS)

I, Scott Group, after being sworn according to law, state that the following is true:

1. I am the defendant in the above captioned case.
2. I was convicted on April 14, 1999 and sentenced to death on May 6, 1999. The trial court assigned Renee W. Green and John P. Laczko for my appeal. On December 19, 2001, the Ohio Supreme Court granted a motion to substitute Annette L. Powers for Renee W. (Green) Turner as counsel for my appeal.
3. I had no rapport or communication with either of my appellate attorneys. I never spoke with Renee Green. Other than that, I never spoke directly with any of them. They never came to see me and I could only communicate with them by mail.
4. I wrote numerous letters asking my attorneys to call or visit me, but they never did. My family was constantly calling the attorney's offices and being ignored. I

felt that it was very important for me to have input into my own appeal, but my attorneys apparently didn't think so.

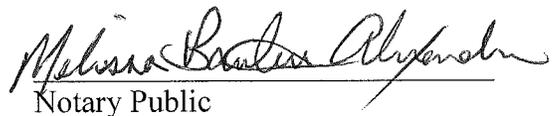
5. I never received any substantive correspondence from my attorneys. I had absolutely no communication with either attorney. In other words, any attorney-client communication about what should go into my appeal was entirely one-way. Other than following my insistence on the ineffective assistance of counsel claim, I had no input into my appellate issues. I never even saw the brief before it was filed.
6. None of my attorneys ever even mentioned filing a *Murnahan* application. I didn't even know what it was. The first lawyers to discuss *Murnahan* with me were my current federal habeas attorneys.

Further Affiant Sayeth Not



Scott Group

Sworn and subscribed before me this 7th day of May, 2015.



Notary Public

STATE OF OHIO) IN THE COURT OF COMMON PLEAS
) ss.
COUNTY OF MAHONING) CASE NO. 97 CV 66

STATE OF OHIO)
)
Plaintiff)
)
-vs-) TRANSCRIPT OF PROCEEDINGS
)
SCOTT A. GROUP) TELEPHONE CONFERENCE
)
) WITH DR. SOLOMAN FULERO
Defendant)

APPEARANCES: Atty. Timothy E. Franken
On behalf of the State

Atty. Andrew J. Love
Atty. Jerry McHenry
Atty. Cynthia A. Yost
On behalf of the Defendant

BE IT REMEMBERED that at the trial of the above
entitled cause, in the Court of Common Pleas, Mahoning
County, Ohio, beginning on the 7th day of March, 1999,
and continuing thereafter, as hereinafter noted,
before the Honorable Maureen A. Cronin, and a Jury of
12 members, the above appearances having been made,
the following proceedings were had:

*Court Reporter #1
RMC 2/8/99*

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MAHONING COUNTY YOUNGSTOWN, OHIO

1 (WHEREUPON, the following was had in
2 the conference room of the Mahoning County
3 Prosecutor's Office at 12:30 p.m., April 7,
4 1999, with counsel and court reporter
5 present, and Dr. Soloman Fulero was present
6 via telephone conference and was inquired of
7 as follows:)

8 BY MR. MCHENRY.

9 Q Doctor, can you hear us?

10 A Hi. Yeah. I apologize. I told Jerry I got
11 a 1:00 that I got to teach.

12 Q We will talk fast. For the record, this is
13 a proffer of Dr. Soloman Fulero's testimony, if he
14 testifies, Friday in the case of State v Scott Group.

15 Doctor, the reason we are here is because
16 the prosecutor has raised a Motion in Limine to
17 prohibit your testimony in the Scott Group case, and
18 the Judge is not present, but we have present myself,
19 Andrew Love, Cynthia Yost, for the defendant; and for
20 the State of Ohio we have Timothy Franken.

21 MR. FRANKEN: Good afternoon, Doctor.

22 DR. FULERO: How are you doing?

23 MR. MCHENRY: Also present is a court

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1 reporter taking this down so that the Judge
2 can read it later at her convenience.

3 MR. FRANKEN: Please say something,
4 Doctor.

5 BY MR. MCHENRY.

6 Q That's a little better. So I think maybe we
7 can hear you a little better.

8 A I was saying the Judge is probably eating
9 lunch like every other sane person, other than trial
10 attorneys.

11 Q That's right. You reviewed certain
12 materials that I provided to you in Scott Group's
13 case; have you not?

14 A Yes.

15 Q Did you review a photograph array which I
16 told you had been used by Sandra Lozier, the living
17 victim in this case?

18 A Yes.

19 Q Did you review a videotape made January 28,
20 1997 in which Sandra Lozier basically responded to
21 police questioning?

22 A Yes.

23 Q Okay. Can you tell me what essentially --

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1 if you are called to testify, what you will tell us
2 about the perils and pitfalls of eyewitness
3 identification and the vagueries thereof?

4 A Well, I provided what I think is a pretty
5 straightforward outline, which I think you have
6 provided to the prosecution. Basically I should say
7 at the outset that I would not render any opinion as
8 to the specific accuracy or inaccuracy of any given
9 eyewitness, particularly Miss Lozier. That's for the
10 trier of fact. And the role of this sort of testimony
11 is to, essentially, educate the jurors about the
12 scientific work that's been done on eyewitness
13 identification so that they can then apply it to the
14 case.

15 So my testimony would be about -- I would
16 testify, first, I guess about the general accepted
17 theory of memory, that memory is reconstructive and
18 elaborative, and that it changes over the course of
19 time with the provision of new information and with
20 thinking about an event. So I would then divide
21 memory into three stages; acquisition, retention and
22 retrieval. I would talk about factors that are
23 relevant in each one of those three stages. Those

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Scott Group Return of Writ Appendix
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1 factors are listed in the outline and statement.

2 I won't go through them, but some of the
3 ones that are most important in a case like this, one
4 might be weapons focus. It might be stress and
5 arousal. The very weak, if any, relationship between
6 the confidence with which an identification is made
7 and its accuracy is a factor; that is, generally that
8 we know that lay people assume the two to be related
9 strongly so that if someone is very certain or
10 confident, jurors assume that they are more likely to
11 be accurate. Scientific studies show that is not the
12 case. A photo spread constitutes post-event
13 information.

14 This is sort of an unusual case. The
15 identification test of picking someone out of a spread
16 in this case is simply a task in which a person is
17 asked to pick out someone already familiar to them
18 from another time. What you may want to think of, and
19 what I would probably put up on a board for the jurors
20 to see, is a time line; a line, a simple arrow going
21 to the right with two points on it, Point A and Point
22 B. Point A is the crime. Point B is in-court
23 testimony. Factors that are relevant at the crime, I

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1 have mentioned already, stress, weapons focus, et
2 cetera, et cetera, et cetera. In the space between
3 Point A and Point B would be the photo spread,
4 questioning by police, thinking about it, hearing, et
5 cetera. Point B is in court.

6 I understand already -- speaking of the
7 elaborative nature of memory, I would be prepared to
8 testify that additional details, as I understand it --
9 now, I haven't read any transcripts of her testimony,
10 but it's been represented to me by the defense that
11 Miss Lozier has added material to what I know from the
12 tape.

13 The other thing that's unusual in this case
14 is that there are two sources of eyewitness
15 identification attacks. One, you know, one or prime
16 situations, I should say; one of them is where the
17 kind of prototype where you're robbed essentially by
18 someone you don't know. The other prototype is where
19 the claim is made that this is a person that I know
20 from before; that is, prior or to the left of Point A
21 on the time line. You know, the mere fact that
22 someone says I, you know, I'm certain that I knew this
23 person, you know, is not -- I would testify that

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1 that's not to be all or end all of the case.

2 There is a phenomenon known as unconscious
3 transference, and that phenomena explains the kinds of
4 identifications that are made in which we are certain
5 that it's someone that we know but it turns out not to
6 be someone that we know.

7 For example, this explains the walking up to
8 somebody in the mall, being certain that it's Uncle
9 Fred when really it's someone else, and so there is
10 that phenomena.

11 Now, I mean, those are the things that I
12 would testify to, and I am assuming that they would
13 relate in certain ways to defense argument about the
14 difference in story or the claim of mistaken
15 identification.

16 Q Doctor, the fact that this witness,
17 Mrs. Lozier, has told us on direct examination that
18 she had seen Mr. Group at various times, a number of
19 times between the end of September or October of '96
20 through the shooting date of January the 18th, a
21 number of times that has been described as maybe as
22 many as ten times, the fact that she says on the
23 morning of the shooting I looked through a peephole in

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1 the door in response to a knock. I saw my Ohio Wine
2 man. I let him in. He said that he was there to look
3 at invoices because the new girl at work was screwing
4 up the invoices, the fact that she said she spent some
5 time, I believe in the neighborhood of perhaps ten
6 minutes, give or take on either side, going through
7 invoices with him. He didn't seem to know what he was
8 doing. I left him alone. He looked at invoices for
9 approximately five minutes in the office. Then he
10 went to the bathroom, came back with a gun. Those
11 contacts, does that guarantee a good eyewitness
12 identification or does that mean anything?

13 A Well, those are two separate questions. And
14 it's difficult to answer does it -- you know, nothing
15 guarantees, you know, a good eyewitness, an accurate
16 eyewitness identification. Does it go to the
17 reliability of the identification? Yes. If the
18 assumption is made that that level of contact really
19 did occur, because I think that there are additional
20 details that have been provided on direct examination
21 that were not on the tape. And, again, we know that
22 memory is reconstructive and that details get added
23 over the course of time or can be added and elaborated

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1 on. So one of the questions I think for a jury, and
2 I'm speaking now in some ways, obviously, differently
3 than I might speak in front of the jury, but I think
4 one of the questions for the jury is how much weight
5 to give the direct -- the account that was given on
6 direct examination.

7 One of the things I haven't mentioned, of
8 course, is one of the things on the outline is
9 retention interval, lengths of time. And statements,
10 descriptions even, often change over the course of
11 time. And since memory decreases rapidly over the
12 course of time, it's always important to look at
13 information and details about events that are provided
14 closer to the time as opposed to later on.

15 MR. MCHENRY: I have nothing further
16 for you. Mr. Franken, for the State, may
17 have some questions.

18 BY MR. FRANKEN.

19 Q I believe you said, Doctor, that the prior
20 exposure, I mean the day of the shooting where they
21 talked about something that was common to them and
22 that they had conversations about before, I believe
23 you said goes to the reliability; is that correct?

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1 A Well, yeah, with assumptions that, you know,
2 all of that is accurate; right. I mean, if we assume
3 that her memory of that is entirely accurate, you
4 know, the fact that she has conversations with him,
5 you know, just prior, you know, minutes prior
6 certainly does go to the reliability and certainly is
7 a factor that if I were a prosecutor I would certainly
8 bring up.

9 Q Okay. Then what I am having a problem with
10 is you are going to testify to factors and variables
11 that occur in the stop, as they call it here,
12 stop-and-rob situation where two people have never met
13 before, a guy comes in, orders a pack of gum and
14 sticks the gun in a clerk's face. What do they have
15 to do with this instance where these people had had a
16 relationship, even if only a business one?

17 A As I said, there are two types of, you know,
18 mistaken ID's. One is mistakingly identifying a
19 stranger, a second stranger, you know, in the place of
20 one, but it's also the other kind of mistaken
21 identification is mistaking a stranger for someone you
22 know. And so I don't necessarily agree with the
23 implicit notion that your question contains, which is

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1 that these factors don't apply in situations where
2 your claim is that it's somebody that I know from the
3 previous time. I believe they do, and I think the
4 research supports that the presence of factors like
5 weapons and stress and so forth impairs accuracy in
6 those kinds of identification as well.

7 Q Okay. And could you enlighten us as to
8 where the research is on a case typical to this where
9 they had prior contact even before the day of the
10 shooting and then they had ten minutes of contact?

11 A Yeah, I can give you specific not only
12 research; but if you -- probably the primary test on
13 this is Elizabeth Loftus' book published in 1980 by
14 Harvard University Press, and you probably got it in
15 your law library.

16 Q I have it.

17 A Which she recounts a specific incident in
18 which a robbery took place at a train depot, I think
19 it was, in which the teller was robbed by someone who
20 came up to him, you know, presuming to buy a ticket.
21 The teller who was robbed claimed that he knew the guy
22 because he had seen the guy before, and that the guy
23 had purchased tickets from him in the past, picked him

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1 out of a photo spread. The police arrested him, but
2 on further investigation found that the guy had an
3 alibi, rather an iron-clad one, so it couldn't have
4 been him. And as it turned out, the phenomena was
5 that the teller had seen the guy at an earlier time
6 and, therefore, had mistakingly transferred his face
7 to the face of the perpetrator. It's unconscious
8 transference.

9 Q Uh-huh.

10 A So there is not only scientific research,
11 there is actually real cases in which this occurred.

12 Q That's antidotal?

13 A That's not to say that that's the most
14 probable version of events, but it can happen. And,
15 you know, as you know, again, I think the role of the
16 expert is to say, yes, you know, if the defense is
17 making, you know, a claim like this based on, you
18 know, certain facts that it has, that we know that the
19 scientific research supports that this is a
20 possibility. This can happen.

21 Q Okay. I know Loftus' book, and it did
22 happen once. But I am asking about the research
23 into --

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1 A Yes, there is research, I think, in that
2 book on unconscious transference, and there is a body
3 of other studies on unconscious transference that have
4 been done in labs around the world. It is a phenomena
5 that we can replicate in the law. Oh, so you have
6 read that incident?

7 Q I read her book.

8 A Okay.

9 Q And also someone sent me a copy of the one
10 that attacked it, which I got to find it somewhere.

11 A I don't know a book which attacked it.

12 Q Yeah, Loftus got attacked when she first
13 started this.

14 A I am not aware of that one. You don't know
15 the author; do you?

16 Q Someone sent it to me. I want to say it was
17 1980.

18 A Yeah, the original publication date was
19 1980.

20 Q Back around there sometime.

21 A I am not familiar with any of them like
22 that.

23 MR. FRANKEN: I have nothing further.

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1 MR. MCHENRY: Anyone else?

2 Doctor, I think that's all we need for
3 the time being.

4 DR. FULERO: Okay. I want to tell you
5 that I don't know if you did this, Jerry,
6 but I went to the post office this morning
7 to sign for a certified letter that turned
8 out to be a subpoena for this morning at
9 9:00 a.m.

10 MR. MCHENRY: Really? Just disregard
11 that subpoena.

12 DR. FULERO: I will bring it with me
13 and assume that the date really is April 9.

14 MR. MCHENRY: You are absolutely
15 correct. I am sure it was a typo --

16 DR. FULERO: Okay.

17 MR. MCHENRY: -- Doctor.

18 DR. FULERO: Regards to you both and
19 look forward to seeing you.

20 MR. MCHENRY: Okay.

21 DR. FULERO: Now, you know, again,
22 Jerry, just stay in close touch, if need be.

23 MR. MCHENRY: I will do that.

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DR. FULERO: Thank you.

MR. MCHENRY: Certainly.

* * * * *

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REPORTER'S CERTIFICATE

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REPORTER'S CERTIFICATE

I HEREBY CERTIFY the above and foregoing is a true and correct transcript of all evidence introduced and proceedings had in the phone conference of the within named case as shown by my stenographic notes taken by me during the phone conference and at the time the evidence was being introduced.



CATHERINE A. PRESLEY, RPR
OFFICIAL COURT REPORTER

OFFICIAL SHORTHAND REPORTERS
MAHONING COUNTY YOUNGSTOWN, OHIO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 APPELLEE :
 :
 vs. : CASE NO. 99-1152
 :
 SCOTT GROUP :
 : DEATH PENALTY CASE
 APPELLANT :
 :

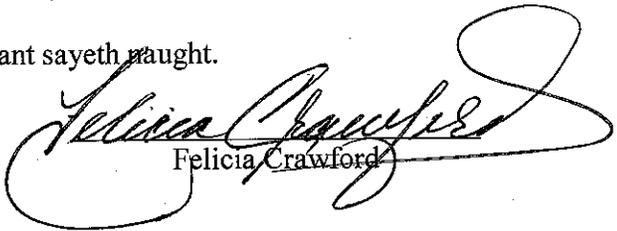
AFFIDAVIT OF FELICIA CRAWFORD
IN SUPPORT OF APPELLANT SCOTT GROUP'S
MOTION TO REOPEN APPEAL

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

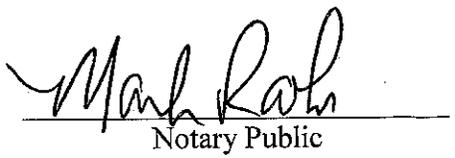
I, Felicia Crawford, after being sworn according to law, state that the following is true:

1. I am employed as an investigator by the Ohio Public Defender's Office.
2. I was assigned by the Ohio Public Defender's Office as an investigator to the capital trial case of *State v. Scott Group* in Mahoning County, Ohio.
3. Mr. Group was tried in March and April of 1999. His appointed attorneys were Assistant State Public Defenders Andrew Love, Jerry McHenry, and Cynthia Yost.
4. I was asked by Mr. Group's federal habeas counsel to review a confidential report that I prepared during my work on Mr. Group's trial. The report is attached to my affidavit.

5. This report memorializes my interview of Ann Agee during my pre-trial investigation of Mr. Group's case. In this report, Ann's name was spelled "Agie".
6. I discussed with Ms. Agee the disappearance and death of her daughter, Charity, in January 1997. According to Ms. Agee, Charity was viewed on a security surveillance tape entering the Downtown Bar on New Year's Eve of 1997.
7. Ms. Agee explained that she sued the Downtown Bar because the proprietor, Sandra Lozier, had served champagne to underage patrons on New Year's eve. Charity was underage in January 1997.
8. Ms. Agee also told me that Charity had a childhood friend named Brian Ferguson. Ferguson would have considered Charity to be like a sister to him, and Ferguson possibly called Charity his sister when he was around other people.
9. This report on Ms. Agee was obtained at the direction of Mr. Group's attorneys. Although this report is not dated, I am certain that my interview of Ms. Agee and this report would have been completed in advance of Mr. Group's trial. I am certain that the information in this report would have been made available to Mr. Group's attorneys in advance of the trial.
10. Further affiant sayeth naught.


Felicia Crawford

Sworn and subscribed in my presence this 21st day of April, 2015.


Notary Public



MARK ROOKS
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES 12/21/18

CONFIDENTIAL ATTORNEY
WORK PRODUCT

Ann Agie

Scott Group

Interviewed by Felicia C. Crawford.

- Ann stated on New Year's Eve of 1996, her 18 year old daughter Charity left her home around 10 p.m. and that was the last time she saw Charity alive.
- Chief detective Tyree reported to Ann that during the early morning hours on January 1, 1997, Charity accompanied Richard Anderson to his home. When the two arrived at the house, they saw Richard's mother in full swing of a party and they proceeded up the stairs to Richard's bedroom. Richard and Charity's blood alcohol levels were extremely high and they began making noise in the bedroom. Upon hearing the noise, Richard's mother went upstairs and told the two to keep their noise level down. The two complied for a brief period and then continued to make noise. Richard intoxicated and thinking that his mother was going to reprimand them again placed his hands around Charity's throat causing her windpipe to collapse. At the time Richard believed that he had covered Charity's mouth.
- Ann believed that Charity's death was an accident. Charity weighed 100 pounds, very petite and intoxicated, therefore Charity was unable to removed Richard's hands from her throat.
- Ann stated that Charity's body was found in a trash bag.
- Chief Tyree told Ann that on one occasion a friend transported Charity's best friend Wendy Clay to Richard's home and that on April 16, 1997 Wendy's body was discovered buried in Richard's backyard. (For additional information regarding Charity and Wendy's death see attachments.)
- Ann stated that Richard's parents both worked at General Motors and that she sued the Anderson because Mrs. Anderson knew what Richard had done and remained silent. (Richard allegedly carried the trash bag, containing Charity's body from his bedroom to the outside. Mrs. Anderson "had to hear the noise.") The Anderson's insurance refused to settle the claim with Ann.
- Ann stated that she also sued the Downtown Bar and the Loziers on separate lawsuits, and that she has had problems in settling the claim because the Youngstown State University owns the Downtown Bar, and not the Loziers.
- Ann stated that the reason for her lawsuit against the Loziers was due to on New Year's Eve, Sandra served champagne to all the bar customers including the underage patrons.
- Ann stated that on January 3, 1997 Chief Tyree found Charity's body and that on the same day he confiscated the Downtown Bar's videotape of people

going in and out of the bar, New Year's Eve. Tyree reported to Ann that the videotape only showed Charity entering the bar but not leaving it.

- Ann stated that the Downtown Bar's patio was closed on New Year's Eve.
- Ann stated that Chief Jimmy Tyree retired and currently resides in McDonald, Ohio.
- Ann recalled that on January 18, 1997 three Youngstown detectives came to her home and asked her if Charity had a brother. Ann responded yes, a stepbrother named Ron. The detectives also asked if Charity worked at a wine shop to which Ann replied "no, no one ever worked at a wine shop." The detective Darryl Martin then showed Ann a series of pictures of young white males "in their early 20's or late teens...but no one over 35." (Later this writer showed Ann the photo array of white males. Scott's picture was included in this photo array given to us in the prosecutor's discovery. Ann stated that the police did not show her the photo lineup and that Scott's picture was not included in the lineup that she was shown.)
- Ann stated that a childhood friend of Charity's, Brian Ferguson would have considered Charity a sister and possibly called Charity his sister when he was around people. Ann described Brian as a tall, blonde haired male.
- Ann stated that Charity never owned a bracelet that had her name engraved on it.
- Ann stated that Charity's female friends were white and that her significant male friends were Black.
- Ann recalled that on one occasion a friend Cheryl introduced her to Ruth and Lisa and that Ruth asked her if she would be willing to talk with Scott. Ann told Ruth yes and visited Scott. Ann stated that during her visit, Scott appeared to be a sincere person. Ann considered herself a "good judge of character."
- Ann stated that she found it very strange that Robert, Jr., and Sandra Lozier never attended any of Scott's hearings. Ann believed that any victim or the victims' families would want to see the perpetrator and hear the verdict/sentence that the perpetrator would receive.
- Ann stated that her friend Heather Newbecker frequented the Downtown Bar.
- Ann is willing to assist Scott in any way that she can.

#77742v1

IN THE SUPREME COURT OF OHIO

Case No. 99-1152

STATE OF OHIO,)
)
 Appellee,)
)
 v.)
)
 SCOTT GROUP,)
)
 Appellant.)

Appeal taken from Mahoning County
Common Pleas Case No. 97-CR-66

Death Penalty case

Application for Reopening Pursuant to
S. Ct. Prac. R. 11.06

AFFIDAVIT OF JILLIAN S. DAVIS, VICKI WERNEKE, AND
JOSEPH WILHELM IN SUPPORT OF APPLICATION FOR REOPENING
PURSUANT TO S. CT. PRAC. R. 11.06(B)(4)

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861 (11th Cir. 1986); *Ragan v. Dugger*, 544 So. 2d 1052 (Fla. Dist. 1 Ct. App. 1989); *Whitt v. Holland*, 342 S.E.2d 292 (W. Va. 1986).

8. Upon our review of the record in Mr. Group's case, we identified several Propositions of Law that were not raised by Mr. Group's previous direct appeal counsel.
9. The undersigned do hereby swear that in our opinion, these Propositions of Law set forth substantial and prejudicial deficiencies in the representation prior appellate counsel provided to Mr. Group. We hereby incorporate the Application for Reopening and the Exhibits, to which this affidavit is attached, in support of our belief. See S. Ct. Prac. R. 11.06.
10. We also believe that Mr. Group was prejudiced by the deficiencies in the representation provided by former appellate counsel in that, if the identified Propositions of Law had been raised, there is a reasonable probability that Mr. Group's convictions and death sentence would have been vacated and appellate relief would have been granted.
11. We are convinced that each Proposition of Law presented in the Application for Reopening is substantive and worthy of full briefing and consideration by this Court.

GOOD CAUSE ARGUMENT

A. Lack of Counsel

12. We have examined the record of proceedings in the Common Pleas Court and this Court in *State v. Group*, and nowhere was he advised of the opportunity to have counsel appointed to represent him in a Motion to Reopen under S. Ct. Prac. R. 11.06.
13. Although in *Morgan v Eads*, 104 Ohio St. 3d 142, 818 N.E.2d 1157 (2004), this Court ruled that there is no right to counsel in proceedings under *State v. Murnahan*, 63 Ohio St.3d 60 (1993), this Court has not-infrequently appointed counsel to represent similarly situated indigent death row petitioners in their *Murnahan* applications. See e.g., *State v. Hale*, 119 Ohio St. 3d 1459, 894 N.E.2d 53 (2008) (Table); *State v. Frazier*, 93 Ohio St. 3d 1462, 756 N.E.2d 1237 (2001) (Table); *State v. Woodard*, 93 Ohio St. 3d 1496, 758 N.E.2d 1147 (2001) (Table); *State v. White*, 88 Ohio St. 3d 1439 (2000); *State v. Brooks*, 90 Ohio St. 3d 1495, 739 N.E.2d 1157 (2000) (Table); *State v. Getsy*, 87 Ohio St. 3d 1471 (1999).
14. In fact, this Court has previously accepted the lack of counsel as limited grounds for good cause. *State v. Fox*, 83 Ohio St. 3d 514, 515 (1998). In *Fox*, the Court rejected an unlimited extension of time due to the lack of counsel. *Id.* To deny Mr. Group a finding of 'cause' based upon his lack of counsel would render a unique injustice of denying Mr. Group the opportunity to exhaust and remedy his constitutional right to effective assistance of appellate counsel.

15. The United States Supreme Court has held that ineffective assistance of post-conviction counsel may be cause to excuse procedural default in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Similarly, since the *Murnahan* application is a post-conviction process, and Mr. Group did not have counsel at all in the post-conviction proceeding, under *Martinez*, his lack of counsel may be cause for failing to timely file, especially where, as here, *Murnahan* was the first and only opportunity to raise ineffective assistance of appellate counsel.

PROPOSITION OF LAW NO. 1

Appellate Counsel is ineffective when counsel fails to allege the ineffective assistance of trial counsel based on trial counsel's failure to present an expert witness to develop evidence about the unreliability of eyewitness identifications.

16. Sandra Lozier had been shot twice in the head when she identified Scott Group as her husband's killer and her assailant. The trial court appointed an expert on eyewitness identification on defense motion in April 1999. On April 7, 1999, counsel proffered the testimony of Dr. Solomon Fulero by phone. Transcript of Proffer, Ex. B to Application to Reopen, at p. 1. Dr. Fulero proffered that he would testify about memory and factors that enter into identification. *Id.* at p. 4-5. In this case he would testify regarding unconscious transference and various other factors influencing memory. *Id.* at p. 7. There was no explanation as to why he was not called.
17. The Supreme Court has acknowledged the dangers inherent in eyewitness identification and the specific danger of suggestive influences that go along with pretrial eyewitness identification. *U.S. v. Wade*, 388 U.S. 218, 235 (1967). The Sixth Circuit Court of Appeals has also found that, "eyewitness misidentification accounts for more false convictions in the United States than any other factor." *Ferensic v. Birkett*, 501 F.3d 469, 478 (6th Cir.2007). In *Ferensic*, the court went on to explain that eyewitness identification expert testimony is "universally recognized as scientifically valid and of 'aid to the trier of fact' for admissibility purposes." *Id.* at 482 (quoting *United States v. Smithers*, 212 F.3d 306, 315 (6th Cir.2000)). See also *Jackson v. Bradshaw*, 681 F.3d 753 (6th Cir. 2012).
18. In *State v. Madrigal* (2000), 87 Ohio St. 3d 378, this Court rejected a defendant's claim that counsel was ineffective for failing to retain an eyewitness identification expert because the claim was purely speculative, there being no indication of what the expert's testimony would be. Mr. Group's case is distinguishable from *Madrigal* in that in Mr. Group's case, there was record evidence of what the testimony would be and it would have been greatly helpful to rebut Mrs. Lozier's eyewitness identification.
19. For example, Dr. Fulero would have testified that memory is both reconstructive and elaborative and it changes over time as an individual has time to think about the identification and gets additional information; he would have testified about how various factors influence memory, and how there is very little relationship between the confidence with which the identification is made and the accuracy of it; he would have explained the phenomenon of unconscious transference, where a victim may feel certain

that she knew her attacker before the attack, but is mistaken. Transcript of Proffer, Ex. B to Application to Reopen at p. 4-9. Moreover, Mrs. Lozier's testimony was assailable. For starters, she suffered a major head trauma from a gunshot wound. Mrs. Lozier testified that she was shot by the Lozier's regular Ohio Wine delivery man but she claimed that she did not know his name. TR. 2613. However, Defendant's Trial Exhibit B is a photograph depicting Mr. Group in his Ohio Wine work shirt. His name, "Scott," plainly appears on right front part of that shirt. Further, Mrs. Lozier testified that the assailant was about Robert Lozier's height only thinner. TR. 2630. But Mr. Group weighed about 190 pounds. He was not thinner than Robert Lozier, who weighed 175 pounds according to the Coroner's Forensic Autopsy Report, State's Trial Ex. 42. There is a reasonable probability that testimony from an expert such as Dr. Fulero would have undermined the jury's confidence in Mrs. Lozier's identification of Mr. Group.

20. Counsel had a duty to exercise reasonable professional skill and judgment to investigate and present a proper expert on eyewitness identification. Trial counsel simply proffered the witnesses testimony without ever putting him on the stand and allowing the jury to hear his testimony. Trial counsel's lack of skill and judgment was clear from the record itself.
21. If appellate counsel had raised this issue on appeal, there is a reasonable likelihood that this Court would have reversed this matter for a new trial and sentencing. *Evitts*, 469 U.S. 387; *Strickland v. Washington*, 466 U.S. 668 (1984). Mr. Group was prejudiced by the failure of appellate counsel.

PROPOSITION OF LAW NO. 2

Appellate counsel is ineffective for not alleging the ineffective trial counsel based on trial counsel's prejudicially deficient opening statement.

22. While *Strickland* provides great leeway to counsel for matters of trial strategy, misleading the jury in opening statement by citing numerous points in the state's case that would be disproven by other evidence, and then failing to present that other evidence cannot be judged to fall under that *Strickland* rubric.
23. Counsel assured the jury in opening statement that the evidence would show the following:
 - Bonnie Donatelli, who testified against Mr. Group at trial, had "an ax to grind" because she "wanted to date Scott in the past." TR. 2531. Ms. Donatelli testified on cross examination that she did not have an ax to grind with Mr. Group. TR. 2681. She testified that she never had a relationship with him and never wanted to have a relationship. TR. 2683, 2685.
 - Mr. Group's Fila gym shoes, which were seized from him by the police on January 18, 1997, sat in a police storage locker for seven months before being sent out for testing to BCI. In fact, the shoes were sent to the BCI lab just five days after being taken from Mr. Group. TR. 3710.

- Adam Perry had been bragging to various people in the county jail that he “was going to set Scott up.” TR. 2536. In fact, no testimony supported this assertion. TR. 3001-02; 3017-18; TR. 3849-51.
 - The third bullet found at the crime scene was a .22 caliber. TR. 2541. This bullet was found by the bartender, Mark Thomas, and immediately turned over to the police at the scene. TR. 2948-49. However, Nancy Bulger with BCI testified that all three bullets came from the same weapon, and they were all either .38, .357, or 9mm. TR. 3072.
24. Trial counsel misled the jury in his opening statement, stating that the evidence would show one thing, when in fact, he presented no evidence on that issue. “It is long-standing precedent that the state may comment upon a defendant’s failure to offer evidence in support of its case,” *State v. Collins*, 89 Ohio St. 3d 524 (2000), and the state would have had every right to comment on Mr. Group’s failure to present evidence on a theory raised in opening statement. *State v. Harris*, Case No. 87915, WL 416701 *1 (Ohio App. Dist. 2007).
 25. This is not a case where defense counsel made the decision not to make an opening statement at all. That type of decision could easily be attributed to a tactical decision which would probably not rise to the level of ineffective assistance. *State v. Williams*, 74 Ohio App. 3d 686, 700 (1991). This is a case where trial counsel gave false and misleading information in the opening statement. This would never constitute a tactical decision on trial counsel’s part.
 26. Failure to present what counsel promised in opening statement is not only unreasonable, but was prejudicial under the circumstances. *English v. Romanowski*, 602 F.3d 714, 729 (6th Cir. 2010) (citing *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988)) (finding IAC prejudice based in part on counsel’s failure to present a witness as promised in opening statement, noting that, “little is more damaging than to fail to produce important evidence that had been promised in an opening.”); *see also United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 259 (7th Cir. 2003) (finding unfulfilled promise by defense counsel in opening caused prejudicial negative inference as to defendant and defense counsel’s credibility).
 27. Counsel was obligated to use their professional skills and judgment in presenting a defense. Instead, he unreasonably misled the jury, making unfulfilled promises in opening statement, resulting in prejudice to Mr. Group’s defense. This could not possibly be a strategic decision, and constitutes ineffective assistance of counsel.
 28. If appellate counsel had raised this issue on appeal, there is a reasonable likelihood that this Court would have reversed this matter for a new trial and sentencing. *Evitts v. Lucy*, 469 U.S. 387 (1985); *Strickland*, 466 U.S. 668. Mr. Group was prejudiced by the failure of appellate counsel.

PROPOSITION OF LAW NO. 3

Appellate counsel is ineffective when counsel fails to challenge the admission into evidence of prejudicial “other acts” evidence.

29. Patty Nellis, an employee of Ohio Wine, was permitted to testify for the state about money that had come up missing from Mr. Group’s route, about a month prior to the murder TR. 2788. She testified that Mr. Group was approximately \$1,300.00 short from the route. TR. 2789. No one was ever charged with the theft. Mr. Group was not fired or otherwise disciplined for the theft. However, the testimony made it seem like Mr. Group would have a motive for the robbery to replace the missing money. Counsel objected to the testimony and put the objection on the record, arguing that the testimony was neither relevant nor probative, but was highly prejudicial. TR. 2851.
30. The trial court abused its discretion in admitting this evidence and its decision was unreasonable, arbitrary and unconscionable. *Blakemore v. Blakemore*, (1983) 5 Ohio St. 3d 217.
31. Evidence of other acts which are wholly independent of the crime charged is generally inadmissible. *State v. Thompson*, (1981) 66 Ohio St.2d 496, 497. In that vein, Evid. R. 404(B) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
32. Evidence of other crimes committed by the accused either before or after the crime charged is inadmissible to show a propensity to commit crimes. *State v. Broom*, 40 Ohio St. 3d 277 (1988), paragraph one of the syllabus. Further, the other act must not be too remote and must be closely related in time and nature to the offense charged. *State v. Burson*, 38 Ohio St. 2d 157, 159 (1974). If the act is too distant in time or too removed in method or type, it has no probative value. *State v. Henderson*, 76 Ohio App. 3d 290, 294 (12th Dist.1991).
33. The state never argued the relevance of the Nellis testimony, simply stating that “It’s no coincidence that the theft occurred . . . on a Thursday, which is a day for deliveries to the Downtown Bar,” and argued it was not prejudicial. TR. 2852. However, the link between the theft and the murder was completely tenuous, since it happened more than a month before the crime. This testimony is not relevant under any of the possible exceptions to the rule of 404(B) or this Court’s jurisprudence. Moreover, the evidence prejudiced Mr. Group’s Due Process right to a fair trial. U.S. CONST. amend. XIV.
34. If appellate counsel had raised this issue on appeal, there is a reasonable likelihood that this Court would have reversed this matter for a new trial and sentencing. *Evitts*. 469 U.S. 387. Mr. Group was prejudiced by the failure of appellate counsel.

PROPOSITION OF LAW NO. 4

Appellate counsel is ineffective when counsel fails to raise error from trial counsel's prejudicially deficient cross-examination of a State's key witness.

35. Trial counsel was ineffective in his questioning of the lead investigator, Detective Martin. Appellate Counsel's failure to raise the issue of counsel's ineptitude on appeal amounted to ineffective assistance of appellate counsel.
36. The investigation of the Downtown Bar homicide was marked by numerous questionable omissions, if not simply poor police work. Therefore, it was necessary for trial counsel to raise these omissions to the jury. However, in this instance counsel actually cross-examined the detective to the point of leading the jury to believe that, had the Youngstown Police Department conducted a more thorough investigation, it would have found incriminating evidence in Mr. Group's apartment.
37. Through leading questions, Mr. Group's counsel basically forced the detective to testify that, although the Youngstown police got a warrant to search Mr. Group's car, no one searched his apartment and therefore did not find money, bloody clothing, or a weapon. TR. 3225. The implication was that had the apartment been searched, the evidence would have been found. There can be no strategic reason for leading a witness to essentially suggest the presence of incriminating evidence where none previously existed.
38. Counsel had a duty to exercise reasonable professional skill and judgment to conduct a skillful cross-examination of the investigating detective. Trial counsel's lack of skill and judgment was clear from the record itself.
39. If appellate counsel had raised this issue on appeal, there is a reasonable likelihood that this Court would have reversed this matter for a new trial and sentencing. *Evitts*, 469 U.S. 387; *Strickland*, 466 U.S. 668. Mr. Group was prejudiced by the failure of appellate counsel.

PROPOSITION OF LAW NO. 5

Appellate counsel is ineffective for failing to raise the ineffective assistance of trial counsel where trial counsel's preparation of the defendant's testimony was prejudicially deficient.

40. It was obvious from the record that Mr. Group was poorly prepared for his testimony. Mr. Group's credibility was terribly undermined by counsel's obvious failure to prepare him properly. Counsel apparently was unaware that Mr. Group had previously pleaded guilty to conspiracy to commit robbery, and Mr. Group testified on direct examination that he had never robbed anyone. The prosecutor jumped on this and was quick to point out the conspiracy plea on cross-examination. TR. 3432, 3450-52.
41. This made Mr. Group look terrible in front of the jury. He appeared evasive and dishonest. If counsel had properly prepared Mr. Group, he would have discussed his guilty plea on direct examination and the prosecutor would have had no reason to pursue additional questioning. That is one of the most basic of trial tactics when dealing with a

witness with a criminal record. No strategic decision can support counsel's actions in this situation. Trial counsel's failure to do so was unreasonable under the circumstances.

42. Trial counsel's failures also were prejudicial to Mr. Group. It made him appear entirely untrustworthy, and further infected his alibi defense. Because the jury totally lost faith in him based on the prosecutor's cross-examination, it could not take his alibi defense seriously. If counsel had been prepared to direct Mr. Group's examination, he would have raised the prior conspiracy plea with him on direct examination to defuse the issue and keep the prosecutor from undermining Mr. Group's credibility with what should have been an obvious matter to counsel. *See Rompilla v. Beard*, 545 374, 390-95 (2005) (ineffective counsel based on defective mitigation investigation of defendant's prior record where circumstances should have made it apparent to trial counsel that defendant's prior record would become an issue and would be used by prosecutor).
43. Counsel had a duty to exercise reasonable professional skill and judgment to prepare Mr. Group to testify at his trial and to investigate to learn of his client's criminal convictions. Trial counsel's lack of skill and judgment was clear from the record itself.
44. If appellate counsel had raised this issue on appeal, there is a reasonable likelihood that this Court would have reversed this matter for a new trial and sentencing. *Evitts*, 469 U.S. 387; *Strickland*, 466 U.S. 668. Mr. Group was prejudiced by the failure of appellate counsel.

PROPOSITION OF LAW NO. 6

Appellate Counsel is ineffective where counsel fails to allege the ineffective assistance of trial counsel based on trial counsel's failure to develop testimony about an alternate suspect.

45. Sandra Lozier testified at trial that the person who shot her and her husband told them his actions were "not about the money." TR. 2596. Rather, that man said he was there because a girl (Charity Agee) had disappeared from the Downtown Bar, and that he was the brother of the missing girl. TR. 2596-97. Robert told the man the Loziers were "working with the police" to solve Charity's murder. TR. 2599. But the man then shot the Loziers, killing Robert and leaving Sandra for dead.
46. Charity Agee's mother, Anne Agee, visited Mr. Group in jail. Mr. Group testified that she told him that Brian Ferguson had grown up with her daughter. Mr. Group testified he was aware that Brian Ferguson may have had information about these crimes. TR. 2523.
47. Prior to trial, OPD investigator Felicia Crawford interviewed Ms. Agee. When asked if Charity had any brothers or sisters, Ms. Agee told her that Charity had a childhood friend named Brian Ferguson. Ferguson would have considered Charity to be like a sister to him, and Ferguson possibly called Charity his sister when he was around other people. Affidavit of Felicia Crawford Ex. C to Application to Reopen at ¶8.

48. Mr. Group said he wrote to Adam Perry, an eventual jailhouse informant, and tried to enlist Perry's help with the question about Ferguson's possible involvement. Specifically, Mr. Group said his "two step plan", referred to in State's Exhibit 37, was to have Perry get Ferguson drunk and take him by Sandra's house in order to prompt Ferguson to talk about his possible involvement in the crimes at the Downtown Bar. TR. 3521-22.
49. When Anne Agee testified, trial counsel never asked her about Brian Ferguson. Counsel only asked whether Charity knew Mr. Group. If counsel had inquired about Ferguson, this would have been some corroboration for Mr. Group's testimony regarding his two-step plan.
50. Counsel had a duty to exercise reasonable professional skill and judgment to bring out the possibility of other suspects where that possibility existed. Trial counsel's lack of skill and judgment was clear from the record itself.
51. If appellate counsel had raised this issue on appeal, there is a reasonable likelihood that this Court would have reversed this matter for a new trial and sentencing. *Evitts*, 469 U.S. 387; *Strickland*, 466 U.S. 668. Mr. Group was prejudiced by the failure of appellate counsel.

PROPOSITION OF LAW NO. 7

Appellate counsel is ineffective where counsel fails to raise serious defects in the culpability phase instructions as error.

52. A capital punishment scheme is only constitutional in so far as it narrows the class of offender eligible for the death penalty. The jury instructions must limit the jury's discretion to insure that the death penalty is imposed only for a limited class of crimes. "In the eligibility decision, the Supreme Court emphasizes the 'need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition.' *Buchanan v. Angelone*, 522 U.S. 269, 275-76 (1998)." *Jamison v. Collins*, 100 F. Supp. 2d 647, 720 (S.D. Ohio 2000).
53. The trial court's instruction to the jury on "purpose" was unconstitutional in that it defined the term as supporting strict liability for the crime. The court instructed, "The defendant's responsibility is not limited to the immediate or most obvious result of the defendant's act. The defendant is also responsible for the natural and foreseeable consequences or results that follow, in the ordinary course of events, from the act or failure to act." TR. 4158. The court further instructed, "When the central idea of the offense is a prohibition against and forbidding of conduct of a certain nature, a person acts purposely if his specific intention was to engage in conduct of that nature, regardless of what he may have intended to accomplish by his conduct." TR. 4156-57.
54. The trial court's jury instruction on purpose violated Mr. Group's Sixth and Fourteenth Amendment rights to a fair trial and Due Process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). The provided instruction essentially negated any intent requirement and

would lead the jury to believe that Mr. Group was responsible for everything that occurred once he started events into motion, whether the result was intended or not. A reasonable jury could have interpreted this instruction as “conclusive,” finding intent based on the proof of Mr. Group’s voluntary actions. *Sandstrom v. Montana*, 442 U.S. 510, 517 (1979). That instruction amounts to a strict liability *mens rea* and does nothing to limit eligibility for a capital sentence.

55. This error was obvious from the record. If appellate counsel had raised this issue on appeal, there is a reasonable likelihood that this Court would have reversed this matter for a new trial and sentencing. *Evitts*, 469 U.S. 387; *Strickland*, 466 U.S. 668. Mr. Group was prejudiced by the failure of appellate counsel.

PROPOSITION OF LAW NO. 8

Appellate counsel is ineffective where counsel fails to raise trial counsel’s ineffectiveness based on the failure to challenge flawed jury instructions.

56. Similarly, trial counsel was ineffective in failing to object to the unconstitutional jury instruction. For the reasons set forth in paragraphs 51-54, above, the instruction on purpose given to the jury was unconstitutional. It was counsel’s duty to raise an objection, but instead he let the instruction stand. The erroneous jury instruction constituted plain error. Because trial counsel failed to object and appellate counsel failed to raise the issue, the error was not reviewed by this Court.
57. Counsel had a duty to exercise reasonable professional skill and judgment to object to the erroneous jury instruction and insure that Mr. Group’s jury considered the proper *mens rea* for capital murder. Trial counsel’s failure to object was not a result of strategy – rather, it was simple carelessness and unreasonable under any circumstances, but particularly when their client was on trial for his life. Trial counsel’s lack of skill and judgment was clear from the record itself.
58. If appellate counsel had raised this issue on appeal, there is a reasonable likelihood that this Court would have reversed this matter for a new trial and sentencing. *Evitts*, 469 U.S. 387; *Strickland*, 466 U.S. 668. Mr. Group was prejudiced by the failure of appellate counsel.

PROPOSITION OF LAW NO. 9

Appellate counsel performs ineffectively where counsel fails to adequately brief issues to this Court on appeal.

59. In Mr. Group’s Sixth Proposition of Law, counsel simply listed, in summary fashion, five bullet points regarding ineffective assistance of trial counsel and in a footnote stated that “this Proposition of Law has been inserted into Appellant’s Merit Brief at the express insistence of Appellant.” See Appellant’s Merit Brief at 30-31, & n.1. Appellate counsel did not attempt to develop Mr. Group’s proposed Sixth Amendment claims legally or factually. So in effect, appellate counsel disavowed responsibility for presenting those claims in a professionally reasonable manner. This goes beyond ineffectiveness;

counsel's inclusion of that footnote and the non-existent argument effectively sabotaged this meritorious claim. Appellate counsel violated their essential duty to advocate Mr. Group's case. *See Strickland*, 466 U.S. at 688.

60. As the result of appellate counsel's substandard representation, this Court struggled to make sense of the Sixth Amendment claims that Mr. Group wanted in his appeal. For example, this Court said: "Since Group does not explain what he means by 'ballistic DNA,' we cannot evaluate this claim." *Group*, 98 Ohio St. 3d at 269. Further, this Court stated: "Group does not identify any mistakes made by defense counsel as a result of allegedly inadequate preparation." *Id.* at 270. This Court also explained that the record failed to support several of the claims. *Id.* at 269 ("But Group fails to show either prejudice or deficient performance."); *id.* at 270 ("As to prejudice, no one can say how a DNA expert from another laboratory would have testified."); *id.* ("Group also suggests that his counsel did not prepare adequately before cross-examining the state's DNA expert witness.").
61. Appellate counsel had a duty to advocate for Mr. Group's cause. *See Strickland*, 466 U.S. at 688. But the brief filed by counsel was devoid of advocacy. Appellate counsel did not explain the factual or legal bases for the claims that Mr. Group wanted in his brief. Appellate counsel apparently added the claims to Mr. Group's brief in the same way that Mr. Group presented them to counsel. Indeed, the claims were presented in a manner so as to make them appear feckless. Appellate counsel clearly distanced themselves from the claims that Mr. Group wanted to have included in the brief. Appellate counsel told this Court that some claims were only being filed because Mr. Group insisted on their inclusion in the brief; and counsel made no efforts to develop those claims.
62. True, some of Mr. Group's proposed claims depended on evidence beyond the record to show prejudice. But appellate counsel had an obligation to inform Mr. Group that some of his claims depended on evidence beyond the record and such claims had to be presented on post-conviction review. Appellate counsel had a duty to consult with Mr. Group and to keep him informed about his appeal. *See id.* This included the need to inform Mr. Group as to the essential differences between post-conviction claims and direct appeal claims. Not only did appellate counsel fail to inform Mr. Group as to this distinction, appellate counsel also failed to use professional judgment by including off-the-record claims such as the need to call additional lay witnesses or expert witnesses where prejudice or deficient performance could not be established on the record. *See Group*, 98 Ohio St. 3d at 269.
63. One claim that could have been litigated on the record was trial counsel's inadequate cross-examination of the State's DNA expert, Jennifer Reynolds.
64. During opening statements, trial counsel promised the jury it would hear testimony from a defense DNA expert and that expert's testimony would highlight "artifacts" and "contamination" that would render the State's DNA evidence "moot." TR. 2533-34. But rather than hearing from a defense expert—with testimony about artifacts rendering the State's DNA evidence moot—the jury instead considered only trial counsel's anemic

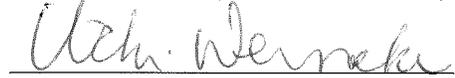
cross-examination of Reynolds. Trial counsel made an attempt to explore with Reynolds the issue of contamination and artifacts but that attempt proved fruitless. Trial counsel asked Reynolds how contamination affected the collection of DNA. But Reynolds said: “Um, I’m actually not familiar with collection techniques. I’ve never done it myself, so I—I wouldn’t—hesitate to say whether it’s prone to it or not prone to it.” TR. 3330-31. Reynolds simply said “[s]ure” to the question whether “contamination of evidence occurs?” TR. 3331.

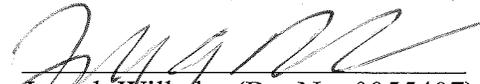
65. Trial counsel then asked about contamination versus degradation of DNA, and asked “would it be fairly easy for that to be contaminated either from the crime scene or from the investigator just from looking and handling something?” But Reynolds could not follow the question: “And for this are you talking about—what kind of contamination are you asking me about?” TR. 3332. Trial counsel’s follow up question about contamination was no clearer to Reynolds: “And again, is it contamination from another human is what you’re asking me?” TR. 3333. And an additional attempt by trial counsel to explore the “artifact” issue that was raised in counsel’s opening statement went nowhere. Reynolds said: “Our conclusions will say the DNA from sample X contains DNA from more than one person. That is a statement of our conclusions. That is certainly not said in this report.” TR. 3340-42.
66. Trial counsel made an unfulfilled, bold promise to the jury about a defense DNA expert that would point out contamination so serious that it would render the State’s DNA evidence moot. Trial counsel produced no expert and trial counsel then struggled lamely while cross-examining Reynolds to develop such evidence. Instead, trial counsel only confounded Reynolds with questions that Reynolds could not follow. The record shows that trial counsel was not up to the task of questioning Reynolds. Appellate counsel should have thus more fully developed this claim in Mr. Group’s merit brief.
67. Another issue that appeared on the record was trial counsel’s failure to request a jury view until mid-way through trial. The court asked at the beginning of trial whether any of the parties wanted a jury view and neither did. TR. 3139. Counsel believed that the request was not resolved. TR. 3137. Counsel went on to argue how important the jury view would be, as the jury could still see the bare wall where the shooting occurred and the office, which was still arranged the way it had been at the time of the shooting. TR. 3137-38. In addition, showing the distances of where the shooting occurred would have shown that Mr. Group would have been covered in blood had he been the shooter. Failure to make a timely request for a jury view may constitute ineffective assistance of counsel. *State v. Biggers*, 118 Ohio App. 3d 788, 791 (10th Dist. 1997); *Strickland*, 466 U.S. 668.
68. In addition, as any claim not raised and exhausted before the state court may be defaulted in federal habeas review, it is counsel’s duty to raise significant issues in a capital case. *Jamison v. Collins*, 100 F. Supp. at 736 n.15. There can be no strategic reason to fail to fully brief a core issue like ineffective assistance of trial counsel, as doing so may well see your client executed.

69. This ineffective assistance of trial counsel issue was significant, and plainly stronger than many of those that counsel presented on appeal. In addition, Mr. Group had very little contact with appellate counsel, and never met to go over possible issues. The decision to give this issue such a cursory treatment was not a reasonable appellate strategy by any means. Judging from the weakness of the rest of the brief, there was no evidence that appellate counsel made a thorough review of the facts and the record. This was a death penalty case, and it was imperative that appellate counsel review the record and raise non-frivolous issues on appeal because otherwise those issues would be defaulted in habeas review. See *Mapes v. Coyle*, 171 F.3d 408, 427-28 (6th Cir. 1999); 1989 ABA Guidelines, Section 11.9.2 Duties of Appellate Counsel, Commentary (“Traditional theories of appellate practice notwithstanding, appellate counsel in a capital case should not raise only the best of several potential issues. Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later. When a client will be killed if the case is lost, counsel (and the courts) should not let any possible ground for relief go unexplored or unexploited.”)
70. If appellate counsel had raised this issue on appeal, there is a reasonable likelihood that this Court would have reversed this matter for a new trial. *Evitts*, 469 U.S. 387. Mr. Group was prejudiced by the failure of appellate counsel.

FURTHER AFFIANTS SAYETH NOT.


 Jillian S. Davis (Bar No. 0067272)


 Vicki Werneke (Bar No. 0088560)


 Joseph Wilhelm (Bar No. 0055407)

Sworn and subscribed before me this 3rd day of June, 2015.


 Notary Public

SARA L. BURNHAM
 NOTARY PUBLIC • STATE OF OHIO
 Recorded in Cuyahoga County
 My commission expires Aug. 3, 2019