Supreme Court of Ohio Clerk of Court - Filed July 14, 2016 - Case No. 2003-0647

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	**Case No. 2003-0647**
Appellee,	:	**Trial Court Case No. 02CR-1153**
-vs-	:	**Death Penalty Case**
JAMES CONWAY, III,	:	On Appeal From The Court Of Common Pleas Of Franklin County, Case No. 02CR1153
Appellant.	:	

Appellant's Application For Reopening Pursuant To S.Ct.Prac.R. 11.06 – Volume 1

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Counsel for Appellant James T. Conway, III

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Appellant moves this Court to grant this Application for Reopening under S.Ct.Prac.R. 11.06 and *State v. Murnahan*, 63 Ohio St.3d 60, 583 N.E.2d 1204 (1992). Appointed counsel did not provide Appellant with effective assistance of counsel in his direct appeal of right to this court. Appellant has attached a Memorandum in Support and affidavit of counsel. (Exhibit A).

Respectfully submitted,

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Memorandum in Support

Appellant requests this Court to consider and grant this application even though he is filing it outside the ninety days proscribed by this Court's applicable Rule. S.Ct.Prac.R. 11.06(A). Conway is aware that this Court previously ruled on application for reopening in this case. *State v. Conway*, 110 Ohio St.3d 1461, 2006-Ohio-4288, 852 N.E.2d 1211.

This Court should not treat this pleading as a successor application as the term is normally understood. Conway is not identifying different propositions that appellate counsel failed to raise other than those he raised in his initial application. Instead, Conway is submitting additional evidence, recently discovered, that he was precluded from submitting in support of his initial application.

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appeal. Barstow had previously interned for the trial judge. Exhibit B, p. 27. Barstow had begun to accept appointments in criminal cases in 1999 and 2000. *Id.* at p. 13. He had been counsel of record in approximately twenty appeals (including civil cases) at the time of Petitioner's direct appeal. *Id.* at p. 20. Barstow had previously represented on direct appeal other individuals who had been sentence to death. *Id.* at p. 14. Barstow was also counsel of record in another capital appeal during the time that he represented Petitioner and that appeal was proceeding on a similar time schedule. *Id.* at pp. 15, 20.

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Graeff agrees with the ABA standards except that counsel a) does not have an obligation to re-investigate the case (Exhibit C, pp. 10-11), and b) should winnow the issues (*id.* at pp. 15, 34).

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Appellate counsel did not file a reply brief in response to the State's merit brief. Exhibit B, p. 67. They also did not file a motion for reconsideration after this Court rendered its decision. *Id.* at p. 69.

D. Appellate Counsel Failed To Raise Arguably Meritorious Issues.

Appellate counsel failed to raise the following three propositions of law in Appellant's briefing:

PROPOSITION OF LAW NO. I

TRIAL COUNSEL'S ACTS AND OMISSIONS DEPRIVED APPELLANT OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. U.S. Constitution, Sixth and Fourteenth Amendments.

Appellate counsel in the Ohio Supreme Court raised three propositions involving ineffective assistance of counsel. (Propositions of Law Nos. IV, VII, and XIX). However appellate counsel failed to raise six additional aspects of counsel's performance that prejudiced Petitioner.

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obligation on the part of trial counsel to even file a motion to suppress." Exhibit C, p. 40.

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Trial counsel called to testify firearms expert, Jeff Hilson. (Tr. 2189). The prosecution voir dired the expert concerning his qualifications. (Tr. 2190). The trial court ruled that Hilson would be permitted to testify. (Tr. 2372). However, defense counsel never called Hilson to testify. His testimony would have called into question Ronald Trent's testimony on an issue critical to this case.

Trent testified that Appellant told him that he (Conway) "a .45 out of the trunk of the car, asked his brother to point out who it was [that had stabbed him]. He cocked the .45 to make sure it was loaded and started shooting at the guy. The guy was running away from him, he started shooting at him. He pulled somebody in front of him, but he said he kept shooting anyway, it's a .45 and it will go through both of them." (Tr. 1876). The prosecution repeatedly referenced this statement in closing argument. (Tr. 2609-10, 2620, 2626, 2544).

Hilson could have addressed the issue of a .45 caliber round having the penetrating capability claimed by Trent. In addition, Hilson could have presented an explanation as to how the .45 caliber pistol could have been so readily discharged. Trial counsel informed the trial court they wanted Hilson to address this issue in his testimony. (Tr. 2197).

Barstow believes that if the defense counsel thought that this testimony that Petitioner kept shooting was prejudicial, counsel should have called a ballistics expert to testify. Exhibit B, pp. 71-72. Graeff believes that counsel should not have called a ballistics expert because the expert's testimony would have only served to emphasize Trent's testimony concerning Petitioner's purported statement. Exhibit C, p. 44.

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An expert retained by the defense, James Cope, prepared a computer simulation of the shooting. Trial counsel did not provide discovery as to the simulation and the report of the expert. (Tr. 2063). The trial court ruled that because counsel had not timely provided discovery, counsel could not use the computer simulation as substantive evidence. (Tr. 2070, 2526). Trial counsel failed to proffer the qualifications of the expert and his testimony. Instead, they only proffered the contents of Exhibits 34-38 and the existence of the videotape. (Tr. 2220-2221).

Both Graeff and Barstow believe that the trial counsel's performance was deficient because defense counsel did not provide the required discovery, leading to the court's prohibition of the testimony of the expert and the simulation he prepared for use at trial. Exhibit B, p. 62; Exhibit C, p. 46.

5. Trial counsel failed to excuse a death-prone juror during voir dire.

During voir dire, prospective juror Frank Finegold initially stated that he was "…in favor of the death penalty." (Tr. 525). Upon further questioning, Finegold was asked "if everything was found beyond a reasonable doubt, then death would be the appropriate penalty?" Finegold agreed with that statement. (Tr. 540).

Barstow does not believe that Finegold's views on the death penalty disqualified him from sitting on the jury. Exhibit B, p. 65. Graeff, if he had been trial counsel, would have moved the court to excuse Prospective Juror Finegold because he could not have fairly considered a sentence of less than death. Exhibit C, p. 57-58.

6. Trial counsel failed to object to an infirm mitigation instruction.

Trial counsel failed to object to the trial court's instruction regarding the course-of-conduct capital specification. (Tr. 2646). The trial court's instruction required the jury to apply the doctrine of transferred intent to the aggravated murder charge and the aggravating

circumstance of course of conduct.

PROPOSITION OF LAW NO. 2

R.C. 2949.22(A)(1) MANDATING LETHAL INJECTION AS THE MEANS OF EXECUTION IN OHIO, IS UNCONSTITUTIONAL.

R.C. 2949.22 (B)(1) violates the due process protection of life, and the Eighth Amendment because lethal injection inflicts torturous, gratuitous, and inhumane pain, suffering, and anguish upon the person executed. U.S. Const. amends. VIII, XIV; Ohio Const. art. I §§ 9, 10, 16; *In Re Kemmler*, 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 (1890).

PROPOSITION OF LAW NO. 3

PROSECUTORIAL MISCONDUCT AT APPELLANT'S TRIAL RENDERED TRIAL COUNSEL INEFFECTIVE.

Ronald Trent testified that Conway said that he kept firing because he knew that the bullets would pass through Gervais and hit his intended target Mandel Williams. *See* Proposition of Law No. 1, sub-part 3, *supra*. The prosecution did not provide this statement in discovery. As a result, defense counsel was not prepared to address this portion of Trent's testimony. Tr. 2926-29. The prosecution was in possession of Trent's statements in which he claimed that Appellant knew that a .45 could pass through one person and strike another person was documented and the statement should have been disclosed to Conway's trial attorneys. The failure to disclose the statement constituted prosecutorial misconduct. *Berger v. United States*, 295 U.S. 78 (1935). This failure rendered Conway's trial attorneys ineffective because they were not able to prepare for Trent's testimony. *Strickland v. Washington*, 466 U.S. 668 (1984). The prosecution's failure to disclose this statement violated Conway's rights to a fair trial and the effective assistance of counsel as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the U.S. Constitution.

Conclusion

Wherefore Appellant Conway requests that this Court consider this application in

conjunction with his prior application, rule that Conway was denied effective assistance of counsel on his direct appeal to this Court, or in the alternative grant Conway an evidentiary hearing, after which it rules that Conway was denied effective assistance of counsel in this Court.

Respectfully submitted,

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Counsel for James T. Conway III

Certificate Of Service

I hereby certify that a true copy of the foregoing *Appellant's Application For Reopening Pursuant To S.Ct.Prac.R. 11.06* was forwarded by first-class, postage prepaid to Steven L. Taylor, Chief Counsel, Appellate Division, Office of the Franklin County Prosecuting Attorney, 373 South High Street, 13th Floor, Columbus, Ohio 43215, on this 14th day of July, 2016.

/s/ Kort W. Gatterdam

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5. Trial counsel failed to excuse a death-prone juror during voir dire.

During voir dire, prospective juror Frank Finegold initially stated that he was "…in favor of the death penalty." (Tr. 525). Upon further questioning, Finegold was asked "if everything was found beyond a reasonable doubt, then death would be the appropriate penalty?" Finegold agreed with that statement. (Tr. 540).

Barstow does not believe that Finegold's views on the death penalty disqualified him from sitting on the jury. Exhibit B, p. 65. Graeff, if he had been trial counsel, would have moved the court to excuse Prospective Juror Finegold because he could not have fairly considered a sentence of less than death. Exhibit C, p. 57-58.

6. Trial counsel failed to object to an infirm mitigation instruction.

Trial counsel failed to object to the trial court's instruction regarding the course-of-conduct capital specification. (Tr. 2646). The trial court's instruction required the jury to apply the doctrine of transferred intent to the aggravated murder charge and the aggravating

circumstance of course of conduct.

PROPOSITION OF LAW NO. 2

R.C. 2949.22(A)(1) MANDATING LETHAL INJECTION AS THE MEANS OF EXECUTION IN OHIO, IS UNCONSTITUTIONAL.

R.C. 2949.22 (B)(1) violates the due process protection of life, and the Eighth Amendment because lethal injection inflicts torturous, gratuitous, and inhumane pain, suffering, and anguish upon the person executed. U.S. Const. amends. VIII, XIV; Ohio Const. art. I §§ 9, 10, 16; *In Re Kemmler*, 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 (1890).

PROPOSITION OF LAW NO. 3

PROSECUTORIAL MISCONDUCT AT APPELLANT'S TRIAL RENDERED TRIAL COUNSEL INEFFECTIVE.

Ronald Trent testified that Conway said that he kept firing because he knew that the bullets would pass through Gervais and hit his intended target Mandel Williams. *See* Proposition of Law No. 1, sub-part 3, *supra*. The prosecution did not provide this statement in discovery. As a result, defense counsel was not prepared to address this portion of Trent's testimony. Tr. 2926-29. The prosecution was in possession of Trent's statements in which he claimed that Appellant knew that a .45 could pass through one person and strike another person was documented and the statement should have been disclosed to Conway's trial attorneys. The failure to disclose the statement constituted prosecutorial misconduct. *Berger v. United States*, 295 U.S. 78 (1935). This failure rendered Conway's trial attorneys ineffective because they were not able to prepare for Trent's testimony. *Strickland v. Washington*, 466 U.S. 668 (1984). The prosecution's failure to disclose this statement violated Conway's rights to a fair trial and the effective assistance of counsel as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the U.S. Constitution.

Conclusion

Wherefore Appellant Conway requests that this Court consider this application in

conjunction with his prior application, rule that Conway was denied effective assistance of counsel on his direct appeal to this Court, or in the alternative grant Conway an evidentiary hearing, after which it rules that Conway was denied effective assistance of counsel in this Court.

Respectfully submitted,

/s/ Marc S. Triplett
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Counsel of Record

AND

/s/ Kort W. Gatterdam
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Counsel for James T. Conway III

Certificate Of Service

I hereby certify that a true copy of the foregoing *Appellant's Application For Reopening Pursuant To S.Ct.Prac.R. 11.06* was forwarded by first-class, postage prepaid to Steven L. Taylor, Chief Counsel, Appellate Division, Office of the Franklin County Prosecuting Attorney, 373 South High Street, 13th Floor, Columbus, Ohio 43215, on this 14th day of July, 2016.

/s/ Kort W. Gatterdam

Kort W. Gatterdam (0040434)
Counsel for James T. Conway, III

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	**Case No. 2003-0647**
Appellee,	:	**Trial Court Case No. 02CR-1153**
-vs-	:	**Death Penalty Case**
JAMES CONWAY, III,	:	On Appeal From The Court Of Common Pleas Of Franklin County, Case No. 02CR1153
Appellant.	:	

AFFIDAVIT OF KORT GATTERDAM

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, Kort Gatterdam, after being duly sworn, hereby state as follows:

1. I am an attorney licensed to practice law in the State of Ohio since 1988. In 1988 to 1989, I worked at the Franklin County Public Defender for approximately eight months, representing criminal defendants primarily in trial proceedings. I worked in the Office of the Ohio Public Defender from 1989–2001 as an Assistant State Public Defender, representing defendants in trial, appellate, post-conviction, and federal habeas corpus proceedings. While employed with that office, I served as chief of the trial section, which involved trying felony cases and providing advice to other criminal defense attorneys across the State regarding trial issues, particularly in capital cases. Beginning in 2001, I have been in private practice. From 2001–2006, I was a partner in the firm Kravitz, Gatterdam & Brown, LLC. Since 2006, I have been with Carpenter Lipps & Leland LLP. I am presently a partner in the firm.

2. The majority of my private practice is criminal defense in state and federal court. I have tried numerous cases in state and federal court and I also handle criminal defense appeals and federal habeas corpus cases. I am certified by the State of Ohio as lead counsel in capital cases and have handled and tried numerous capital cases. I have also tried one federal capital case, *United States v. Lawrence*, and served as counsel on direct appeal. I have also lectured at seminars on trial related issues.

3. I am a member of the following federal bars: United States Supreme Court, United States Court of Appeals for the Sixth Circuit, and United States District Court for the Southern and Northern Districts of Ohio.

4. I was appointed to represent Appellant James Conway, III, in federal habeas proceedings and have reviewed the record in *State v. Conway*, Franklin County Common Pleas Case

EXHIBIT
A

No. 02CR1153. I have also reviewed the direct appeal briefs and examined the direct appeal record.

5. In the course of my federal representation of Appellant Conway, the depositions of Appellant Conway's former direct appeal counsel were conducted.

6. Because of the focus of my practice of law, my Rule 20 certification, and my attendance at death-penalty seminars, I am aware of the standards of practice involved in the appeal of a case in which the death sentence was imposed.

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

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

9. Appellate representation of a death-sentenced client requires recognizing that the case will most likely proceed to the federal courts via 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 sought in federal court.

10. It is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be fairly presented and exhausted throughout the state courts. The standard of practice is to cite directly to the relevant provisions of the United States Constitution and appropriate United States Supreme Court authority in each proposition of law to avoid any fair presentment and exhaustion problems in federal court.

11. Based on the foregoing standards, I reviewed the record in Appellant's case. I have identified the following issues that should have been presented by appellate counsel to the Ohio Supreme Court:

- **Proposition Of Law No. 1: TRIAL COUNSEL'S ACTS AND OMISSIONS DEPRIVED APPELLANT OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. U.S. Constitution, Sixth and Fourteenth Amendments.**

- **Proposition Of Law No. 2: R.C. 2949.22(A)(1) MANDATING LETHAL INJECTION AS THE MEANS OF EXECUTION IN OHIO, IS UNCONSTITUTIONAL.**

- **Proposition Of Law No. 3: PROSECUTORIAL MISCONDUCT AT APPELLANT'S TRIAL RENDERED TRIAL COUNSEL INEFFECTIVE.**

12. Appellate counsel failed to raise these issues in Mr. Conway's direct appeal. Based on my evaluation of the record and understanding of the law, I believe the issues raised in this Application for Reopening are meritorious. Also, had appellate counsel raised these issues, each error would have been properly preserved for federal-court review.

13. Therefore, Mr. Conway was detrimentally affected by the deficient performance of his former appellate counsel.

Further affiant sayeth naught.

KORT GATTERDAM
Counsel for Appellant

Sworn to and subscribed before me on this 13th day of July, 2016.

Notary Public

Erik P. Henry, Attorney At Law
NOTARY PUBLIC - STATE OF OHIO
My commission has no expiration date
Sec. 147.03 R.C.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

- - -

JAMES T. CONWAY, III,	:	
PETITIONER,	:	
vs.	:	CASE NO. 2:07-CV-947
MARC C. HOUK, WARDEN,	:	
RESPONDENT.	:	

- - -

Deposition of **TODD W. BARSTOW,** a Witness herein, called by the Petitioner for cross-examination under the applicable Federal Rules of Civil Procedure, taken before Carol A. Kirk, a Registered Merit Reporter and Notary Public in and for the State of Ohio, pursuant to notice, at the Offices of Carpenter, Lipps & Leland, 280 North High Street, Columbus, Ohio, commencing on Wednesday, March 21, 2012 at 1:36 p.m.

- - -

1 **DEPOSITION OF TODD W. BARSTOW**

2 **APPEARANCES**

3 - - -

4 MARC S. TRIPLETT, ESQUIRE
322 South Main Street
5 Bellefontaine, Ohio 43311
(937) 593-6591,

6 and

7 KORT W. GATTERDAM, ESQUIRE
8 CARPENTER, LIPPS & LELAND
280 North High Street, Suite 1300
9 Columbus, Ohio 43215
(614) 365-4100

10 On behalf of the Petitioner.

11

12 STEPHEN E. MAHER, ESQUIRE
SENIOR ASSISTANT ATTORNEY GENERAL
13 CRIMINAL JUSTICE SECTION
150 East Gay Street
14 Columbus, Ohio 43215
(614) 728-7055,

15 On behalf of the Respondent.

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Wednesday Afternoon Session
March 21 2012
1:36 p.m.

- - -

STIPULATIONS

It is stipulated by and between counsel for the respective parties that the deposition of **TODD W. BARSTOW**, a Witness herein, called by the Plaintiff under the applicable Federal Rules of Civil Procedure, may be taken at this time in stenotype by the Notary, pursuant to notice; that said deposition may thereafter be transcribed by the Notary out of the presence of the witness; that proof of the official character and qualification of the Notary is waived; that the examination, reading, and signature of the said TODD W. BARSTOW to the transcript of his deposition are expressly waived by counsel and the witness; said deposition to have the same force and effect as though signed by the said TODD W. BARSTOW.

- - -

1 **DEPOSITION OF TODD W. BARSTOW**

2 **INDEX TO EXAMINATION**

3 **WITNESS** **PAGE**

4 TODD W. BARSTOW

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1 **DEPOSITION OF TODD W. BARSTOW**

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1 **TODD W. BARSTOW**

2 being by me first duly sworn, as hereinafter certified,
3 deposes and says as follows:

4 **CROSS-EXAMINATION**

5 BY MR. TRIPLETT:

6 Q. Good afternoon. I am Mark Triplett, and with
7 me is Kort Gatterdam. We are counsel for James Conway,
8 III, in the habeas proceeding, and we are here in the
9 case of Conway versus Houk, Case No. 2:07-cv-947
10 pursuant to an order of the court, the District Court,
11 authorizing the taking of your deposition and pursuant
12 to notice, and so I will have some questions for you,
13 sir.

14 A. Sure.

15 Q. For the record, would you state your name and
16 your work address.

17 A. Todd W. Barstow. Work address is 4185 East
18 Main Street, Columbus 43213.

19 Q. Have you ever been deposed before?

20 A. Yes.

21 Q. So you are familiar with sort of the rules of
22 the road on this sort of thing?

23 A. Yes.

24 Q. Obviously our court reporter will want verbal

1 answers. If there's anything I ask that is not clear,
2 and there's a high likelihood that that could occur,
3 please don't hesitate to ask me to rephrase it. And
4 then, of course, if you'll wait until the question is
5 complete before answering. If you need a break at any
6 time, just let me know.
7 A. Sure.
8 Q. We'll stop for a bit for whatever time is
9 necessary.
10 I understand you are a lawyer.
11 A. Yes.
12 Q. Would you describe your education and
13 training?
14 A. I got a Bachelor's degree in 1984 from
15 Washington Lee University in Lexington, Virginia. I
16 then served in the Army for four years. Came back
17 home. Graduated from Capital Law School in 1991,
18 passed the Bar. Was admitted in November of '91.
19 That's pretty much my education.
20 Q. And you are licensed to practice law?
21 A. Yes, I am licensed.
22 Q. And where are you licensed to practice?
23 A. In Ohio and then the various federal courts
24 in Ohio, the two districts, two district courts, the

1 Sixth Circuit and the U.S. Supreme Court.
2 Q. Could you summarize your employment history?
3 A. When I first got out of law school?
4 Q. As a lawyer.
5 A. As a lawyer, sure. When I first got out of
6 law school, I worked for another attorney, Pete Beagle,
7 who's now retired. I worked for him, and then I worked
8 for Kreiner & Peters. That's an insurance defense and
9 subrogation firm in Dublin. And then after working
10 there, I went out on my own in August of 1994 as a solo
11 practitioner, and that's who I've worked for since
12 then.
13 I'm also a judge advocate for the Ohio
14 National Guard, the Army National Guard, so that is a
15 legal experience. So I've had the requisite military
16 training for that, and I'm going to retire from that
17 next month -- or, excuse me, the end of May. The
18 weather feels like we're already there. But May 31st
19 I'll retire from the military. That's just a part-time
20 job that is legal work.
21 Q. So you began your career working for Beagle
22 law firm?
23 A. Um-hmm.
24 Q. And you were there approximately how long?

1 Three years?
2 A. I started working for Peter in like early
3 '92, and so as a combination of I was doing work for
4 him and had some of my own practice on the side, which
5 is very typical, I guess, and then I worked there until
6 the Spring of '94 when I got hired at Kreiner & Peters.
7 I was an associate there. I had no outside work. They
8 did insurance defense and subrogation cases, and I
9 worked there for six or eight months and just decided
10 that I wanted to go out on my own. And so I rented
11 space with a friend of mine out in Whitehall, and I've
12 been there ever since. That was in August or September
13 of '94.
14 Q. When you worked in Mr. Beagle's office, what
15 was the practice?
16 A. He had a sort of a general practice. He did
17 a lot of criminal work, trial work. He also did some
18 domestic, and he also did some personal injury work.
19 So those are sort of the things that I did with him.
20 Q. So you did all those areas of practice --
21 A. Yes, sir.
22 Q. -- that he was involved in?
23 A. Yes, sir.
24 Q. Your reason for going to the other firm was

1 just a better situation?
2 A. They offered me more money, I'll be totally
3 frank, and I just -- you know, it was just a business
4 decision. They offered me a steady pay check, you
5 know, a bigger paycheck, benefits, things like that.
6 Q. When you were working for the firm, I sort of
7 infer from what you said that that practice did not
8 involve a lot of criminal work, or did it?
9 A. None, zero. They only did insurance defense
10 work and insurance subrogation work where we would be
11 the plaintiff. They also had a collections division of
12 the firm. I never got involved in that. They were
13 doing collections work. I never got involved in that.
14 So with the firm, I was doing civil trial
15 work, taking depositions, things like that, you know,
16 working with adjusters from the various insurance
17 companies where we had contracts, meeting with them,
18 meeting with witnesses and representatives from the
19 insurance companies, and then trying cases for the
20 company, civil trial work.
21 Q. Along the line of where you earlier answered
22 that you had your deposition taken previously, what
23 sort of situation or case was that?
24 A. Identical to this one. It's a state

1 versus -- or it's the death penalty case, and I
2 apologize, I just can't remember the gentleman's name.
3 It's typical as in habeas. So I had my deposition
4 taken there.
5 Q. Do you know approximately how long ago that
6 was?
7 A. A couple years ago.
8 Q. And then you left from the law firm you
9 referred to to go into your own practice?
10 A. Um-hmm, yes.
11 Q. In what year did you do that?
12 A. That was in 1994.
13 Q. And when you began your -- were you in a solo
14 practice then?
15 A. Yes.
16 Q. And you still are to the present day?
17 A. Yes.
18 Q. In your solo practice, how would you describe
19 the practice you had over that period of time in terms
20 of areas of concentration?
21 A. Well, when I first started, I would do just
22 about anything that I could to get an income as I
23 suppose most lawyers would; but over the years, it's
24 evolved into criminal defense and then more recently a

1 lot of criminal appellate work. I also do some low
2 intensity domestic. I do some personal injury, nothing
3 big, and I do some probate work, wills, small estates,
4 things like that. I used to do bankruptcy, consumer
5 bankruptcy. I don't do that anymore after the law
6 changed. I do, however, do --
7 Q. So like me, maybe you got out of that in
8 about 2005?
9 A. Yes, sir. I finished that up. I felt that
10 that law made -- it really became for specialists,
11 people who just did that exclusively. I do, however,
12 do some creditors bankruptcy work for a bank in
13 Coshocton and also for the City of Coshocton when they
14 have usually Chapter 13 issues. So I just do --
15 Q. Attending 341 meetings and all that?
16 A. 341s. There's some litigation in that when
17 we have disputed claims, filing motions for relief from
18 stay, things like that.
19 Q. If we were to go back to around 2003, would
20 that be about when you became involved in the Conway
21 matter?
22 A. I believe so, yes.
23 Q. As of that time, how would you describe your
24 practice in terms of if you were to generally state

1 what percentage of time was devoted to what, what was
2 it like then?
3 A. Well, I was doing -- as opposed to today, I
4 was doing a lot more trial work than I am today,
5 criminal trial work, and was also actively doing
6 debtors bankruptcy work, a lot of that. There was a
7 lot of that going on. Probably I would say 60, 70
8 percent of the work, though, was criminal trial work in
9 the various courts, and I would include in that
10 juvenile delinquency matters as well, young people who
11 are charged with offenses. So that was the bulk of it
12 at that time.
13 I had just really -- I started really doing a
14 lot of the appellate work I would say in '99 or 2000.
15 A couple of the common pleas judges had approached me
16 and asked if I would be willing to take cases that they
17 could appoint me to in the Tenth District, and so I
18 started taking those, and that practice as of today has
19 really grown.
20 Q. So in terms of your practice back then, let's
21 say in around 2003, you were taking criminal cases.
22 Were some of those death penalty cases?
23 A. Yes. Here in Franklin County, there were a
24 lot more death penalty trial cases than there are now.

1 I think just -- from my discussions with the judges
2 now, there may be one or two death penalties cases
3 pending in the Franklin Common Pleas Court. Back then
4 every judge had, you know, two or three on his or her
5 docket. That trial practice has shrunk almost to
6 nothing.
7 Q. So you were appointed to represent
8 Mr. Conway, correct?
9 A. Yes, sir, that's correct.
10 Q. As of the time you were appointed to
11 represent Mr. Conway, how many death penalty cases had
12 you had?
13 A. Appeals or --
14 Q. Let's say trial at first here.
15 A. That would be difficult for me to remember.
16 I could tell you how many I've done in total, but I
17 apologize, I couldn't tell you the year lineup for
18 them.
19 Q. Okay.
20 A. I can say this. Let me try to help. In
21 terms of appeals, this was the third death penalty
22 appeal to the Ohio Supreme Court that I handled.
23 Q. Okay.
24 A. In terms of trials -- and, Mr. Triplett, I'll

1 try to help you. I think probably all told, I have to
2 jury trial tried I believe four death penalty cases.
3 Q. Okay.
4 A. And I've had probably four or five that did
5 not result in a trial that were resolved through a
6 negotiated plea.
7 Q. Was there a case with a defendant named
8 Monroe?
9 A. Jonathan Monroe was an appeals case that I
10 had, yes, sir.
11 Q. So that was a direct appeal you did --
12 A. Yes, sir.
13 Q. -- in a death penalty case?
14 A. Yes, sir.
15 Q. And do you remember how you became involved
16 in that particular case and what county that was from?
17 A. It's in Franklin County. That was a case
18 again where I was appointed by the judge, and I don't
19 remember what judge it was. I would have been
20 contacted by the bailiff and asked if I would take the
21 case, and I said yes. I did that case with -- Joe
22 Edwards was my co-counsel. I believe that was --
23 Q. Who was your counsel?
24 A. Joe Edwards, Joseph Edwards, and Joe and I

1 got appointed on two cases almost the same time. One
2 was Mr. Monroe, and, I apologize, I cannot remember the
3 name of the other one. We had those -- those sort of
4 tracked along at almost at the same time. In fact, I
5 think our oral argument in those cases was like within
6 a week of each other.
7 Q. Was there another one, defendant named
8 Turner?
9 A. That's it, Michael Turner. That's the case
10 where I was deposed, and that's the case that was done
11 at about the same time that Mr. Monroe's case was done.
12 Q. Do you know who appointed you in that case?
13 A. That case would have been Pat McGrath, Judge
14 McGrath.
15 Q. Was he the judge that appointed you in this
16 case?
17 A. I believe he was.
18 - - -
19 ENTRY APPOINTING TODD BARSTOW AND
20 DAVID GRAEFF AS COUNSEL FOR
21 PURPOSES OF APPEAL WAS MARKED AS
22 EXHIBIT C.
23 - - -
24 Q. I'm going to hand you what has been marked as

1 Petitioner's Exhibit C.
2 A. Okay.
3 Q. Does that appear to be a true and correct
4 copy of the order of the Common Pleas Court appointing
5 you and David Graeff as counsel for Mr. Conway?
6 A. It does.
7 Q. Does that appear to have been filed with the
8 clerk on February 27th, 2003?
9 A. Yes, sir.
10 Q. On the Monroe case and the Turner case, was
11 Mr. Edwards -- was he co-counsel with you on both of
12 them?
13 A. Yes, sir.
14 Q. Had you had prior training in capital cases
15 prior to your taking on the direct appeal in this
16 particular case?
17 A. I was Rule 20 certified at the time. I had
18 attended the Ohio Association of Criminal Defense
19 Lawyers seminars and had taken the appellate track, so
20 I was qualified to do appellate cases. So I was
21 certified at the time.
22 Q. Are you certified both for trial and
23 appellate, or were you certified for both trial and
24 appellate in that fashion?

1 A. Yes.
2 Q. Were you certified as lead or co-counsel?
3 A. I eventually did get certified as lead. I
4 started off as co and tried some cases.
5 Q. Would you have been co or lead in 2003, if
6 you recall?
7 A. I'm sorry. I don't remember. I will say
8 this: My recollection is I would have tried cases
9 first before I -- some death penalty cases first before
10 I started delving into doing appeals.
11 - - -
12 DOCUMENT ENTITLED, "GUIDELINE
13 10.15.1 - DUTIES OF POST-CONVICTION
14 COUNSEL" WAS MARKED AS EXHIBIT A.
15 - - -
16 Q. I'm going to hand you what has been marked as
17 Exhibit A --
18 A. Okay.
19 Q. -- entitled "Duties of Post-Conviction
20 Counsel, ABA Guidelines." In the course of your
21 practice, did you have an opportunity to become
22 familiar with the ABA standards and guidelines
23 regarding capital representation for appellant
24 purposes?

1 A. I don't remember the specifics, but I
2 remember the seminar training on the subject and being
3 aware of it at the time.
4 Q. The exhibit that I've handed you, there's a
5 portion of it that's sort of more like commentary, and
6 the first part of it sort of sets out standards for
7 counsel on really the first page and then to the half
8 first third or so of the second page. Would you mind
9 taking a look at that?
10 A. Okay. I've looked at the bold.
11 Q. Okay. Thank you.
12 Would you agree that those statements, those
13 standards would be a prevailing standard of practice
14 for counsel in post-conviction appellate proceedings?
15 A. I wouldn't have any idea what the -- are you
16 talking about across the country?
17 Q. Well, I'm talking about in terms of what
18 would be the expected standard of practice for a lawyer
19 handling cases of this type.
20 A. I would say that that's what the ABA expects.
21 Q. Would you agree with that from your
22 perspective and your experience?
23 A. Would I agree with what, sir?
24 Q. With those guidelines as set forth -- are

1 there any of those you would have a problem with?
2 A. Oh, no, I don't have any disagreement with
3 those, no, sir.
4 Q. In addition to the death -- so have there
5 been just those two appellate cases you've been
6 involved with prior to Conway at the appellate level we
7 talked about?
8 A. Death penalty, yes. I had done other
9 non-death appellate cases.
10 Q. So you've done a number of appeals of
11 non-death penalty criminal cases?
12 A. Oh, yes. At this point, I have probably well
13 over a hundred, I guess.
14 Q. Could you estimate what that number would
15 have been as of February of 2003?
16 A. This would be strictly a guess.
17 Q. Sure, approximation.
18 A. Twenty or so, something like that.
19 Q. Okay.
20 A. And that would include -- when I worked for
21 Kreiner & Peters, I did civil. I did appellate work as
22 well. If you tried a case and it got appealed, you did
23 the appeal. So I was involved with the civil aspect of
24 appellate cases, too.

1 Q. Of the approximately 20, what percentage of
2 those would you say would have been criminal versus
3 civil?
4 A. Oh, I would say probably about 80% criminal.
5 Q. And just for clarity's sake, we're talking
6 about direct appeals from the judgment of conviction
7 and sentencing?
8 A. Right. I've never done a post-conviction or
9 a habeas or any of that. They were all on direct
10 appeals.
11 Q. Does the direct appeal of a death penalty
12 case differ in your opinion from that of doing an
13 ordinary appeal of a criminal case that's not a death
14 penalty case?
15 A. Well --
16 Q. And if it does, how?
17 A. I would say it does. Obviously one
18 difference is in Ohio, it goes to a different court, so
19 there's a different set of rules that you have to
20 follow. Certainly you have -- in terms of
21 responsibility, it's certainly a very heavy
22 responsibility, not that depriving someone of their
23 liberty in a non-capital isn't, but you're talking
24 about a specific case, and obviously there's some --

1 there's other procedural things that you need to do;
2 requesting a stay, making sure that gets taken care of,
3 may or may not do that. You wouldn't normally do that
4 in a non-capital case necessarily, so there's things
5 like that.
6 Q. What about in terms of tactics and strategy,
7 do you believe that there's a difference in the way you
8 would approach a death penalty case versus how you
9 would approach, say, a felonious assault case?
10 A. Yes. I think in a felonious assault case,
11 maybe the assumption is the person's been incarcerated
12 but I think in a direct appeal in that non-capital
13 case, you're probably looking for some good issues that
14 can reduce the sentence that the person got, could get
15 the person a new trial if there's significant errors
16 like that.
17 You might see things that you would say, gee,
18 that was an error for the court to do, but your
19 experience tells you that once you get to the Court of
20 Appeals, that's not going to -- they're not going to
21 probably go for that. That's not going to be something
22 that's going to get their interest.
23 Q. Okay.
24 A. So you also know that the chances of the case

1 going beyond your appellate district court to the Ohio
2 Supreme Court are infinitesimally small. That's just
3 statistics. So you're looking at sort of a one shot,
4 can I find something here that can get the client some
5 relief, no matter what that might be.
6 In a death penalty case, you know that even
7 though you're at the first level of appeals, the case
8 is going to go on in a different forum for a long time,
9 and so you're probably going to be looking at a lot of
10 issues to raise that you know probably that the Ohio
11 Supreme Court is not going to do much with but that the
12 federal court system may have an interest in.
13 Q. So you would agree, then, that one of the
14 duties is that you would need to have your eye on
15 federalizing issues, constitutionalizing issues that
16 you raise in a death penalty case --
17 A. Yes.
18 Q. -- would be more so than in an ordinary
19 appeal?
20 A. Yes, sir.
21 Q. And you talked about in an ordinary -- for
22 want of a better way of putting it, an ordinary appeal,
23 say, of the felonious assault case, the non-capital
24 case, that you would want to find issues that may

1 attract the court's attention and have the best chance
2 of getting your client relief, is that sort of
3 winnowing of issues, is the consideration different in
4 a death penalty case from that point of view also?
5 A. Yes. I think again, to expand, I think that
6 you know that the chances of your non-capital case
7 going beyond your district court of appeal are
8 infinitesimally small, so you're going to try to pick
9 the good issues that you think will get relief from
10 your court. In a death penalty case, you might put
11 issues in that you would never put in in that
12 non-capital case, because you will try to capture
13 them -- as you put it, sir, federalize them so that
14 once the case is moved over to federal habeas, you
15 preserve those issues.
16 Q. So you would agree, then, that winnowing down
17 of issues the way you might do in an ordinary criminal
18 appeal is not something that you would be making a
19 priority in a death penalty case?
20 A. Probably not, no.
21 Q. You're familiar with the concept of
22 procedural default, of how issues may become defaulted
23 because not properly preserved at the trial level?
24 A. Yes.

1 Q. Would you agree that part of the role of
2 counsel in a death penalty appeal is to try to bring
3 defaulted issues back to life, so to speak, such as
4 where there is a failure to object or something of that
5 nature, but it was a valid issue that was there?
6 A. Are you talking about in the direct appeal?
7 Q. In the direct appeal.
8 A. Sure.
9 - - -
10 AFFIDAVIT OF KATHRYN L. SANDFORD
11 WAS MARKED AS EXHIBIT B.
12 - - -
13 Q. Going again to sort of standards that apply
14 in preparation, I'm going to hand you what has been
15 marked as Exhibit B, and ask you to look at paragraphs
16 4 to 10 in particular, 4 being the last paragraph on
17 page 1 and then 5 through 10 being the paragraphs on
18 page 2.
19 A. Okay.
20 Q. For the record, Exhibit B is -- does that
21 appear to be denominated an affidavit of Kathryn L.
22 Sandford?
23 A. It does.
24 Q. Do you happen to know her?

1 A. No.
2 Q. With respect to those paragraphs 4 through 10
3 that I asked you to review, would you agree with the
4 statements contained in those paragraphs regarding the
5 duties and concerns of appellate counsel in a death
6 penalty case?
7 A. Well, except I'm not familiar with the
8 statistics she cites in paragraph 10 to --
9 Q. Okay.
10 A. I don't know whether that's accurate or not.
11 Q. Okay.
12 A. But the 4 through 9 paragraphs, I don't have
13 any major disagreement with that.
14 Q. In paragraph 10 where she does cite,
15 paragraph 10 talks about the difference in the success
16 rate or the low success rate in state court versus a
17 higher success rate in federal habeas. Would you agree
18 with the general principle that regardless of what the
19 statistics may actually bear out, regardless of whether
20 or not those numbers are accurate, that in general, the
21 federalized issue has a better chance of success in a
22 federal habeas proceeding than it would in state court
23 based upon your knowledge of the practice and your
24 learning from training and seminars and so forth?

1 A. Well, it's my understanding from seminar
2 training that your odds are better in federal habeas
3 than they are in the state court system, but I just
4 can't comment on her numbers.
5 Q. And, again, the numbers -- but you agree with
6 the basic idea expressed there apart from whether the
7 numbers are accurate or not?
8 A. Um-hmm, I do.
9 Q. Now, do you remember how you came to be
10 appointed to represent Mr. Conway?
11 A. Well, I got a -- I don't remember. I would
12 assume I got a phone call from Judge McGrath's chambers
13 asking me if I would take the case, double checking if
14 I was Rule 20 qualified. As to how Judge McGrath came
15 to pick my name, I don't know.
16 Q. Were you well acquainted with Judge McGrath?
17 A. Yes. I had done an internship at the court
18 when I was in law school with Judges Stratton and
19 McGrath.
20 Q. Did your work with Judge McGrath involve
21 being involved in any of his political campaigns for
22 election or assisting in anything of that nature?
23 A. Well, once I had become licensed, I am sure
24 that I contributed money to his campaigns or worked on

his campaign. Now, full disclosure, I was formerly a member of the Republican Central Committee here in Franklin County when I lived in Franklin County. So I'm sure that I -- I'm sure I did things. I don't remember any specifics, but I'm sure I did things.

Q. And your co-counsel in this case was Dave Graeff, correct?

A. Yes, sir.

Q. Had you previously been acquainted with Mr. Graeff?

A. I knew Dave. Of course, I know his wife, Wilma, who's now Judge Lynch's bailiff. So they're sort of a well-known couple here in the county, and I had never done any work with Dave, but I certainly knew who he was. I had met him and knew who he was.

Q. Had you worked with him in the past?

A. This is the only case that I can recall working with Dave on.

Q. So would it be fair to say, then, that you and Mr. Graeff were, more or less, independently appointed to the case by Judge McGrath with his knowing that it was necessary to appoint two lawyers for purposes of Mr. Conway's appeal?

A. Again, I don't know how Judge McGrath came to

1 the conclusion, but he may have asked -- he may have
2 told me or his chambers may have told me, Is Dave
3 Graeff okay to work with? That's usually what happens
4 in these co-counsel cases, if there's a trial, the
5 bailiff would say, hey, we're going to appoint you.
6 Q. Were you familiar with Mr. Graeff's
7 experience in capital litigation?
8 A. Yes, sir.
9 Q. What was your understanding of that at the
10 time?
11 A. At the time and to this day, it was my
12 understanding that he's considered to be one of the
13 best appellate litigators in this part of the state or
14 maybe in the state. I would say he's very highly
15 regarded by the Bar and by the bench.
16 Q. Were you acquainted with trial counsel in the
17 case, Mr. Suhr and Mr. Rigg?
18 A. I know both of them from the Bar obviously.
19 I've never worked with them in terms of a case, whether
20 it was co-counsel or co-defendants, that I can recall,
21 but I obviously know them socially through the Bar and
22 both being defense attorneys.
23 Q. Would you say you were professional friends
24 of either of them?

1 A. Not really, no.
2 Q. How about social friends of either of them?
3 A. No. I mean Brian and I are both members of
4 the Charity Newsies, which is a community organization
5 here in town. We raise money for needy children. So I
6 have contact with Brian through that organization.
7 Q. Brian is Mr. Rigg?
8 A. I'm sorry. Mr. Rigg.
9 Q. Just making the record clear, that's all.
10 A. With Mr. Rigg. So we may see each other at
11 events with that organization, and I think Mr. Rigg's
12 office hosts a well-known Christmas party every year.
13 I've probably been to that two or three, four times
14 over the years.
15 Q. When would that have occurred? Prior to
16 2003?
17 A. Probably.
18 Q. Were you acquainted with Attorney Chris
19 Cicero?
20 A. Again, I know Mr. Cicero through the Bar
21 Association, through the Bar, both being criminal
22 defense attorneys.
23 Q. So just kind of a professional acquaintance?
24 A. Um-hmm.

1 Q. You had not worked with him?
2 A. No. Never co-counseled a case with him. If
3 I see him in the hallway at the courthouse, I'll say,
4 Hi, how are you, and we exchange pleasantries.
5 Q. Have you had any sort of social friendship
6 with Mr. Cicero up to that point or since?
7 A. He hosts fund raisers for various judges at a
8 restaurant over on the west side, on West Broad Street.
9 I've probably been to those half a dozen times for
10 various political fund raising events because they have
11 great food.
12 Q. Now, once you were appointed to represent
13 Mr. Conway, did you ever meet with him?
14 A. Yes.
15 Q. And can you recall specifically any of the
16 meetings with Mr. Conway?
17 A. Well, I remember meeting him in the Franklin
18 County jail.
19 Q. Okay.
20 A. I believe he was being held there, because I
21 believe he had another death penalty case that was
22 going on at about the same time.
23 Q. So rather than him being promptly transported
24 to the Department of Corrections, he remained in the

1 Franklin County jail for a period of time?
2 A. That is my recollection. I do not ever
3 recall going to death row, which was then in Mansfield,
4 to meet with Mr. Conway.
5 Q. Do you remember how many meetings you had
6 with Mr. Conway or whether there would have been more
7 than one?
8 A. I believe there were two.
9 Q. Did you have discussions with him,
10 substantive discussions regarding the issues to be
11 raised for the appeal?
12 A. Yes.
13 Q. Did you in the course of those meetings, one
14 or two meetings, with him share your thoughts regarding
15 the issues or solicit his --
16 A. Yes, I would do that. I would do that with
17 any appellate case. You want to meet the client if you
18 can and talk about what is going on or have them write
19 you the issues, write me a ten-page letter about
20 everything that you think was wrong with your trial,
21 with your lawyer, with the judge, with the prosecutor,
22 with the witnesses, with the jurors, whatever you want
23 to do. I don't care how much -- give me everything
24 you've got.

1 Q. Did he do that with you; do you remember?
2 A. I remember that, that he did, that he did
3 send letters to -- I recall receiving correspondence
4 from him throughout the course of the case, not a whole
5 lot, but some letters explaining what he thought the
6 important issues were.
7 Q. Were those letters and issues things that you
8 remember discussing with your co-counsel?
9 A. I did. I mean I don't remember if I got them
10 or if Dave Graeff got them, Mr. Graeff got them, but we
11 would have shared them if one of us had received them
12 and not the other.
13 Q. You've indicated you've represented a good
14 number certainly by now of criminal defendants and some
15 capitally accused defendants --
16 A. Yes.
17 Q. -- as clients. How would you characterize
18 Mr. Conway in terms of intelligence level compared to
19 the average client?
20 A. Well, I thought Mr. Conway was a very
21 intelligent person. He was very articulate. He
22 probably was a little bit better educated than the
23 average client I would meet with or would represent.
24 He seemed to be very convinced about what should have

1 happened in his case.
2 Q. In fact, he has a very high IQ; are you aware
3 of that?
4 A. I don't know what his IQ is. I don't
5 remember off the top of my head; but, again, compared
6 to clients, compared to the general population, I would
7 say he's a very intelligent, articulate, sort of
8 insightful young man.
9 Q. So when you discussed issues with him, he
10 didn't have difficulty understanding what you were
11 talking about or had better understanding than the
12 average client?
13 A. Well, let me say this in two parts.
14 Mr. Conway had his own insight into what should have
15 happened. He was very convinced as to what should have
16 happened in this case as with a lot of clients but much
17 more articulate as to why things didn't go his way very
18 tragically at trial.
19 Q. Did you have opportunity to meet any of his
20 family members during the course of your representation
21 of him?
22 A. I do not recall meeting any family members,
23 no, sir.
24 Q. Do you recall whether any of them, his mother

1 or any other family members, contacted you to try to
2 arrange appointments to discuss the case?
3 A. I don't recall that. If they had, if they
4 had contacted me and wanted to come in, I certainly
5 would have met with them.
6 Q. In terms of the working of the relationship
7 of yourself and Mr. Graeff, was one of you sort of
8 taking point or taking the lead more in the case than
9 the other, would you say, or was it kind of a collegial
10 back and forth? How would you characterize it?
11 A. Well, I would say David would, or Mr. Graeff,
12 excuse me, because at the time he just had vastly more
13 experience in this type of litigation than I did. So I
14 felt I was still learning. Even though I had been an
15 attorney for ten, twelve years at that point, I felt I
16 still had a learning curve in these types of cases, and
17 I would have certainly relied on his experience and
18 expertise.
19 Q. Did you obtain the record of the case?
20 A. Yes.
21 Q. Do you believe you read the entire record of
22 the case?
23 A. I read the entire transcript, and I went to
24 the clerk's office at the Supreme Court and went --

1 that's where that's kept, and went through, looked at
2 the exhibits, photographs. In fact, I believe that
3 when I went there, I saw that the Common Pleas Court
4 got sent parts of the wrong record, because the autopsy
5 was -- photos were of an African American man, and I
6 believe Mr. Gervais was Caucasian.
7 Q. Right.
8 A. I had to contact the clerk and get some
9 things sorted out there.
10 Q. Was that something you did with Mr. Graeff,
11 visiting the clerk's office?
12 A. I believe I did that on my own. I mean Dave
13 and I would have had a meeting. Dave came out to my
14 office several times. I think we would have had a
15 meeting maybe either telephonically or in my office
16 about how we were to divvy some things up, and
17 Mr. Graeff did some of the procedural matters with the
18 Supreme Court, obtaining a stay of execution and some
19 other things, I think actually filing the notice of
20 appeal and some of those things, and then I did some of
21 these other things, again going to the Supreme Court
22 clerk and things like that.
23 Q. In terms of your review of the transcript, I
24 want to ask you a question or two relative to your

1 methodology, I guess, so to speak. Do you have a sense
2 of -- since we all have to budget our time being busy
3 lawyers, do you have a sense of what typically is a
4 reading rate you have when you're going through your
5 transcript of pages per hour or anything like that?
6 A. I've never calculated that, no, sir.
7 Q. Do you take notes or make a digest of it?
8 A. Yes, I take notes, and then I also use yellow
9 stickies, and I'll write down a thought and put it on
10 the page. Sometimes that issue will get resolved later
11 on in the transcript through a stipulation or something
12 like that, so I remind myself that's where that
13 happened.
14 Q. Do you still retain any of your transcript
15 notes from when you reviewed the transcript of the
16 case?
17 A. No. I went to look for them, and I was not
18 able to locate them. I was able to locate the
19 transcript, but I was not able to locate notes or other
20 materials.
21 Q. Do you believe they still exist and you just
22 haven't been able to locate them to this point, or they
23 maybe are no longer in existence?
24 A. I would certainly hope they still exist, but

1 I can't say.
2 Q. Do you believe that whatever search you did
3 to attempt to locate them was an exhaustive one, or is
4 it possible that some additional effort might yet yield
5 those notes?
6 A. Well, I'm not overly saying about locating
7 them short of going through every box in the storage
8 unit. The boxes are numbered and we have an index in
9 them; but going through every box and seeing if it's
10 been somehow misplaced or put into a box, short of
11 doing that, no, I didn't do that.
12 Q. Exhaustive short of that is what you're
13 saying to me?
14 A. Right. Let me say this: The index that we
15 have indicates that Conway is in its own box, which is
16 true for the transcript. It takes an entire banker's
17 box with nothing but the transcript in it, but there's
18 no other notes or other materials in that box.
19 Q. Would your practice at the time have been to
20 keep notes with materials in the box as opposed to
21 keeping them in some other file location?
22 A. The practice is, especially in larger cases
23 that have large transcripts, is we'll put the
24 transcript in one part of the file. We'll put notes,

1 pleadings, whatever else, in another part of the file
2 so you don't have mishmash stuff getting stuck down in
3 transcript pages, things like that.
4 - - -
5 SUPREME COURT OF OHIO MOTION, ENTRY
6 AND CERTIFICATION FOR APPOINTED
7 COUNSEL FEES WAS MARKED AS EXHIBIT
8 D.
9 - - -
10 Q. I'm going to hand you what has been marked
11 Petitioner's Exhibit D, and does that appear to be a
12 true copy -- although I realize some of the copying is
13 now white, does it appear to be a true copy of the
14 motion for payment of appointed counsel fees that you
15 submitted after the completion of your work in this
16 case?
17 A. It does.
18 Q. Looking at that exhibit, can you tell me what
19 the rate of pay you were getting paid for your work in
20 this case was? Would it be accurate to say it was $50
21 per hour?
22 A. I believe that's what it is. I don't
23 remember anymore.
24 Q. Would that be your normal rate if you were

1 doing the case on a retained basis?
2 A. No, sir.
3 Q. If someone were coming to you to do a case
4 like this where though it may be a capital case on a
5 retained basis, what sort of rate would you expect to
6 receive for your work normally?
7 A. Well, for public cases where I'm hired
8 non-capital, I charge 175 an hour, which I think is a
9 very reasonable rate; but considering where my office
10 is, I think it's probably about right for that
11 neighborhood. I've never even fantasized about being
12 retained on a capital case, but I would think it would
13 be -- I think I would expect to be paid more than $50
14 an hour.
15 Q. Would the rate of $50 per hour, how would
16 that compare, let's say, to a rate that might be
17 necessary in order to run your office?
18 A. Well, I wouldn't want to have to depend
19 exclusively on $50 an hour cases to maintain my office.
20 Q. Would you say it's fair to say that back in
21 2003 and 2004, in that timeframe, that a greater rate
22 than that would be necessary in order to run your
23 office?
24 A. Well, my office, yes. I don't know about

1 other people, but my office, yes.
2 Q. Now, from my prior review of Exhibit D, the
3 motion for the approval of your fees for payment in
4 this case, it looks like it reflects that you spent
5 27.5 hours reading the transcript. Does that appear to
6 be accurate to you?
7 A. Yes, it does.
8 Q. Would you say that that was accurate -- not
9 that that was accurate -- you would say that was an
10 accurate reflection of the amount of time you spent
11 reading the transcript?
12 A. Yes. I don't have any memory of it, but --
13 Q. If the transcript is a little over 3,000
14 pages in length, does that sound like --
15 A. Yes, that sounds right. I think it's
16 about --
17 Q. What would be a normal rate of review, does
18 that sound for you like approximately --
19 A. Yes.
20 Q. -- the right amount of time?
21 A. Yes, sir.
22 Q. Now, did you have an opportunity during your
23 representation in the direct appeal for Mr. Conway to
24 meet with trial counsel, Mr. Suhr or Mr. Rigg?

1 A. I don't recall any meetings with them. I
2 don't recall any meetings with them, no, sir.
3 Q. Do you know whether Mr. Graeff would have had
4 some meetings with them that he told you about?
5 A. I don't remember. He may have. I just don't
6 remember.
7 Q. But you don't remember having had any
8 yourself?
9 A. Personally, no, sir.
10 Q. Now, you've testified about going to the
11 clerk's office and reviewing the exhibits that were
12 maintained there --
13 A. Yes, sir.
14 Q. -- and reviewing the transcript of the case.
15 Do you remember whether you took any action or
16 contemplated any action -- whether you took any action,
17 let's leave it that way, to correct or supplement the
18 record?
19 A. Other than what we discussed earlier about
20 there being some incorrect --
21 Q. Autopsy.
22 A. -- autopsy photos? I think the autopsy
23 portion was obviously some other case; and other than
24 that, I don't recall doing or contemplating anything

1 else to get it fixed. Let me say this: Or anything
2 that I observed that needed to be fixed or
3 supplemented.
4 Q. But you took action to resolve that?
5 A. To fix that, and I think that was just merely
6 letting the clerk's office at the Supreme Court know
7 that it was obviously not -- because I think even when
8 you start looking through the autopsy, it was not -- it
9 was the wrong autopsy.
10 Q. Did you ever come to learn how that came
11 about that -- you said it was an African American
12 person --
13 A. Obviously an African American male.
14 Q. -- depicted in the autopsy, so -- and these
15 were autopsy photos?
16 A. Yes, sir. I recognized them as being in the
17 autopsy room in the Franklin County morgue, and there
18 was an autopsy there, and I looked at the pictures
19 first, and I said this is not Mr. -- I believe my
20 recollection is this is what happened, this is not
21 Mr. Gervais, because I didn't -- based on -- I said, I
22 thought that he was Caucasian, and then I looked at the
23 autopsy, and it was some other man. So I don't know
24 what happened at the clerk's office. They handle tons

1 of stuff, and they're entitled to make a mistake once
2 in a while.
3 Q. Did you ever make inquiry of Mr. -- I gather
4 you didn't, because you hadn't met with them, Mr. Suhr
5 and Mr. Rigg, regarding whether somehow some other
6 autopsy photos in an unrelated case got into evidence
7 in the case?
8 A. I don't know what happened.
9 Q. Apart from those autopsy photos being there
10 that didn't belong there, were there autopsy photos
11 there of Mr. Gervais that did belong there?
12 A. I don't recall that. I believe that then
13 they got substituted, and I think I went back down and
14 looked through it again. I believe so.
15 Q. I guess what I'm trying to figure out here
16 is, were those missing, the autopsy photos of
17 Mr. Gervais and somehow there were substituted autopsy
18 photos of another deceased person as opposed to the
19 other deceased person's photos just happening to be in
20 that regard along with Mr. Gervais' photos if that
21 makes sense?
22 A. But my recollection is that some other
23 autopsy was in the file in the Supreme Court clerk's
24 office, and I don't recall -- I believe that later on

1 they got that -- the right autopsy was placed into the
2 record. That's my recollection. I don't remember
3 anything really more about that.
4 Q. So you don't remember whether the photos of
5 the African American man that were there were there in
6 addition to or instead of?
7 A. I don't remember if they were in addition to
8 or instead of. I remember they were there.
9 Q. At some point the Gervais photos were put in
10 there? Were you able to ascertain that?
11 A. My recollection is I let Mr. Graeff know what
12 had happened, because that was, again, something that I
13 obviously thought he should know about, and I believe
14 he got that corrected.
15 Q. That was corrected by contacting the clerk
16 and saying --
17 A. You need to get the right autopsy up here and
18 return the wrong autopsy to the right file, of course.
19 Q. That particular thing, is that -- well, would
20 you agree with the general proposition that there's
21 kind of a special duty to do what you did in looking
22 over that entire record of the capital case?
23 A. Sure. Yeah, you want to make sure that
24 things are correct.

1 Q. But that was the only thing you found that
2 was awry in the record?
3 A. That's the only thing I remember because it
4 was -- I don't remember if there were other problems
5 off the top of my head.
6 Q. Now, in terms of drafting the brief itself,
7 do you recall how you and David Graeff divided the
8 work, divided the issues?
9 A. My recollection is that David did more of
10 what I would call the death penalty unique issues, and
11 that I looked at issues that you would find in a
12 non-capital case, such as the felonious assault case,
13 the hypothetical felonious assault case that we
14 discussed earlier. David had more familiarity because
15 of his experience with those death penalty unique
16 issues.
17 Q. So you were looking more at issues that were
18 more kind of might be present in a more run-of-the-mill
19 sort of criminal case?
20 A. In a non-capital case, yes, sir.
21 Q. If you would look again at Exhibit D there,
22 your invoice, would you agree it appears that you spent
23 approximately -- you spent 20 hours in research? Would
24 you agree that's what is reflected there?

1 A. Yes.
2 Q. And would you say that is accurate, not
3 overstated or understated?
4 A. No independent recollection. I would have to
5 say that that's accurate.
6 Q. And then 20 hours are reflected there it
7 appears, again referring to Exhibit D, as for drafting
8 of issues; would you agree with that?
9 A. Well, under draft merit brief, there are 19
10 hours.
11 Q. Would you say that's accurate as well?
12 A. Yes, sir.
13 Q. Your invoice does not appear to reflect the
14 specific propositions that you wrote. Would you agree
15 with that?
16 A. That's correct.
17 - - -
18 SUPREME COURT OF OHIO MOTION,
19 ENTRY, AND CERTIFICATION FOR
20 APPOINTED COUNSEL FEES WAS MARKED
21 AS EXHIBIT E.
22 - - -
23 Q. Let me hand you what is marked as Exhibit E.
24 Recognizing or looking at this, does this appear to be

1 a motion for counsel fees submitted by Mr. Graeff in
2 this case?
3 A. It does.
4 Q. With respect to this bill, it seems from my
5 review of it that he had drafted propositions 10
6 through 21. If that's correct, would you say that that
7 by inference would mean that you drafted the remaining
8 propositions?
9 A. From this, yes.
10 - - -
11 MERIT BRIEF OF JAMES T. CONWAY, III
12 WAS MARKED AS EXHIBIT F.
13 - - -
14 Q. Hand you what is marked as Petitioner's
15 Exhibit F. Does that appear to be a true and correct
16 copy, that Exhibit F, of the merit brief that you and
17 Mr. Graeff filed before the Ohio Supreme Court on
18 February 2nd, 2004?
19 A. It does.
20 Q. Are you familiar with what I'll call the
21 contemporaneous objection rule?
22 A. I think so.
23 Q. In other words, the rule that if something
24 occurs that is legally objectionable in terms of

1 evidence being offered, that the time to object is as
2 it's coming in and not some later time?
3 A. Yes.
4 Q. And does that in your experience have an
5 impact on appellate issues?
6 A. Yes.
7 Q. What would you say that effect is?
8 A. Well, if an objection is not entered at the
9 time and is never entered, then you're looking at a
10 plain error situation when you get to the appellate
11 court. So that would be to me the biggest problem.
12 Sometimes -- and if I could just expand a little bit.
13 Q. Please do.
14 A. Sometimes you have -- what is frustrating is
15 sometimes you have something that's objected to and
16 then the objector withdraws it and you say to yourself,
17 I wish I hadn't done that, that might have been
18 something nice, or it gets withdrawn later on, and
19 sometimes something happens in the trial that makes
20 that objection moot or resolves that issue.
21 Q. As you were going through the record in Jimmy
22 Conway's appeal, did it appear to you that the Franklin
23 County prosecutor's assistants who were handling the
24 case would frequently cite to the failure of an issue

1 to be preserved -- or during the appeal, during their
2 briefing of the appeal, failure to be preserved for
3 direct appeal because trial counsel had failed to
4 timely object?
5 A. I don't understand. You have me confused.
6 Q. Do you recall that being an issue in this
7 case, where the prosecutor argued that the matter was
8 waived because trial counsel had failed to object on a
9 timely basis?
10 A. Are you talking about the prosecutors in the
11 appeal?
12 Q. Or at trial.
13 A. Well, in the appeal, yes, and you frequently
14 see that. The appeal was handled by Ms. Coriell and I
15 think Steve Taylor, but I don't remember, and I recall
16 from just reviewing their brief the other day that they
17 frequently pointed that out in their response, in their
18 merit brief, yes. Well, that's a great issue, but
19 there was no objection. There was no objection. It
20 was waived, it was waived, it was waived.
21 I don't recall from the transcript, because I
22 didn't review the transcript, if the trial prosecutors
23 used a similar argument at different points.
24 Q. Well, with respect to appellate counsel

1 raising that issue, that I assume could have a harsh
2 effect if the rules apply then by the court to exclude
3 an objection from consideration?
4 A. Yes, sure.
5 Q. What would you say would then be the way to
6 avoid the harshness of the rule, or what is the
7 appropriate way -- what ways exist to handle that then?
8 A. At trial or --
9 Q. At the appellate level.
10 A. Well, you raise the issue and you either in a
11 responsive brief or in the brief itself discuss how
12 this is -- this is not plain error, because you know
13 that's what is going to come from the other side.
14 Q. That they will say it's not plain error,
15 right?
16 A. Plain error, plain error.
17 Q. What if you don't have the plain error
18 argument?
19 A. Well, then you have a problem. I mean if you
20 don't have a good plain error argument?
21 Q. Well, if the argument -- what about is then
22 the approach that an ineffective assistance of counsel
23 for not making the objection?
24 A. Sure, you can raise an IAC claim in that

1 instance. You could do that both in the anticipated
2 plain error argument. So those would be a couple
3 different ways that you could approach that.
4 Q. Is there any downside in raising it as an
5 ineffective assistance issue if it appears to be there?
6 A. In a death penalty case, probably not. I
7 mean depending on how far out you go. Of course,
8 you're always -- again, then you're going to have to be
9 prepared for the comeback of, well, it's a trial
10 tactic --
11 Q. Right.
12 A. -- didn't make any difference, the evidence
13 was overwhelming.
14 Q. And, in fact, in your brief, you did raise
15 some ineffectiveness issues?
16 A. Yes, sir, I did.
17 Q. Would you agree that the raising of what
18 would appear to be a substantively defaulted issue by
19 that means of ineffective assistance of counsel, doing
20 so would be a prevailing standard of practice that
21 counsel should use to handle that situation as of the
22 time you were doing Mr. Conway's direct appeal?
23 A. You're talking about appellate counsel doing
24 that?

1 Q. Yes. I'm sorry if I wasn't clear about that.
2 A. Yes.
3 Q. You previously testified that winnowing
4 issues down the way you would -- if you recall back to
5 our discussion of the felonious assault kind of case or
6 the non-death penalty case, that winnowing issues in
7 capital cases is not a good idea, one of the reasons
8 discussed.
9 A. Well, I mean you don't want to --
10 theoretically you would raise every thing that you had.
11 I think there is maybe --
12 Q. Well, you don't want to raise an issue that's
13 plain --
14 A. Obviously you want to be professional about
15 it. So in terms of some winnowing, but you would --
16 no, you don't prune the tree the same way that you
17 would in a hypothetical felonious assault case.
18 Q. You're aware that at the time that James
19 Conway was on trial, he had another pending death
20 penalty case?
21 A. Yes.
22 Q. You were not involved in that case?
23 A. No, sir.
24 Q. But you were aware that it had been going

on --

A. Yes, sir.

Q. -- at the time that this trial was going on?

A. Yes.

Q. Assuming that the trial court in this case had ordered that no mention be made of the other pending capital case and that a state witness had violated the order by making a reference to it and counsel did not object, do you think that is a potentially meritorious appeal issue?

A. Well, it's potentially. I'd have to recall what that was, because I recall that there was that issue. My recollection is that there was a witness who was connected to both cases in some fashion. I don't remember what that person's name was. I think this was the meeting at Route 22 and 104 in Chillicothe or something like -- or Circleville or something like that. I don't remember.

- - -

PAGES 1825 AND 110 OF A TRANSCRIPT
WAS MARKED AS EXHIBIT J.

- - -

Q. Hand you what has been marked as Exhibit J, and ask you if you look at that and if that appears to

1 deal with that issue in this case. Does that appear to
2 be a portion of the transcript perhaps of the testimony
3 of Mr. Trent?
4 A. It could be.
5 Q. Do you remember who Ronald Trent was?
6 A. Ronald Trent was a jailhouse informant in
7 this case. I think he had been jailed with Mr. Conway.
8 He testified as a state's witness pursuant to a pool
9 agreement is my recollection.
10 Q. Does this appear on the second page in
11 particular to contain where the court made reference to
12 the requirement not to make any reference to the other
13 murder case?
14 A. Let me say that the first page is a copy of
15 page 1825 of a transcript. The second page of this
16 Exhibit J is from 110. I'm going to assume it's from
17 the same transcript, and I'm going to assume it's from
18 the transcript in this case.
19 Q. Yes.
20 A. So page 110 is a discussion between one of
21 the defense attorneys, one of the prosecutors and the
22 judge about the issue of some witnesses know about this
23 other death penalty case that Mr. Conway had pending.
24 Q. So that would appear to be an order that

1 there not be any mention made by state's witnesses of
2 the existence of another murder case pending against
3 Mr. Conway?
4 A. No, I would disagree with that.
5 Q. Okay.
6 A. Because I don't see -- on page 110, I don't
7 see anywhere where the court tells the prosecutors
8 don't go there or words to that effect. The prosecutor
9 says, I'm going to tell them to stay away from this
10 other case, but the court never says, State of Ohio,
11 I'm telling you stay away from this, don't go near it,
12 don't touch it, or you're going to have a problem or
13 whatever. There's nothing in there like that, at least
14 on this page.
15 Q. Well, let's leave that for the moment.
16 A. Yes, sir.
17 Q. In this case at trial, the defense filed a
18 motion to suppress, and I'm going to ask you if you
19 recall this, that instead of going forward with a
20 motion to suppress before the trial judge in this case,
21 counsel instead stipulated to the admissibility of the
22 transcript of the motion to suppress hearing that was
23 held in Mr. Conway's other case. Do you recall that?
24 A. I seem to recall something like that, yes.

1 Q. Would you say based upon your experience that
2 counsel in a death penalty case should go forward and
3 make a record of the motion to suppress in his own
4 particular case that's before the court?
5 A. Well, theoretically, yes.
6 Q. Do you think the failure to have done so
7 would have constituted deficient performance or could
8 have constituted deficient performance by trial
9 counsel?
10 A. It could have.
11 Q. And by extension then could this have
12 actually worked a prejudice to the defendant in the
13 case?
14 A. It could.
15 Q. Was there a reason that you can now recall as
16 to why that issue was not raised as one of the IAC
17 claims in this case on appeal?
18 A. I can't.
19 Q. Another issue that came up during the case
20 was the trial court's approval of funding for a
21 firearm's expert. The state having presented evidence
22 suggested -- or actually saying that James Conway had
23 stated he fired a shot knowing that bullets would go
24 through the body of Mr. Gervais and into Mr. Williams,

1 and I guess I should back up for the record and say
2 you'll recall that the factual elements of this case
3 included that there had been an allegation that a man
4 named Mandel Williams had stabbed Mr. Conway's brother?
5 A. Yes.
6 Q. And ultimately the person who died was
7 Mr. Gervais?
8 A. Yes.
9 Q. And that there was testimony to the effect
10 that Mr. Conway had stated to the jailhouse informant
11 that, in fact, he fired the shot knowing that it would
12 go through Mr. Gervais and into Mr. Williams, the
13 intended target, because he had stabbed Mr. -- does
14 that all ring a bell with you?
15 A. Yes, I remember that.
16 Q. And you recall that the State had
17 cross-examined Mr. Conway extensively when he took the
18 stand regarding the number of times the weapon was
19 discharged and the manner in which it was discharged?
20 A. Yes, I remember that. I mean I remember it.
21 With great specificity, I don't recall that.
22 Q. Do you have an opinion as to whether
23 defense -- or should defense counsel have called an
24 expert to explain that in the 45 round, you would not

1 normally be expected to go through one body and into
2 another?
3 A. Could you repeat that?
4 Q. Mr. Conway having allegedly said to the
5 jailhouse informant that he fired the shot into
6 Mr. Gervais knowing that it would hit -- go through him
7 and into Mr. Williams, the intended target, do you
8 believe that that issue should have caused defense
9 counsel to call an expert to testify regarding whether
10 the 45 round that was fired would ordinarily be
11 expected to go through one body and into another under
12 the circumstances?
13 A. Well, I think that my thinking -- that's not
14 going to answer your question. I think that that's
15 something the defense attorney could have considered
16 doing, is having an expert come in and testify about
17 what 45-caliber bullets do in space.
18 Q. In fact, you recall the record reflecting
19 there was a witness who was an expert about guns that
20 the defense had, but he was apparently limited or the
21 discussion was about the nature of the firing of the
22 gun itself as opposed to the impact of it?
23 A. I do recall that.
24 Q. Do you know of any reason for not raising an

1 issue related to this in the direct appeal?
2 A. I can only -- I would assume that my thinking
3 would have been if -- once Mr. Conway -- it wouldn't
4 have made any difference what Mr. Conway -- what
5 bullets actually do or should be -- excuse me -- what a
6 45-caliber bullet would be expected to do in space,
7 that my recollection is that Mr. Conway admitted that
8 he fired the weapon, and it did, in fact, go through
9 Mr. Gervais and strike Mr. Williams, and so
10 Mr. Conway -- I don't believe there was anything in the
11 record that indicated Mr. Conway had any expertise or
12 training in what 45-caliber bullets do in space.
13 Q. Would an expert on the issue of what it would
14 be expected to do not have the effect of -- wouldn't
15 that make it even more important to have an expert to
16 say that that, in fact, could not happen if the expert
17 were to say that? In other words, if Mr. Conway is not
18 an expert?
19 MR. MAHER: I'd object because you're
20 contradicting the record.
21 MR. TRIPLETT: In what respect?
22 MR. MAHER: The bullet did, in fact,
23 penetrate one person --
24 MR. TRIPLETT: Right.

1 MR. MAHER: -- and hit another. Your
2 question contradicts the record.
3 MR. TRIPLETT: Well, let me rephrase the
4 question, because I didn't intend to do that.
5 BY MR. TRIPLETT:
6 Q. You said that Mr. Conway wouldn't be expected
7 to be an expert in whether that would happen?
8 A. No. What I said was, is that there's nothing
9 in the record that suggests that he has any training or
10 expertise in ballistics.
11 Q. But he had attributed to him by Mr. Trent the
12 statement that he expected that to occur, that is, that
13 the bullet would go through one person and into the
14 other?
15 A. That's what Mr. Trent testified to.
16 Q. Right. And I'm saying that given that that
17 statement attributed to -- you would agree that that
18 statement attributed to Mr. Conway was not accepted by
19 the defense is accurate?
20 A. No -- yes, I recall that there was a very
21 vigorous cross-examination of Mr. Trent and his motives
22 for testifying to what he testified to.
23 Q. Defense counsel had retained an expert who
24 had assembled a computer simulation. Do you recall

1 that?
2 A. Yes.
3 Q. And you recall the trial court had precluded
4 the testimony of this expert because defense had not
5 timely provided discovery to the prosecution for that?
6 A. I don't remember what the problem was. I
7 remember that there was a problem with the computer
8 simulation person testifying.
9 Q. Would you agree that it would be deficient
10 performance of trial counsel for the defense to have
11 caused the exclusion of evidence that they wanted to
12 present to -- let me restate my question.
13 Would you agree that it's deficient
14 performance to fail to provide notice of discovery of
15 evidence you intend to use when that, in fact, results
16 in it being excluded by the trial court?
17 A. For trial counsel, yes.
18 Q. Could this deficient performance depending
19 upon the contents of the testimony of the expert have
20 prejudiced the defense?
21 A. It could have.
22 Q. So you've testified you saw this issue arise
23 in your review of the record of this case. Do you know
24 of any reason for not raising that as an ineffective

1 assistance of counsel issue for purposes of appeal?
2 A. Well, my recollection is that there was a
3 proffer of this evidence. As I recall, it was laid out
4 in the record as to what the expert would have
5 testified to is my recollection. I could be wrong.
6 Q. Was that in the form of a statement of
7 counsel or a presentation of the witness?
8 A. I believe it was statement of counsel, but I
9 just remember there was a fairly good summary of what
10 this person was going to say in the record, and I guess
11 my -- my thinking again would be as with the previous
12 example on the ballistics expert, as it turned out, the
13 defense position -- I mean Mr. Conway, as I recall,
14 didn't really dispute that he fired the weapon, and so
15 I didn't see how the ballistics person -- or excuse
16 me -- the computer simulation person would have made a
17 difference.
18 Q. Did you believe the proffer of the evidence
19 was efficient or sufficient?
20 A. As I recall, I felt that it was sufficient,
21 because my recollection is it was pretty well laid out
22 what the person was going to testify to.
23 Q. Moving on to another issue. In sort of the
24 parlance of death penalty trial practice, have you

1 heard the expression "automatic death penalty juror"?
2 A. Yes.
3 Q. What does that mean to you?
4 A. That would be the person who might be
5 described variously by people as an eye for an eye
6 person. You take a life, you have to forfeit your
7 life, and probably would -- I don't think there's an
8 actual definition, but my view would be it's somebody
9 who doesn't really care about the circumstances of the
10 death. It's an icy morning and your car slides and you
11 hit a pedestrian on the sidewalk and it kills them, you
12 should be killed, too.
13 Q. A kind of prospective jury would be excluded
14 in a capital case because he or she would automatically
15 vote for death upon conviction?
16 A. Yes, under Ohio law, U.S. Supreme Court law
17 would be properly excluded, yes.
18 Q. In this case, Prospective Juror Frank
19 Finegold agreed with the statement that if everything
20 was found beyond a reasonable doubt, then death would
21 be the appropriate penalty. Should defense counsel
22 have moved to challenge that juror for cause?
23 A. Well, based on that statement alone, you'd
24 certainly want to talk to that juror, because that

1 juror could be referring to -- when he says everything
2 beyond a reasonable doubt, he could be referring to the
3 aggravating factors being found beyond a reasonable
4 doubt, as well as evidence of guilt or innocence.
5 - - -
6 PAGES 525 AND 540 OF A TRANSCRIPT
7 WAS MARKED AS EXHIBIT L.
8 - - -
9 Q. Hand you what has been marked as Petitioner's
10 Exhibit L.
11 A. I've read two pages on Petitioner's Exhibit
12 L.
13 MR. MAHER: I would note for the record that
14 the two pages are non-sequential, one being page 525,
15 the other being page 540, nothing in between.
16 Q. Noting that, looking at this exhibit, you see
17 reference to a statement of Prospective Juror Finegold
18 regarding his feeling on the death penalty?
19 A. Yes, down at the bottom of the page.
20 Q. Would his statement cause you to believe that
21 he may be an automatic death penalty juror?
22 A. No. If I can just expand on that.
23 Q. Sure.
24 A. I wouldn't say he's an ADP to further the

1 parlance. He's certainly someone that if I was trying
2 the case I would have a lot of concerns about because
3 he doesn't -- in this answer, he doesn't seem to be a
4 person who might want to look at mitigating factors.
5 So I would certainly want to question him and find out
6 exactly what was going on, especially when you compare
7 him to page 540 and Prospective Juror Weygandt, when
8 you compare those two answers.
9 Q. At the time of Mr. Conway's direct appeal --
10 I'm finished with that exhibit for now.
11 A. Okay.
12 Q. At the time of Mr. Conway's direct appeal,
13 did the Ohio Supreme Court permit the filing of a reply
14 brief in a capital case?
15 A. I don't recall.
16 Q. Assuming it did, what would be the reasons in
17 favor of filing a reply brief?
18 A. Well, you might want to highlight issues that
19 you had with the State's brief, or maybe to -- if the
20 State was talking about something and you felt that
21 maybe there's some supplementation that was needed for
22 your brief or if you thought that the state was in some
23 way misconstruing an argument or something like that,
24 then you would consider it.

1 - - -

2 THE SUPREME COURT OF OHIO CASE

3 INFORMATION WAS MARKED AS EXHIBIT

4 G.

5 - - -

6 Q. I hand you what has been marked Petitioner's

7 Exhibit G.

8 A. Okay.

9 Q. And we'll ask you if that appears to be a

10 copy of the docket of the Supreme Court direct appeal

11 in this case.

12 A. It appears to be.

13 Q. You agree that it does not appear that a

14 reply brief was filed in this case on behalf of

15 Mr. Conway?

16 A. One wasn't filed as far as I know. It's not

17 indicated here.

18 Q. Would it be your practice ordinarily to file

19 or not file a reply brief assuming it's permitted?

20 A. If it's permitted and I think there's a need,

21 I would file one, whether that's in our hypothetical

22 felonious assault case or in a capital case.

23 Q. Well, in a death penalty case, would you not

24 find that ordinarily you would find something that the

1 prosecution would have said that you would take issue
2 with and want to respond to in a reply brief?
3 A. Well, I think so. I mean in this case, I
4 think that's probably something I would have discussed
5 with Mr. Graeff; and, again, that's why we relied on
6 his -- and let me say this: I was co-counsel with
7 David, with Mr. Graeff, and I'm not trying to get out
8 of any responsibility for anything that did or did not
9 happen in this case. I'm just saying that that's just
10 what would have happened. I'm not trying to put any
11 blame on Mr. Graeff.
12 Q. Understood. So you don't have any specific
13 recollection as to why a reply brief would not have
14 been filed in this case?
15 A. I don't remember, no.
16 Q. That's all I have to ask on that exhibit.
17 A. Yes, sir.
18 Q. Oh, I'm sorry. I'm wrong.
19 Was there a motion for reconsideration filed
20 in this case at the end of the direct appeal to the
21 Supreme Court?
22 A. Yes. That was filed by -- that was filed in
23 June of '06.
24 Q. Well, what you're referring to was the

1 application for reopening filed in the case --
2 A. I apologize.
3 Q. -- and I guess we would say -- we might refer
4 to as a Murnaghan.
5 A. I apologize. I misread that. It does not
6 appear that motion for reconsideration of the court's
7 decision was filed, no, sir.
8 Q. Do you know what reasons there were not a
9 motion of that type filed in this case?
10 A. No, I don't remember any reason.
11 Q. Are there any reasons specific to capital
12 cases that you can think of for filing of a motion for
13 reconsideration in a capital case particularly?
14 A. Not anything specific, no, sir.
15 MR. TRIPLETT: At this point I'm going to
16 suggest that perhaps we take a five-minute break, and
17 I'll confer with co-counsel and we can wrap up.
18 (Short recess taken.)
19 - - -
20 **CROSS-EXAMINATION**
21 BY MR. GATTERDAM:
22 Q. Todd, just a couple of quick ones. I'll try
23 to point you back to the issues.
24 Early on you were asked questions about the

1 failure to object, trial counsel's failure to object to
2 a mention of another homicide.
3 A. Um-hmm, yes.
4 Q. You would agree if somebody is on trial in a
5 homicide case, death penalty or not, if another witness
6 brings up another homicide that's prejudicial, that's a
7 problem?
8 A. That is a problem, yes, sir.
9 Q. And you with your trial experience, what
10 would you do -- whether there was a court order whether
11 they could mention it or not, would you typically
12 object to that if some witness says he was laughing
13 about another murder he committed, would you typically
14 object?
15 A. Yes, sir.
16 MR. MAHER: I'd object to the
17 characterization in that question as being in
18 contradiction to the record which is in this
19 deposition. That sequence of questioning does not
20 exist in the record, and I object to the question.
21 Q. You can go ahead and answer, or I think maybe
22 you have.
23 A. I have.
24 Q. Would you consider it -- if a witness brings

1 up another homicide, would you consider it prejudicial
2 enough that you as a trial attorney may ask for a
3 mistrial?
4 A. I would consider it.
5 Q. Would you agree that you as a trial attorney
6 wouldn't need a court order ordering a witness not to
7 bring up another homicide before objecting if you could
8 object whether there was a court order or not?
9 A. Sure.
10 Q. The only other area I want to ask you about
11 is this whole issue of whether to present a ballistics
12 expert or not, you're familiar with the questions you
13 were asked on that?
14 A. Yes.
15 Q. Mr. Trent was giving testimony regarding
16 things he said Mr. Conway told him, right --
17 A. Yes.
18 Q. -- regarding a firearm and whether it would
19 go through somebody, words to that effect?
20 A. Yes.
21 Q. And maybe this is not true, but the record
22 wouldn't be clear on whether or not Mr. Trent was a
23 ballistics expert, correct?
24 A. I don't recall anything from the record about

1 Mr. Trent and his knowledge of ballistics.
2 Q. And he was a lay witness, correct?
3 A. That's my recollection, yes.
4 Q. Would you agree if ballistics was an issue in
5 a case and a State's witness testified and you believe
6 that they were testifying incorrectly, you could call a
7 witness in your case, you being the defense, to try to
8 rebut that ballistics evidence?
9 A. I think so, yes.
10 Q. If ballistics was a key issue and you didn't
11 call a witness who could rebut that, does that rise to
12 the level of deficient performance or could it, I
13 guess?
14 A. It could.
15 Q. Could it also rise to the level of prejudice?
16 A. It could.
17 MR. GATTERDAM: That's all we have.
18 MR. MAHER: No questions.
19 MR. GATTERDAM: Do you want to read your
20 testimony?
21 THE WITNESS: No. I'm okay. I'm fine. I'll
22 waive.
23 (Signature waived.)
24 - - -

1 Thereupon, at 3:22 p.m., on Wednesday, March
2 21, 2012, the deposition was concluded.
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1 CERTIFICATE

2 STATE OF OHIO :
SS:
3 COUNTY OF FRANKLIN :

4 I, Carol A. Kirk, a Registered Merit Reporter and Notary Public in and for the State of Ohio, duly
5 commissioned and qualified, do hereby certify that the within-named TODD W. BARSTOW was by me first duly sworn
6 to testify to the truth, the whole truth, and nothing but the truth in the cause aforesaid; that the
7 deposition then given by him was by me reduced to stenotype in the presence of said witness; that the
8 foregoing is a true and correct transcript of the deposition so given by him; that the deposition was
9 taken at the time and place in the caption specified and was completed without adjournment; and that I am in
10 no way related to or employed by any attorney or party hereto or financially interested in the action; and I
11 am not, nor is the court reporting firm with which I am affiliated, under a contract as defined in Civil Rule
12 28(D).

13 IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Columbus, Ohio on
14 this 30th day of March, 2012.

15

16 Carol A. Kirk (Dmt)
CAROL A. KIRK, RMR
17 NOTARY PUBLIC - STATE OF OHIO

18 My Commission Expires: April 8, 2012.

19 - - -

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EXHIBIT
A

GUIDELINE 10.15.1—DUTIES OF POST-CONVICTION COUNSEL

A. Counsel representing a capital client at any point after conviction should be familiar with the jurisdiction's procedures for setting execution dates and providing notice of them. Post-conviction counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution.

B. If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora.

C. Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.

D. The duties of the counsel representing the client on direct appeal should include filing a petition for certiorari in the Supreme Court of the United States. If appellate counsel does not intend to file such a petition, he or she should immediately notify successor counsel if known and the Responsible Agency.

E. Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to:

1. maintain close contact with the client regarding litigation developments; and

2. **continually monitor the client's mental, physical and emotional condition for effects on the client's legal position;**

3. **keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and**

4. **continue an aggressive investigation of all aspects of the case.**

History of Guideline

This Guideline is based on Guideline 11.9.3 of the original edition. Subsections A, B, and D are entirely new. Subsection C includes new language regarding the manner in which post-conviction counsel must present all arguably meritorious issues. Subsection E includes new language emphasizing the ongoing obligations imposed by these Guidelines upon post-conviction counsel.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-8.5 ("Post-conviction Remedies") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

Commentary

Almost all of the duties imposed by Guidelines 10.3 et seq. are applicable in the post-conviction context. Subsection E notes this by way of reminder. Post-conviction counsel should consult those Guidelines and accompanying commentaries.

The Paramount Duty to Obtain a Stay

No matter how compelling the client's post-conviction case may be, he faces the risk that his execution will moot it.[332] This is a phenomenon unique to capital litigation and one that must be uppermost in the mind of post-conviction counsel.

When states fail to provide post-conviction counsel entirely or in a timely manner,[333] or request the setting of an execution date to advance the litigation,[334] or impose short periods of time for filing substantive post-judgment pleadings, the result is emergency requests for stays of execution so that substantive pleadings will be considered.[335] Although

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332. *See* Brooks v. Estelle, 702 F.2d 84, 84-85 (5th Cir. 1983) (dismissing appeal, which had received certificate of probable cause from district court, as moot since petitioner had been executed following the denial of a stay by *Brooks v. Estelle*, 697 F.2d 586 (5th Cir. 1982)).

333. There has been no right to state post-conviction counsel in Georgia. *See* Gibson v. Turpin, 513 S.E.2d 186, 188 (Ga. 1999). In August 1996, Georgia Supreme Court Justice Robert Benham noted that several persons under sentence of death in Georgia were in "immediate need of legal representation," and asked area law firms to volunteer. Bill Rankin, *When Death Row Inmates Go To Court Without Lawyers: In the Late Stages of Their Fight to Stay Alive, Some Must Represent Themselves*, ATLANTA J. & CONST., Dec. 29, 1996, at D5 (internal quotation marks omitted). One Atlanta civil firm that volunteered was assigned the case of Marcus Wellons. *See id.* Three days after the firm received a copy of the trial transcript, the trial court set an execution date for two weeks later. *See id.* The firm rushed to the Georgia Supreme Court and asked for more time to submit a formal post-conviction petition. *See id.* Hours before Mr. Wellons's scheduled execution, the Court denied the request by a 4-3 vote. *See id.* As guards were about to shave Mr. Wellons's head for that evening's electrocution, the federal district court granted a stay of execution. *See id.* State counsel and the federal defender were given ten months to prepare the federal petition. *See id.*

A similar instance of legal Russian roulette took place in Alabama in 2001 in the case of Thomas D. Arthur. *See* Arthur v. Haley, 248 F.3d 1302 (11th Cir. 2001) (affirming grant of stay on day before scheduled execution to inmate who had been unrepresented for more than two years following direct appeal); *Agency Claims Death Row Inmates Without Lawyers a Growing Problem*, CHATTANOOGA TIMES FREE PRESS, March 26, 2001, at B8 (describing *Arthur* case and absence of any state funding for post-conviction representation in Alabama). As suggested *supra* note 47, counsel should be aggressive in challenging such irresponsible behavior by the states as a federal constitutional violation.

334. For example, in Kentucky capital cases the Attorney General invariably requests an execution date at the end of direct appeal, and the Governor invariably signs the death warrant. No stay of execution may be granted until the state post-conviction petition is filed. As a result, in order to obtain a stay, counsel must often file a state post-conviction petition well before the time allowed under state law because there is an outstanding execution date. The practice is the same in federal habeas proceedings. *See, e.g.*, *Execution of Killer Delayed*, CINCINNATI ENQUIRER, June 9, 2000, at D1B.

335. When a capital case enters a phase of being "under warrant"—i.e., when a death warrant has been signed—time commitments for counsel increase, "due in large part to the necessary duplication of effort in the preparation of several petitions which might have to be filed simultaneously in different courts." ABA POST-CONVICTION DEATH PENALTY REPRESENTATION PROJECT ET AL., TIME AND EXPENSE ANALYSIS IN POSTCONVICTION DEATH PENALTY CASES 10 (1987).

the ABA and other professional voices have repeatedly condemned this system,[336] defense counsel must make the best of it—by seeking stays or reprieves from any available source and challenging the unfairness of any overly restrictive constraints on the filing of substantive pleadings and/or stays.

And to the extent that counsel can responsibly reduce the stresses imposed upon the client by this often nightmarish system, counsel should of course do so (e.g., by reassuring the client of the unlikelihood of the execution actually occurring on its nominal date, notwithstanding the alarming preparations being made by the prison).[337]

Keeping the Client Whole

Even if their executions have been safely stayed, however, the mental condition of many capital clients will deteriorate the longer they remain on death row. This may result in suicidal tendencies and/or impairments in realistic perception and rational decisionmaking.[338] Counsel should seek to minimize this risk by staying in close contact with the client.[339]

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336. *See* ABA CRIMINAL JUSTICE SECTION, *supra* note 86, at 10-11 (calling for automatic federal stays throughout post-conviction period); *Legislative Modification*, *supra* note 12, at 855 ("We agree with the Powell Committee [appointed by Chief Justice Rehnquist to study reform of capital habeas corpus] that the current mechanisms for obtaining stays of execution are irrational and indefensible. At best, they lead to an enormous waste of legal effort by all participants in the system, and at worst they result in inconsistencies that have fatal consequences."); Ira P. Robbins, *Justice by the Numbers: The Supreme Court and the Rule of Four – Or Is It Five?*, 36 SUFF. U. L. REV. 1 (2002); Eric M. Freedman, *Can Justice Be Served by Appeals of the Dead?*, NAT'L L.J., Oct. 19, 1992, at 13 (current situation respecting stays is "no way to run a judicial system").

337. *See, e.g.*, McDonald v. Missouri, 464 U.S. 1306, 1307 (1984) (Blackmun, J., in chambers).

> (I thought I had advised the Supreme Court of Missouri once before, in *Williams*, that . . . I . . . shall stay the execution of any Missouri applicant whose direct review of his conviction and death sentence is being sought and has not been completed. I repeat the admonition to the Supreme Court of Missouri, and to any official within the State's chain of responsibility, that I shall continue that practice. The stay, of course, ought to be granted by the state tribunal in the first instance, but, if it fails to fulfill its responsibility, I shall fulfill mine.)

Williams v. Missouri, 463 U.S. 1301, 1301-02 (1983) (Blackmun, J., in chambers) (executions scheduled for prior to the expiration of the time for seeking certiorari on direct appeal must be stayed "as a matter of course").

338. *See* C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 850 (2000) (noting that "[b]etween 1977 and March 1998, 59 [condemned] inmates had volunteered for execution compared to 382 executed unwillingly"); *see also infra* note 351.

339. *See supra* text accompanying notes 189-92.

Counsel's ongoing monitoring of the client's status, required by Subsection E(2), also has a strictly legal purpose. As described *supra* in the text accompanying notes 188-92, a worsening in the client's mental condition may directly affect the legal posture of the case and the lawyer needs to be aware of developments. For example, the case establishing the proposition that insane persons cannot be executed[340] was heavily based on notes on the client's mental status that counsel had kept over a period of months.

The Labyrinth of Post-conviction Litigation

A. The Direct Appeal

Practice varies among jurisdictions as to the limits of the appellate process and the relationship between direct appeals and collateral post-conviction challenges to a conviction or sentence.[341] Issues that are only partially or minimally reflected by the record, or that are outside the record, should be explored by appellate counsel as a predicate for informed decisionmaking about legal strategy.

As Subsection C emphasizes, it is of critical importance that counsel on direct appeal proceed, like all post-conviction counsel, in a manner that maximizes the client's ultimate chances of success. "Winnowing" issues in a capital appeal can have fatal consequences. Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later.[342] When a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored or unexploited.[343]

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340. *See* Ford v. Wainwright, 477 U.S. 399, 402 (1986).

341. In some states, there is a unitary appeal system in which direct appeal and collateral challenges such as ineffective assistance of counsel claims are raised simultaneously. *See, e.g.*, IDAHO CODE § 19-2719 (Michie Supp. 2002). In other jurisdictions, ineffective assistance of counsel claims generally may not be raised on direct appeal but are reserved for separate post-conviction proceedings. *See, e.g.*, Lawrence v. State, 691 So. 2d 1068, 1074 (Fla. 1997) (explaining that claims of ineffective assistance of counsel are not cognizable on direct appeal). The federal system follows the latter rule. *See* Massaro v. United States, 123 S. Ct. 1690 (2003) (unanimous).

342. For example, as described *supra* in note 235 in *Smith v. Murray*, 477 U.S. 527 (1986), the Supreme Court declined to address the merits of a petitioner's claim that his Fifth Amendment rights were violated by the testimony of a psychiatrist who had examined the defendant without warning him that the interview could be used against him. *See id.* at 529. Appellate counsel failed to assert this claim on direct appeal because the Virginia Supreme Court had rejected such claims at that time. *See id.* at 531. The Supreme Court subsequently found such testimony unconstitutional in *Estelle v. Smith*, 451 U.S. 454 (1981). In a "Catch-22" for the defendant, the Court concluded appellate counsel was not ineffective, because the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is

Appellate counsel must be familiar with the deadlines for filing petitions for state and federal post-conviction relief and how they are affected by the direct appeal. If the conviction and sentence are affirmed, appellate counsel should ordinarily file on the client's behalf a petition for certiorari review in the United States Supreme Court. Under the AEDPA, a client's one-year statute of limitations for filing a petition for federal habeas corpus relief generally begins to run upon the denial of certiorari or when the 90 days for filing a petition has elapsed.[344] Appellate counsel should therefore immediately inform successor counsel if he or she does not intend to file a petition for certiorari or when a petition for is denied; if successor counsel is not yet appointed, counsel should promptly advise the Responsible Agency of the need to designate successor counsel (Subsection D).

Appellate counsel should also advise the client directly of all applicable deadlines for seeking post-conviction relief and explain the tolling provisions of the AEDPA,[345] emphasizing that a state post-conviction motion should be filed sufficiently in advance of the one-year deadline to allow adequate time to prepare a federal habeas corpus petition. In states in which the direct appeal and state post-conviction review are conducted in tandem,[346] post-conviction proceedings may be concluded at the same time as, or even before, the direct appeal, effectively rendering the tolling provisions inapplicable.

In light of this mutual dependency among all the post-conviction legal procedures, it is of the utmost importance that, in accordance with Guideline 10.13, appellate counsel cooperate fully with successor counsel and turn over all relevant files promptly.

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the hallmark of effective appellate advocacy." *Murray*, 477 U.S. at 536 (quoting Jones v. Barnes, 463 U.S. 745, 751-52 (1983)). At the same time, the claim was not deemed sufficiently novel to constitute cause for the procedural default because "forms of the claim he [advanced] had been percolating in the lower courts for years at the time of his original appeal." *Murray*, 477 U.S. at 536-37. Mr. Smith was therefore barred from raising the issue in federal habeas proceedings, *id.* at 539, and was executed.

343. It is for this reason that Subsection C refers to "issues . . . that are arguably meritorious under the standards applicable to high quality capital defense representation." *See supra* Guideline 10.8, text accompanying notes 234-36; *see also supra* text accompanying note 28. For examples of such issues, see *supra* notes 231, 271, 276, 307, and *infra* note 352.

344. 28 U.S.C. § 2244(d)(1)(A) (2000); *see* LIEBMAN & HERTZ, *supra* note 28, § 5.1b.

345. *See* Clay v. United States, 123 S. Ct. 1042 (2003).

346. *See, e.g.*, CALIFORNIA SUPREME COURT, CALIFORNIA SUPREME COURT POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH 3 (2002) (petitions for writ of habeas corpus to be filed within 180 days of final due date for filing reply brief on direct appeal); OKLA. STAT. ANN. tit. 22, § 1089(D)(1) (West Supp. 2003) (motion for post-conviction relief must be filed within 90 days from filing of reply brief on direct appeal).

B. Collateral Relief—State and Federal

As described in the commentary to Guideline 1.1, providing high quality legal representation in collateral review proceedings in capital cases requires enormous amounts of time, energy, and knowledge. The field is increasingly complex and ever-changing. As state and federal collateral proceedings become ever-more intertwined, counsel representing a capital client in state collateral proceedings must become intimately familiar with federal habeas corpus procedures. As indicated above, for example, although the AEDPA deals strictly with cases being litigated in federal court, its statute of limitations provision creates a de facto statute of limitations for filing a collateral review petition in state court. Some state collateral counsel have failed to understand the AEDPA's implications, and unwittingly forfeited their client's right to federal habeas corpus review.[347]

Collateral counsel has the same obligation as trial and appellate counsel to establish a relationship of trust with the client. But by the time a case reaches this stage, the client will have put his life into the hands of at least one other lawyer and found himself on death row. Counsel should not be surprised if the client initially exhibits some hostility and lack of trust, and must endeavor to overcome these barriers.

Ultimately, winning collateral relief in capital cases will require changing the picture that has previously been presented. The old facts and legal arguments—those which resulted in a conviction and imposition of the ultimate punishment, both affirmed on appeal—are unlikely to motivate a collateral court to make the effort required to stop the momentum the case has already gained in rolling through the legal system.[348] Because an appreciable portion of the task of post-conviction counsel is to change the overall picture of the case, Subsection E(3) requires that they keep under continuing review the desirability of amending the defense theory of the case, whether one has been formulated by prior counsel in accordance with Guideline 10.10.1 or not.

For similar reasons, collateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation

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347. *See generally*, Goodman v. Johnson, No. 99-20452 (5th Cir. Sept. 19, 1999) (unpublished); Cantu-Tzin v. Johnson, 162 F.3d 295 (5th Cir. 1998). Spencer Goodman was executed by Texas in January 2000 and Andrew Cantu-Tzin was executed by Texas in January 1999.

348. *See generally*, Russell Stetler, *Post-Conviction Investigation in Death Penalty Cases*, THE CHAMPION, Aug. 1999, *available at* http://www.criminaljustice.org/public.nsf/championarticles/99aug06/.

in accordance with Guideline 10.7. (Subsection E(4)). As demonstrated by the high percentage of reversals and disturbingly large number of innocent persons sentenced to death, the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case.[349] That may be because of information concealed by the state, because of witnesses who did not appear at trial or who testified falsely, because the trial attorney did not conduct an adequate investigation in the first instance, because new developments show the inadequacies of prior forensic evidence, because of juror misconduct, or for a variety of other reasons.

Two parallel tracks of post-conviction investigation are required. One involves reinvestigating the capital case; the other focuses on the client. Reinvestigating the case means examining the facts underlying the conviction and sentence, as well as such items as trial counsel's performance, judicial bias or prosecutorial misconduct. Reinvestigating the client means assembling a more-thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses.

As with every other stage of capital proceedings, collateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues.[350] These include not only challenges to the conviction and sentence, but also issues which may arise subsequently.[351] Collateral counsel should assume that any meritorious issue not contained in the initial application will be waived or procedurally defaulted in subsequent litigation, or barred by strict rules governing subsequent applications.[352] Counsel should also be aware that

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349. *See supra* text accompanying notes 47-58.

350. *See supra* Guideline 10.8 and accompanying commentary. As Subsection C emphasizes, the duty to investigate and present such claims applies to "all issues, whether or not previously presented." Until previously unpresented issues are fully explored, there is no way to determine whether or not any arguably applicable forfeiture doctrines may be overcome. *See* House v. Bell, 311 F.3d 767 (6th Cir. 2002) (en banc), *cert denied*, 123 S. Ct. 2575 (2003) (certifying to state courts issue of whether procedural vehicle existed to present evidence of innocence first uncovered during federal habeas proceedings).

351. For example, although the Justices disagree on the point, as shown most recently by their varying opinions respecting the certiorari petition in *Foster v. Florida*, 123 S. Ct. 470 (2002), it may well be that after a certain length of time continued confinement on death row ripens into an Eighth Amendment violation.

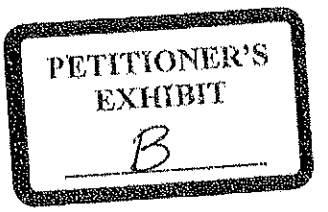
352. *See* Mason v. Meyers, 208 F.3d 414, 417 (3d Cir. 2000) (stating that as a result of the strict rules governing successive *habeas corpus* petitions enacted by the AEDPA and codified at 28

any change in the availability of post-conviction relief may itself provide an issue for further litigation.[353] This is especially true if the change occurred after the case was begun and could be argued to have affected strategic decisions along the way.

U.S.C. § 2244(b), "it is essential that habeas petitioners include in their first petition *all* potential claims for which they might desire to seek review and relief").

353. *See, e.g.*, Lindh v. Murphy, 521 U.S. 320, 322-23 (1997) (discussing the retroactive application of various procedural provisions in the AEDPA to pending cases).

Exhibit A



IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	
	)	
Appellee,	)	Case No. 2003-0647
	)	
-vs-	)	
	)	Trial Court Case No. 02CR-1153
JAMES CONWAY, III,	)	
	)	
Appellant.	)	

AFFIDAVIT OF KATHRYN L. SANDFORD

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, Kathryn L. Sandford, after being duly sworn, hereby state as follows:

1. I am an attorney licensed to practice law in the state of Ohio since 1994. I have been an Assistant State Public Defender in Ohio since 1996. My primary area of practice is capital litigation. I am certified under Sup. R. 20 as appellate counsel in capital cases.

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

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

4. The initial responsibility of appellate counsel, once the transcript is filed, is to ensure that the entire record has been filed with this Court. Appellate counsel has a fundamental duty in every criminal case to ensure that the entire record is before the reviewing courts on appeal. Ohio R. App. P. 9(B); Ohio Rev. Code Ann. § 2929.05 (Anderson 1995); State ex rel. Spirko v. Judges of the Court of Appeals, Third Appellate District, 27 Ohio St. 3d 13, 501 N.E. 2d 625 (1986).

5. After ensuring 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.

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

7. Since the reintroduction of capital punishment in response to the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), the area of capital litigation has become a recognized specialty in the practice of criminal law. 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.

8. Appellate representation of a death-sentenced client requires recognizing that the case will most likely proceed to the federal courts at least twice: first on a 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 sought in federal court. The issues that must be preserved are not only issues unique to capital litigation, but also case-and fact-related issues, unique to the case, that impinge on federal constitutional rights.

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

10. It is important that appellate counsel realize that the capital reversal rate in the state of Ohio is eleven percent on direct appeal and less than one percent in post-conviction. It is my understanding that forty to sixty percent (depending on which of several studies is relied upon) of all habeas corpus petitions are granted. Therefore, appellate counsel must realize that in Ohio, a capital case is very likely to reach federal court and, therefore, the real audience of the direct appeal is the federal court.

11. Based on the foregoing standards, I have identified three propositions of law that should have been presented to this Court by appellate counsel. The propositions of law identified in Conway's application for reopening were not presented to this Court.

13. Based on my evaluation of the record and understanding of the law, I believe that if these propositions of law had been properly presented for review, this Court would have granted relief. Also, these errors would have been preserved for federal review.

14. Therefore, James Conway, III, was detrimentally affected by the deficient performance of his former appellate counsel.

Kathryn L Sandford

KATHRYN L. SANDFORD
Counsel for Appellant

Sworn to and subscribed before me this 25th day of May, 2006.

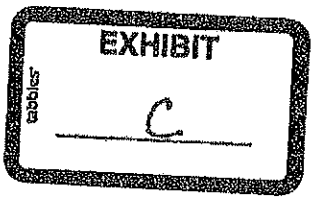
Ruth Tkacz

Notary Public

RUTH TKACZ, ATTORNEY AT LAW
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.

EAC (ADST)

ORIGINAL



IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	03-0647
v.	:	Case No. 02CR1153
	:	Judge Patrick M. McGrath
James T. Conway, III	:	
Defendant	:	

E N T R Y

The Court hereby appoints Todd Barstow and David Graeff as counsel for purposes of appeal in the above case.

Patrick M. McGrath, Judge

Copies to:

Ronald J. O'Brien
Prosecuting Attorney

ON COMPUTER-SMW

FILED
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SUPREME COURT OF OHIO

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PETITIONER'S EXHIBIT D

ORIGINAL

SUPREME COURT OF OHIO

MOTION, ENTRY, AND CERTIFICATION FOR APPOINTED COUNSEL FEES

FILED
APR 10 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

State of Ohio,
Plaintiff

v.

James T Conway,
Defendant

Supreme Court No. 03 647

Appeals Court No. —

Trial Court No. 02 CR 1153

ON COMPUTER-RV

MOTION FOR APPROVAL OF PAYMENT OF APPOINTED COUNSEL FEES AND EXPENSES

The undersigned, having been previously appointed counsel for the defendant for the appeal to this court, as evidenced by the attached entry of appointment, now moves for an order approving payment of fees earned and expenses incurred as reflected by the itemized statement of the reverse hereof, pursuant to R.C. 2941.51.

Hours Worked: IN COURT 1.0 | OUT OF COURT 95.1

Expenses (if any): $ 348.26

O.R.C. charge section number, name and classification

A. 2903.01, Aggravated Murder, UF

B. 2903.01 Attempted Murder UF

C. 2923.13 W U D FS

SUPREME COURT DECISION: Affirmed - 3/8/06

TERMINATION DATE: 3/8/06

ATTORNEY'S NAME: Todd W. Barstow

SOC. SEC. NO.: 238 274 921

ATTORNEY'S SIGNATURE: [signature]

ATTORNEY'S ADDRESS: 4155 E Main St

NUMBER AND STREET: Col's

CITY: OH

STATE: 43213

ZIP:

INFORMATION BELOW TO BE COMPLETED BY SUPREME COURT AND COUNTY AUDITOR ONLY

JUDGMENT ENTRY

This court finds that counsel performed the legal services set forth in the itemized statement on the reverse hereof, and that the fees and expenses hereinafter approved are reasonable. IT IS THEREFORE ORDERED that appointed counsel fees are approved in the sum of $ SEE ATTACHED ENTRY and expense in the sum of $ SEE ATTACHED ENTRY for a total allowance of $ _____, which amount is ordered certified to the _____ County Auditor for payment.

SEE ATTACHED ENTRY

CHIEF JUSTICE

CERTIFICATION

The County Auditor, in executing this certification, attests to the accuracy of the figures contained herein. A subsequent audit by the Ohio Public Defender Commission and/or Auditor of the State which reveals unallowable or excessive costs may result in future adjustments against reimbursement or repayment of audit exceptions to the Ohio Public Defender Commission.

COUNTY NUMBER	WARRANT NUMBER	WARRANT DATE

COUNTY AUDITOR

I her by certify that the following time was expended in representation of the defendant before the Supreme Court of Ohio:

DATE	ACTIVITY	TOTAL TIME

Time is to be recorded in tenth of an hour (6 minute) increments.

EXPENSE	PAID TO	AMOUNT
Copying/Assembly of Merit Brief	Kinko's	$345.26

To obtain reimbursement, the purpose of each expense must be clearly identified, and a receipt provided for each expenditure over $1.00.

I hereby certify the above is a true and accurate account of the time spent and expenditures incurred in representing the defendant in the Supreme Court of Ohio.

Applicant's Signature

OPD-1031 (4/96)

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	
v.	:	Case No. 02CR1153
	:	Judge Patrick M. McGrath
James T. Conway, III	:	
Defendant	:	

E N T R Y

The Court hereby appoints Todd Barstow and David Graeff as counsel for purposes of appeal in the above case.

Patrick M. McGrath, Judge

Copies to:

Ronald J. O'Brien
Prosecuting Attorney

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Conway

ITEMIZED BILLING FOR JAMES T. CONWAY, III
CASE NO. 03-647

DATE	TYPE OF SERVICE	HOURS
3/12/03	Letter to co counsel	.1
3/13/03	Read letter from client	.2
3/14/03	Letter to co-counsel	.2
3/14/03	Letter to client	.2
3/17/03	Letter from co counsel	.2
3/19/03	Phone call w/co-cnsl	.3
3/21/03	Letter from client	.3
4/16/03	Phone call w/co-cnsl	.2
4/21/03	Mtg w/ co-cnsl	1.5
5/2/03	Letter from client	.2
6/5/03	Letter to client	.1
6/9/03	Review memo contra	.1
6/11/03	Letter to client	.1
6/13/03	Letter to client	.2
6/20/03	Phone call w/co-cnsl	.4
6/24/03	Letter to client	.2
7/23/03	Phone call w/co-cnsl	.3
10/11/03	Read transcript	5.0
10/12/03	Read transcript	3.0
10/18/03	Read transcript	7.0

10/19/03	Read transcript	3.5
10/21/03	Phone call w/ co-cnsl	.2
10/25/03	Read transcript	5.0
10/26/03	Read transcript	4.0
10/30/03	Meeting w/co-cnsl	1.0
11/3/03	Phone call w/ co-cnsl	.4
11/8/03	Research	5.0
11/9/03	Research	3.0
11/11/03	Research	5.0
11/15/03	Research	4.0
11/16/03	Research	3.0
12/30/03	Letter to Supreme Court	.2
12/30/03	Letter to co counsel	.2
12/30/03	Letter to client	.1
1/7/04	Letter from client	.1
1/14/04	Phone call w/co-cnsl	.3
1/17/04	Draft Merit Brief	7.0
1/18/04	Draft Merit Brief	3.5
1/23/04	Draft Merit Brief	5.0
1/24/04	Draft Merit Brief	3.5
1/25/04	Phone call w/co-cnsl	.3
1/26/04	Brief writing	2.5
1/29/04	Final Draft	3.0

1/30/04	Phone call w/co-cnsl	.2
1/30/04	Deliver Merit Brief to Printer & set up printing	.5
2/2/04	File Merit Brief	1.0
3/31/04	Letter to client	.2
4/24/04	Review Appellee Brief	3.0
4/29/04	Letter from client	.2
5/9/04	Letter from client	.3
9/1/04	Letter to client	.2
4/5/05	Letter to client	.2
5/23/05	Letter to client	.2
8/11/05	Phone call w/co-cnsl	.3
8/13/05	Phone call w/co-cnsl	.2
8/20/05	Prepare for oral argument	4.0
8/22/05	Prepare for oral argument	4.0
8/23/05	Oral Argument	1.0
3/8/06	Read decision/letter to client	1.0

EXPENSES: Copying and assembly of Merit Brief: $348.26

GRAND TOTALS: OUT OF COURT: 95.1

IN COURT: 1.0

GRAND TOTAL: 96.1

PETITIONER'S EXHIBIT E

SUPREME COURT OF OHIO

MOTION, ENTRY, AND CERTIFICATION FOR APPOINTED COUNSEL FEES

ORIGINAL

FILED
APR 04 2006
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

State of Ohio,
Plaintiff

v.

James Conway
Defendant

Supreme Court No. 03-0647

Appeals Court No. None

Trial Court No. 02 CR 1153

DEATH PENALTY CASE

ON COMPUTER-RV

MOTION FOR APPROVAL OF PAYMENT OF APPOINTED COUNSEL FEES AND EXPENSES

The undersigned, having been previously appointed counsel for the defendant for the appeal to this court, as evidenced by the attached entry of appointment, now moves for an order approving payment of fees earned and expenses incurred as reflected by the itemized statement of the reverse hereof, pursuant to R.C. 2941.51.

Hours Worked:	IN COURT	OUT OF COURT
	1	99

Expenses (if any): $ 0.00

O.R.C. charge section number, name and classification

A. R.C. 2903 - Aggravated Murder w/Death Spec.

B. R.C. 2903 - Attempted Murder

C.

RECEIVED
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MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

SUPREME COURT DECISION	TERMINATION DATE
State c. Conway - affirmed 2006-Ohio-79 108 OhioSt.3d 214	03-08-06

ATTORNEY'S NAME	SOC. SEC. NO.	ATTORNEY'S SIGNATURE
David J. Graeff	[redacted]	David Graeff

ATTORNEY'S ADDRESS NUMBER AND STREET	CITY	STATE	ZIP
P.O. Box 1948	Westerville	Ohio	43086

INFORMATION BELOW TO BE COMPLETED BY SUPREME COURT AND COUNTY AUDITOR ONLY

JUDGMENT ENTRY

This court finds that counsel performed the legal services set forth in the itemized statement on the reverse hereof, and that the fees and expenses hereinafter approved are reasonable. IT IS THEREFORE ORDERED that appointed counsel fees are approved in the sum of $ _____ and expense in the sum of $ SEE ATTACHED ENTRY for a total allowance of $ _____, which amount is ordered certified to the _____ County Auditor for payment.

SEE ATTACHED ENTRY
CHIEF JUSTICE

CERTIFICATION

The County Auditor, in executing this certification, attests to the accuracy of the figures contained herein. A subsequent audit by the Ohio Public Defender Commission and/or Auditor of the State which reveals unallowable or excessive costs may result in future adjustments against reimbursement or repayment of audit exceptions to the Ohio Public Defender Commission.

COUNTY NUMBER	WARRANT NUMBER	WARRANT DATE

COUNTY AUDITOR

I hereby certify that the following time was expended in representation of the defendant before the Supreme Court of Ohio:

DATE	ACTIVITY	TOTAL TIME
10/10/03	Read trial transcript	5.00
10/11/03	Read trial transcript	5.00
10/12/03	Read trial transcript	6.00
10/17/03	Read trial transcript	4.00
10/18/03	Read trial transcript	5.00
10/19/03	Read trial transcript	6.00
10/24/03	Read trial transcript	4.00
11/17/03	Research Issue Ten	5.00
11/18/03	Draft Issue Ten	1.00
11/19/03	Research Issue Eleven and draft	6.00
11/26/03	Research Issue Twelve	4.00
11/28/03	Draft Issue Twelve	2.00
12/04/03	Research Issue Thirteen	2.00
12/05/03	Draft Issue Thirteen	2.00
12/06/03	Research Issue Fourteen	3.00
12/07/03	Draft Issue Fourteen	1.00

Time is to be recorded in tenth of an hour (6 minute) increments.

EXPENSE	PAID TO	AMOUNT

o obtain reimbursement, the purpose of each expense must be clearly identified, and a receipt provided for each expenditure over $1.00.

hereby certify the above is a true and accurate account of the time spent and expenditures incurred in representing the lefendant in the Supreme Court of Ohio.

David Graeff
Applicant's Signature

)PD-1031 (4/96)

I hereby certify that the following time was expended in representation of the defendant before the Supreme Court of Ohio:

DATE	ACTIVITY	TOTAL TIME
12/18/03	Research Issue Fifteen	2.00
12/19/03	Draft Issue Fifteen	1.00
12/20/03	Research Issue Sixteen	4.00
12/21/03	Draft Issue Sixteen	1.00
12/26/03	Research Issue Seventeen	3.00
12/27/03	Draft Issue Seventeen	1.00
12/30/03	Research Issue Eighteen	2.00
12/31/03	Draft Issue Eighteen	1.00
01/09/04	Research Issue Nineteen	2.00
01/10/04	Draft Issue Nineteen	3.00
01/11/04	Research Issue Twenty	2.00
01/12/04	Draft Issue Twenty	2.00
01/17/04	Research Issue Twenty-One and draft	3.00
01/28/04	Edit draft brief	1.00
01/30/04	Review final brief for filing	1.00
04/24/04	Review prosecutor's brief; read cases	2.00

Time is to be recorded in tenth of an hour (6 minute) increments.

EXPENSE	PAID TO	AMOUNT

To obtain reimbursement, the purpose of each expense must be clearly identified, and a receipt provided for each expenditure over $1.00.

I hereby certify the above is a true and accurate account of the time spent and expenditures incurred in representing the defendant in the Supreme Court of Ohio.

David Graff

Applicant's Signature

OPD-1031 (4/96)

I hereby certify that the following time was expended in representation of the defendant before the Supreme Court of Ohio:

DATE	ACTIVITY	TOTAL TIME
~~08/17/05~~	~~Prepare oral argument~~	3.00
08/22/05	Prepare oral argument	3.00
08/23/05	Oral argument - Ohio Supreme Court	1.00
03/09/06	Read decision - review cases cited	1.00

Time is to be recorded in tenth of an hour (6 minute) increments.

EXPENSE	PAID TO	AMOUNT

To obtain reimbursement, the purpose of each expense must be clearly identified, and a receipt provided for each expenditure over $1.00.

I hereby certify the above is a true and accurate account of the time spent and expenditures incurred in representing the defendant in the Supreme Court of Ohio.

David Graeff
Applicant's Signature

OPD-1031 (4/96)

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	
v.	:	Case No. 02CR1153
	:	Judge Patrick M. McGrath
James T. Conway, III	:	
Defendant	:	

E N T R Y

The Court hereby appoints Todd Barstow and David Graeff as counsel for purposes of appeal in the above case.

Patrick M. McGrath, Judge

Copies to:

Ronald J. O'Brien
Prosecuting Attorney

FILED
COMMON PLEAS COURT
FRANKLIN COUNTY, OHIO
2003 FEB 27 PM 3:23
CLERK OF COURTS

Exhibit F

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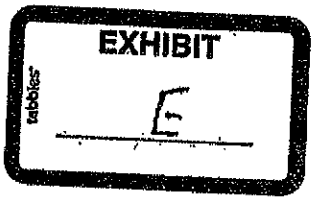
ON COMPUTER - HCG



IN THE SUPREME COURT OF OHIO
2004

STATE OF OHIO,	:	
Appellee,	:	
vs.	:	Case No. 03-0647
JAMES T. CONWAY, III,	:	[Death Penalty Case]
Appellant.	:	

MERIT BRIEF OF JAMES T. CONWAY, III

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FILED
FEB 02 2004
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

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STATEMENT OF THE CASE

James T. Conway was indicted by the Franklin County Grand Jury under case number 02 CR 1153 for one count of aggravated murder with prior calculation and design, involving a Jason Gervais.

Count one of the indictment carried a death penalty specification, i.e. that the offense involved the purposeful killing of, or attempt to kill, two or more persons.

Mr. Conway was also indicted for attempted murder, count two; having a weapon under disability, count three; and the first two counts also carried a firearm specification.

After pre-trial motions, and voir dire, a trial commenced on January 17, 2003. At the conclusion of the first phase, on January 31, 2003, the jury returned verdicts of guilty on all counts.

A mitigation hearing commenced on February 5, 2003, and at its conclusion, the following day, the jury's verdict came back death.

The sentencing of Mr. Conway was conducted on February 18, 2003, in which the trial court sentenced Mr. Conway to death. On March 4, 2003, the trial court filed its sentencing opinion.

A new attorney filed a motion for a new trial, and on March 21, 2003, an evidentiary hearing was conducted with respect to said motion for a new trial.

On July 14, 2003, the decision was filed denying Mr. Conway's motion for a new trial; with the subsequent judgment entry filed on September 2, 2003.

Mr. Conway filed his notice of appeal on April 10, 2003 as a matter of right before this Court.

On October 13, 2003, notice was given of the record being filed.

The transcript of proceedings consist of seventeen volumes in roman numerals.

Volumes I through VI involve pre-trial motions commencing on December 30, 2002; and January 10, 2003, Volume II.

Volumes III through VI focus on voir dire.

Volumes VII through XIII involve the trial phase of the proceedings; Volume XVI involves the mitigation held on February 5 and 6, 2003, plus the sentencing hearing on February 18, 2003.

Volume XVII focuses on the post-trial evidentiary hearing.

STATEMENT OF THE FACTS

The Prosecution's case: Witnesses at the scene.

On January 19, 2003, Heidi Malone worked patrol for the Columbus Police Department. She was assigned to precinct 18, which comprises the northern part of the City of Columbus. (Vol. VII, T - 1111-13).

She was summoned to a strip club named Dockside Dolls. It was originally a fight, and she arrived with her partner at approximately 2:40-45 a.m. They were the first law enforcement officials on the scene. (T - 1114-15).

Her description of the parking lot of Dockside Dolls when she arrived: "It was chaos." (T - 1116).

She went to the back corner of the club's building and found two males on the ground, i.e. on the sidewalk, that "runs down the side of the building." (T - 1118).

Officer Malone stated her partner then called for medics via the "portable hand walkie". (T - 1121).

She went inside the building and viewed a T.V. video that covered the outside areas of the club parking lot. She could see nothing with respect to the incident. (T - 1123).

On cross-examination, she testified the original call involved a "fight", and that they did not respond until the second call, which stated "shots fired". This she termed a high priority and they arrived within moments. (T - 1121-28).

The next witness, Damien LeCaptain, was head of security at Dockside Dolls on January 19, 2002. He supervised approximately five to ten people. (T - 1135).

On the night of January 18, 2002 through the early morning hours of January 19, 2002, he was supervising a full staff of ten bouncers. (T - 1136).

At closing time, he looked out in the parking area and saw approximately thirty-five to forty people fighting. The fight was broken down into basic groups of three to five; he noticed a large group of whites and a smaller group of blacks fighting each other. (T - 1137-38).

Mr. LeCaptain recognized some of the whites as what he termed "regulars at the bar". (T - 1139).

He remembered this particular group, and testified they stood out because they spent a lot of money at the club, i.e. $125.00 a bottle for Asti. This group had patronized the club for "probably a month", and varied in numbers from fifteen to twenty. (T - 1141).

Upon going outside, Mr. LeCaptain yelled that "he had already called police". (T - 1142).

This was in an effort to try to calm the proceedings. He then stated he noticed an African-American stab a Caucasian. He heard someone say an individual has a knife, and then he heard another individual say he was going to get a gun. He was going back inside the club-building when he heard shots fired. (T - 1143).

A diagram of the scene, State's Exhibit V-1, was used throughout the trial, and was formally introduced into evidence at this time. (T - 1146).

He heard at least five shots; and testified the time between the stab wound and the person getting the gun, was approximately one minute and a half to two minutes. (T - 1151).

The gunshots occurred in sequence, and there were "no pauses". (T - 1152).

One of the strippers who was employed by the bar was a person named Becky Loar, who also went by the name "Dallas". Mr. LeCaptain testified she was sitting on top of a part of a car in the parking lot where the gun was retrieved. (T - 1153).

Mr. LeCaptain concluded his direct examination by saying that the black individual who did this stabbing "started running towards the north part of the building, the back parking lot." (T - 1157).

On cross-examination, Mr. LeCaptain explained that the stabbing was "a slash across the midsection." (T - 1159).

He confirmed the gunshots were "one right after the other." The black individual who did the stabbing was "pretty well built, not a small guy by any means." (T - 1162-63).

Anthony Zara, 33, worked as a bouncer at Dockside Dolls, a "strip club", on January 19, 2002. (T - 1167-68).

On the night in question, ten were employed, because the "club was packed." (T - 1168-69).

Mr. Zara was working "the lot". (T - 1168).

While there, he witnessed an initial fight between two males, around closing. He escorted one of the individuals out, and shortly thereafter, the "fight started right back up outside the club." (T - 1171-72).

Then "it seemed like fights exploded everywhere." (T - 1172).

Involved in the fight was a person called Rob [Myers], who was a regular at the club. He would come in with five to six other people and they were "all white and young guys."

"They were very noticeable because they were spending a lot of money", i.e. six bottles at $250.00 a night. (T - 1174).

Mr. Zara testified that to control the melee, he had placed a choke hold on one of the fighters and then this "Rob" punched the individual who Mr. Zara was holding. (T - 1173).

During the course of this fight, Mr. Zara hit his head on the concrete, and shortly thereafter, he heard someone saying, "He's going for a gun." (T - 1178).

Mr. Zara was inside the club when he heard the shots, and testified they were rapid, and "it was at least four." (T - 1178).

On cross-examination he reiterated the "shots were as fast as the trigger could fire." (T - 1195).

The next witness on the scene called by the prosecution was Troy Ankrum, who also was employed as a bouncer at Dockside Dolls that evening. (Vol. VII, T - 1222-23).

Mr. Ankrum testified there was "high tension" between two groups, a "group of white gentlemen and a group of black gentlemen." (T - 1225).

He stated there had been a fight the night before, and as a result, he actually had tried to keep the white group out from entering the club, because the black group had previously arrived. He was unsuccessful. (T - 1226-28).

With respect to the events that evening-early morning, the altercation started out in the parking lot. (T - 1230).

Mr. Ankrum explained the groups fighting had been separated, i.e., the black group was near the sidewalk, and the white group was on the other side, close to parked cars. (T - 1233).

Racial slurs were then shouted, a white guy was "punched unconscious", and then the next significant event Mr. Ankrum remembers is a white guy pulled up his shirt and said, "That f'ing "nigger stabbed me", *** "and then that's when everything just went absolutely crazy." (T - 1233-34; 1237).

Mr. Ankrum stated the person who got stabbed was in the "white group"; he identified the person who did the stabbing as a Mandel Williams, who was in the black group. Both had previously been in the club. (T - 1239-40).

The next thing he remembers is that this "Rob" [Myers], "a mixed or Filipino goes to a Dodge Intrepid." Mr. Ankrum continues, testifying a dancer, "Dallas", was sitting on the trunk of the car,

Rob pushed her aside, opens the trunk, pulls out a weapon, and chambers a round. Then a white male came over, took the gun by force, and started firing "gangster-style" with the gun sideways. (T - 1241).

"Rob" was with the white group. (T - 1242).

When he saw this, Mr. Ankrum yelled, "He's got a gun." He testified that a young man walked by Mandel Williams, the latter grabbed him, and used him as a "human shield". (T - 1244).

He further describes this incident by saying that Mandel Williams was running down the side of the building, the person with the gun starts walking, and meanwhile, Mr. Gervais is walking near the sidewalk. Mandel Williams grabbed him, was using him as a human shield and "they both went down together." (T - 1248).

He estimates that there were seven shots. (T - 1249).

Mr. Ankrum testified during the time just before the shooting, it was "chaos". (T - 1267).

He stated when the shooting began, the person was approximately twenty to thirty feet from Mandel Williams, and at the conclusion, he was within eight feet. The first shots occurred while Mandel was running along the building, then Jason Gervais was grabbed as the human shield. (T - 1268-69).

He identified in court Mr. Conway as the person who fired the gun. (T - 1273).

At the conclusion of his direct testimony, in response to a

question regarding the workings of the club, he testified, "There was distribution of Ecstasy" inside the club. (T - 1274).

On cross-examination, Mr. Ankrum stated after the stabbing incident, that is when we knew "we lost control". (T - 1294).

On re-direct examination, he testified the shots were being fired in a northwesterly direction, while Mandel Williams was running north. (T - 1300).

Rebecca Loar, 24, was employed by Dockside Dolls as a "dancer/waitress" on January 19, 2002. (Vol. IX, T - 1397).

Her boyfriend at the time was Paris Long (who testified right after her), and on the night in question, she estimates between five to seven bouncers were working. (T - 1399).

She also recollects a male by the name of "Rob" [Myers], who was there and would often come with a group of males, approximately seven to twelve. (T - 1400-01).

Rob's nickname was the "Rock", and she believes he was of Samoan heritage; and the people in his group were all white. (T - 1401-02).

Ms. Loar also remembers a small group of black males there that evening. (T - 1404).

Just before the sequence of events in the parking lot, she had gone out to look at another girl's car, i.e. "Heather ". (T - 1406).

While outside, she witnessed a big fight and described it as

"total chaos". (T - 1407).

Ms. Loar stated it started out as a "racial thing": blacks, whites, and then Mexicans were involved in a "nasty fight". (T - 1408).

When she was outside, she was sitting on top of a car, which turned out to be the same one that had the "gun pulled out of the trunk." She described it as a nice car, the type that an "undercover cop would drive." (T - 1412).

She believed it to be Rob's [Myers]. (T - 1414).

While sitting on the automobile, Ms. Loar said a person came up to her, who was pretty frantic, and who had just gotten stabbed. His eyes were glossy, like he was in shock. (T - 1416).

When the person came up to her, he said, "The nigger stuck me." He was holding his abdomen, and blood was coming out of his shirt. (T - 1419-20).

Ms. Loar testified that "Rob" then slid her off the trunk of the auto, and although she tried to reason with him, he got his gun out of the trunk of the vehicle. (T - 1421).

She is familiar with guns, and owns a .357 Desert Eagle. She believed the gun that was retrieved was a semi-automatic. (T - 1422).

She said "Rob" then passed it off to a male white, who started running. She said she stated, please, hit who you're aiming at. (T - 1424).

She was then shown the diagram, i.e. State's Exhibit V-1, and testified the person was running north with the gun, towards Mandel, who was wearing a red sweater. (T - 1425-26).

She watched as Jason [Gervais] walked by, and then Jason was pulled in front of him, the shooting happened, and Jason fell to the ground. Then, "He shot Mandel a few more times." (T - 1428).

She estimates that there were four to five shots fired after Jason fell to the ground. (T - 1433).

Ms. Loar stated she went over and tried to assist Jason, and after that was not possible, she initially went to Mandel, but stopped because, "He was the cause of it." (T - 1434-35).

On cross-examination and further description of what Mandel Williams did, she testified that he pulled his arm around Jason's neck, and used him as a human shield. (T - 1446).

Paris Long was employed as a bouncer at Dockside Dolls on January 19, 2002. (T - 1454).

His responsibility was to "protect the girls, protect the customers". (T - 1455).

Mr. Long also described an initial altercation at the door, between the club door and the lobby, which involved about two to four guys. (T - 1455).

He had recognized a group of white guys that had frequented the club for about two to three weeks in a row. They "threw a lot of money around." One of this group looked like the "Rock", and

this group was approximately twenty-one to twenty-five years old. (T - 1456-57).

He assisted in the continuing initial fight. After being separated, they began to walk out, when he sees that people are fighting outside. Ultimately, there were twenty to twenty-five people involved. (T - 1460-61).

In further assisting, Mr. Long testified he was escorting a group of five to their vehicles out back in the parking lot. (T - 1462).

During this sequence, he heard someone yell, "That fucking nigger stabbed me." (T - 1464).

When he heard the gunshots, Mr. Long testified he "just took off running back towards the door." (T - 1471).

He remembered a person with "red tips" in his hair who was dressed in red and black. This person was on the ground, injured. He heard at least three shots. (T - 1472-73).

He was shown a picture, State's Exhibit Y-11, and said it looks like the person with the "red tips". He also identified Mr. Conway as being in the club that night. (T - 1475-76).

On cross-examination, Mr. Long testified it was probably two and a half minutes between the stabbing, and when the shooting began. (T - 1486).

Mandel Williams, 24, went with three others in the late evening of January 18, 2002 to Dockside Dolls. One of the

individuals he went with was a Corey McCormick. (T - 1497).

Mr. Williams knew one of the dancers at the club, and went there to visit her. (T - 1498).

One of the individuals he recognized at the club was a Ricky Turner. (T - 1500).

Ultimately, when they were leaving the club, Mr. Williams testified he saw Ricky Turner and his "crew were already fighting." (T - 1503).

As he was walking outside, he heard racial slurs coming from Ricky Turner's group. (T - 1504).

In response to these racial slurs, he and his friends retort by saying racial slurs back. (T - 1506).

While the fight was going on, he testified, he grabbed a knife, and "the first person I seen I cut." (T - 1507).

The individual he stabbed was a male white, and he testified he did it once. (T - 1509-10).

After the manager came out, and said he had called the police, Mr. Williams testified he began to leave to go to his car. While this was happening, he heard someone saying "get my gun, get my gun", and then shots. (T - 1512; 1519).

Mr. Williams' testified he heard Jason say, "Get down, they're shooting." Mr. Williams said Jason put Mandel down to the ground. (T - 1519-20).

He heard six to seven shots, and got shot the first time in

the shoulder. He said the shooting continued while he was on the ground. (T - 1522).

He was shot four times, in the shoulder, wrist, knee, and ankle. (T - 1526).

The police interviewed him several times, and he lied to them. According to his testimony, he lied as to who the shooter was, and his stabbing another individual because he was "scared". (T - 1528).

A number of months went by before he finally told the authorities "the truth". (T - 1529).

On the evening in question, he was wearing a red and black Tommy Hilfiger sweater and identified his clothing through State's Exhibit Y-11. (T - 1530-31).

Mr. Williams had a gun in his car, i.e. a .45, near the driver-side door, and also identified State's Exhibit Y-8 as the gun. (T - 1532; 1534).

On cross-examination he confirmed that this individual, Corey, nicknamed Cain, and Ricky Turner had experienced problems before. (T - 1536; 1538).

He denied pulling Jason in front of him to block a shot. (T - 1546-47).

There had been three interviews with the police where Mr. Williams had lied. Finally, in the fourth interview, conducted approximately a month before, in December, he admitted that he used

the knife. (T - 1563-64).

An individual named Earl Larimore was at the club on January 19, 2002, and was leaving at about 2:35 a.m. (T - 1609-10).

Mr. Larimore was not involved with any of the groups. He testified while he was leaving he heard a person say he got stabbed: "He lifted up his shirt and pointed to his left abdomen area." (T - 1611).

About fifteen to thirty seconds later, he hears six to eight gunshots and sees two people falling. (T -1613-15).

On cross-examination, Mr. Larimore testified the shots were in rapid succession. (T - 1618).

Brian McWhorter, 23, has known James Conway for about six to seven years, and socialized with him. (Vol. X, T - 1736).

On January 19, 2002, he was with him at Dockside Dolls. Also present were Mr. Conway's brother Jeff, a Ricky Turner, his brother Jimmy Turner, and a "Rob" [Meyers], who looks Samoan. (T - 1737-38).

There were ten to eleven people in the group, and they were drinking champagne and beer. (T - 1739-40).

When it came time to leave, about 2:30 a.m., Mr. McWhorter testified there was a "big fight". About twenty to twenty-five people were involved, including Mr. Conway and his brother, Jeff. (T - 1741).

Mr. McWhorter stated Jeff Conway said he got stabbed and then

"Jimmy" went over to a car, got a gun, and then he heard shots. (T - 1744).

Mr. McWhorter identified James Conway in the courtroom, and testified that in the parking lot he saw Mr. Conway with a gun in his hand. (T - 1747; 1749).

He heard five to seven shots. (T -1750).

The car that he got into, which was leaving, had "Rob" driving; also inside were Jimmy Turner and James Conway. (T - 1750).

They went to a place called "Big Mike's". (T - 1753).

Mr. McWhorter testified that after this evening, he was interviewed initially twice by the police. He lied to them. (T - 1767-68). He stated that initially he told the police he was not in the car with the others when they left Dockside Dolls, and also he initially said he did not see Mr. Conway with a gun. (T - 1758-59).

Mr. McWhorter testified there also was another discussion with the detective involved in this case, when he was in an attorney's office named Chris Cicero. Mr. Conway was present at the Cicero office. (T - 1757).

According to Mr. McWhorter, Mr. Cicero told him what to say when he was conversing with the detective over the phone. (T - 1760).

Around this time, Mr. McWhorter testified he also, "got jumped". Over objection, he testified that one of the individuals

who jumped him was a Shawn Nightingale, but he did not know the others. Mr. Conway was not there. After the beating, he went into his house. (T - 1762-63).

A few days after he got jumped, he went to the police and according to his testimony, "came clean". (T - 1771).

On cross-examination, he testified that Rob's last name was Myers. (T - 1779).

Dr. Keith Norton has worked as a pathologist for the Franklin County Coroner's Office for the past fourteen and a half years. (T - 1676-78).

Dr. Norton performed the autopsy of Jason Gervais on January 19, 2002. The cause of death was a "gunshot wound to the back." He identified State's Exhibit N-1 as the coroner's report. (T - 1681-82).

Gunshot wound number 4 he labeled as the fatal wound. It went into the left lung, then into the muscles of the neck, and death was caused by bleeding from the left lung into the chest cavity. (T - 1706-07).

Mr. Gervais had .17 grams percent of alcohol in his blood, which means he was legally intoxicated. (T - 1708).

<u>The Prosecution's case</u>: <u>Witnesses not at the scene</u>.

Michael Lee Arthurs testified he has known James Conway as a friend and has "bought drugs from him." (Vol. VIII, T - 1213).

Mr. Arthurs listed the friends that hung out together, one of

them was a person named Rob Myers, along with Shawn Nightingale, and a Jamie Horton. (T - 1214).

The group went to strip clubs a lot. (T - 1215).

Mr. Arthurs described a meeting he had with James Conway at the intersections of Ohio State Route 22/104. According to his testimony, he owed Mr. Conway money for some drugs he had purchased. There was an objection, under Evid. R. 404(B), and this was overruled. (T - 1215).

At this meeting, Mr. Conway told him he had killed someone at Dockside Dolls, and for him to watch the news. Mr. Arthurs testified he gave him money, and then went home. (T - 1217).

He identified Mr. Conway in the courtroom, and testified that in the past he knew him to weigh approximately 250-270 pounds. He has slimmed down since that time, according to Mr. Arthurs. (T - 1219).

Ronald Trent testified as a jail house informant. This was over objection by the defense pursuant to Evid. R. 404(B) and 403. (Vol. X, T - 1790). Pursuant to pre-trial motions, the trial court denied the objection-motion. (T - 1803).

Ronald Trent, 30, had previous felony convictions for three aggravated burglaries, where he spent nine and a half years in prison, along with a receiving stolen property, said sentence being thirteen months. (T - 1812-13).

On October 14, 2001, he had been arrested for gross sexual

imposition. (T - 1814).

During his time in the Franklin County Correctional Facility, according to his testimony, he gained knowledge in conversing with James Conway. He attempted to go through his attorney, but she did not do anything, so he wrote a letter to the county prosecutor. (T - 1814-15).

When Mr. Conway first came into the jail facility, in February 23, 2002, Mr. Trent was there. According to Mr. Trent, he dressed Mr. Conway's shooting wounds, stating he needed help with the bandages. (T - 1816-17).

Mr. Trent testified that he became friends, found out that they were related, i.e. cousins, and the two talked every day. (T - 1817-18).

According to Mr. Trent, Mr. Conway told him that a fight had occurred at Dockside Dolls, there was a stabbing, an individual had pulled some guy in front of the person, and Mr. Conway shot. He stated it was a Colt .45 and would go through the first individual, and into the person he was shooting. (T - 1820).

Mr. Conway also told Mr. Trent that he wanted Brian McWhorter killed. He was supposed to get $30,000.00 for his efforts and that a down payment of $5,000.00 had been brought down to the jail, through a Jamie Horton. (T - 1821-22).

He identified State's Exhibit 1-1, as a letter written on April 14, 2002, to the prosecutor's office; and a second letter,

State's Exhibit 1-3, as correspondence he sent on April 10, 2002. (T - 1824; 1826).

Ultimately, he confirmed a meeting occurred between the police and himself on May 25. (T - 1829).

He identified Mr. Conway in court, and stated he struck a deal with Detectives Scott and Floyd. (T - 1831).

In addition to killing Brian McWhorter, Mr. Trent stated he also was to make a video of a person confessing, and that this individual was to be a person named Randy Price. (T - 1834-35).

As a result of the above, the Scott/Floyd team got a Sheriff's Deputy that resembled Mr. Conway, and used him for the video. (T - 1835).

Mr. Trent testified he would converse with Mr. Conway through a three-way phone conversation, often initiated by Mr. Conway's girlfriend, Brittany, and also through his attorney, Chris Cicero. (T - 1836).

Mr. Trent testified the video made with the detective, i.e. the person confessing, and then acting dead, was shown to Mr. Conway. According to Mr. Trent, Mr. Conway then smiled. (T - 1842).

State's Exhibit U is the State's confession of Sheriff's Deputy Shively, and State's Exhibit U-1 reflects a picture of the same deputy. Mr. Trent stated that he was told to send it to the prosecutor's office, the lawyer, and to the news media. (T - 1846).

He further identified State's Exhibit 1-5 as the agreement he

struck, in exchange for his testimony. (T - 1851).

Mr. Trent further described his fear because of certain "posters in the neighborhood", State's Exhibit 1-8. (Vol. XI, T - 1872).

These posters supposedly appear on the west side of Columbus and also the north side. (T - 1872-73). The posters labeled him a "snitch". (T - 1876).

On cross-examination, he was shown an affidavit signed by him on October 21, 2000, Defendant's Exhibit 13. (T - 1896-97).

Mr. Trent admitted that this affidavit signed by him was a lie. (T - 1900).

On re-direct examination, Mr. Trent stated the "contact person" he was to see after he was released from the jail was a Jamie Horton. (T - 1911).

After the State rested, (T - 2004), a Rule 29 motion to dismiss the charges, along with the death penalty specification, was overruled by the trial court. (T - 2004; 2027-28; Vol. XII, T - 2057).

The Defense case:

Jeffrey Conway, the brother of James Conway, testified for the defense. He went to Franklin Heights High School, and his birthday is November 18, 1981. (Vol. XII, T - 2091).

On January 19, 2002, he went to Dockside Dolls, arriving there approximately midnight to 12:30 a.m. His brother, James, was

already there. (T - 2092).

He owned a 1994 Ford Thunderbird, and when he arrived, he parked it all the way in the back lot. (T - 2092-93).

He was leaving the club about 2:30 a.m. A man named Corey [McCormick, (T - 2123)], whose nickname was Cain, was outside. (T - 2093).

When Jeff Conway was in high school, he had experienced problems with Corey McCormick. They involved fights, using baseball bats, and attempts to damage vehicles. These incidents had occurred a couple years previous. (T - 2094-95).

He testified "Cain" was hitting him, another person had him in a headlock, and this was followed by Mandel Williams cutting him. (T - 2096).

He could feel the blood running down his stomach, he stated he was in shock, and felt light headed. (T - 2097-98).

He identified the tee shirt and the sweater he was wearing that night, which visibly reflects the results of the cut. (T - 2098; 2102).

Mr. Conway also showed his scar to the jury. (T - 2103).

Mr. Conway stated he told his brother, James, he got stabbed, and testified the next thing he sees is Mandel Williams coming at him. He had something in his hand. (T - 2103; 2106).

When Mandel started at him, that is when Mr. Conway heard shots. There was a white guy near Mandel, and the latter pulled him

in front of Mandel. (T - 2107).

He had never been stabbed before, and after the shots were fired, he left and went to Big Mike's Cafe. He then home where his mother bandaged his wound. (T - 2111).

He testified he has a previous felony for attempted CCW, and further identified the clothes he was wearing through Defense Exhibit 31. (T - 2113).

Finally, on direct, he noted his brother "Jim" had previously won $100,000.00 on the lottery. (T - 2116).

On cross-examination, in response to the question as to who was doing the shooting, he testified he did not know. (T - 2138).

He was arrested approximately one week later at another strip bar, called Kahoots. (T - 2153).

After he was arrested, he was interviewed by a female detective. He testified he "didn't talk to her", i.e. he told her nothing. (T - 2156).

He further noted he gave the clothes previously identified, to Chris Cicero, the attorney. (T - 2163).

On re-direct, he stated Chris Cicero was representing him, and that his mother gave the clothes to Mr. Cicero. (T - 2183).

With respect to his decision not to talk to the police, he stated he was given "bad legal advice". (T - 2184).

James Conway testified in his own behalf.

When he was young, his father was in prison, so he was in

charge of his brother and sister. His mother worked two jobs, and he himself went to Franklin Heights High School where he was in the band and the Navy R.O.T.C. He wanted to be a pilot, but because of vision problems, he could not pursue that career. (T - 2224-25).

At the end of 2000, he won the Ohio lottery, the first time it was $50,000.00, and then through the second procedure, he ended up with $100,000.00. (T - 2225; 2228).

On the evening in question, he initially went to the movies with his girlfriend, Britnee, at Lennox, and then left and went to Dockside Dolls. (T - 2229).

At the end of the evening, he remembers leaving where there was an initial fight, with one punch, that was broken up right away. (T - 2230).

When he walked outside, he noticed a guy knocked out on the ground, and stated the fight was going on. The bouncers eventually had gotten things calm, and then his brother comes up to him and says he was stabbed. (T - 2233).

He was both upset his brother was stabbed, and afraid. The owner came out and said the police were on their way, and then he heard his brother say, "There's the guy -- that's him." (T - 2235).

The next thing he sees is Mandel running at him, (T - 2236), and was sure he still had a knife. He testified he had a honest belief his brother was in imminent danger. (T - 2238-39).

"Rob" was standing right beside him, Mr. Conway testified he

took the gun, and started shooting low, trying to stop the person from getting at his brother. (T - 2240).

He testified he never saw Jason Gervais, i.e. he came out of no where. (T - 2241).

Mr. Conway reiterated he believed Mandel was trying to stab his brother again. (T - 2243).

Several weeks later he was arrested. (T - 2246).

He stressed he had no intention of killing anyone. (T - 2248).

On cross-examination, he testified he never went to a car to retrieve a gun. He snatched it out of Rob Myers' hand. (T - 2265).

He was mad his brother got stabbed. (T - 2267).

When he took the gun out of Rob's hand, he just started shooting, i.e. "at the guy in the red coat". (T - 2286).

Mr. Conway testified the time between the first shot and the last one was almost instant. There were eight shots. (T - 2287).

He estimated the distance between himself and Mandel when his brother said, "That's the guy", as "seven feet away". (T - 2298).

With respect to afterwards, Mr. Conway said he wanted to talk to the police, but he wanted his attorney to be present. (T- 2301).

He further described as being in "total shock" with respect to the events in the parking lot. (T - 2302).

Approximately one month afterwards, in February, he testified there was a big shoot-out at Big Mike's, when he himself got shot. (T - 2304). He weighed 350 pounds at the time. (T - 2308).

He cannot remember what happened to the gun, (T - 2317), and he further confirmed that he knew that Jeff, his brother, had experienced previous problems with "Cain". (T - 2320).

After the shoot-out at Big Mike's, and while in jail, he became friends with Ronald Trent. (T - 2321).

Mr. Conway stated he never spoke to Ronald Trent about the case. He further mentioned that he would use Chris Cicero's cell phone to call Ronald Trent. (T - 2328).

He never talked to Ronald Trent about killing Brian McWhorter. (T - 2331).

He agrees that he went to his attorney's office with Brian McWhorter, and while there, the "lawyer asked Brian McWhorter what had happened?". (T - 2349).

The testimony concluded for that day, and out of the presence of the jury, the trial court repeated that he had previously ruled that Ronald Trent became a State agent on 5/16/02. (T - 2367).

The following day, before the jury was brought out, there was a lengthy session in which Mr. Conway listened to the Ronald Trent tapes, and the conversations he had with Trent. (Vol. XIV, T - 2372-2401). During this session, one of the defense counsel stated that Mr. Conway had previously "never heard the tapes." (T - 2396). The tapes between Mr. Conway and Trent were recorded on dates beginning on 05-17-02; 05-18-02; 05-19-02; 05-23-02; and 05-24-02. (T - 2378-95).

After reviewing them in front of the court and counsel, in response to a question, Mr. Conway stated, as to their accuracy, "There is a problem with all of them." (T - 2396).

The tapes were recorded at the visitation booth at the Franklin County Jail. (T - 2401).

After this, the cross-examination of Mr. Conway continued. He stated he had a previous conviction for felonious assault on a police officer. (T - 2404).

After he had gone to Big Mike's early that morning in question, he went to his mother's house, located at 2005 Dyer Road, Columbus. (T - 2405).

He was then questioned with respect to the tapes previously mentioned, and in particular, tapes of 05-17-02 and 05-18-02 were reviewed. (T - 2410-12).

Mr. Conway testified it was Trent's plan to make a video, i.e. of the person supposedly dead. (T - 2415).

Towards the conclusion of his cross-examination, defense counsel moved for a mistrial out of the presence of the jury. The prosecutor had initiated conversations dealing with another matter, i.e. "an animal plant in Chillicothe." While overruling the motion, the trial court instructed the prosecutor to "stay away from Chillicothe." (T - 2435-42).

On re-direct, (T - 2450), defense counsel attempted to have placed in evidence information about an audio tape that Mr. Trent

had made. (T - 2453). At the sidebar, defense counsel stated that Trent made an audio tape in his own case which, he said, "freed him". (T - 2456). This was the same plan that was involved in the situation with Mr. Conway. The trial court denied allowing this type of evidence. (T - 2462).

Mr. Conway, back on re-direct, repeated that he denies trying to have anything bad happen to Brian McWhorter. (T - 2465).

At the conclusion of his testimony, and after some more witnesses testified on his behalf, final arguments were given, and after jury instructions, Mr. Conway was found guilty on all of the counts, including count one with the death penalty specification. (Vol. XV, T - 2686). [The trial jury initially had circled guilty on the death penalty specification instead of marking the appropriate check space. They were sent back to place the mark in the appropriate space].

The trial court then scheduled the mitigation hearing to commence on February 5, 2003.

After preliminary matters, and opening remarks, the first witness on behalf of James Conway was his father, James Conway, Jr. (Vol. XVI, T - 2795).

He was born in Columbus, and has lived here all of his life. He works for a wastewater treatment plant on Jackson Pike. He is 49 years old. (T - 2796).

He is married to Janice Conway; they have three children,

James, Jennifer and Jeffrey. He described the family life while they were growing up as happy and normal. (T - 2797).

He himself was gone for six months when James was young, and also was incarcerated another time for two years. (T - 2798-99).

With respect to their upbringing, he testified he was "strict because he wanted him to get a good start in life." He also mentioned he ridiculed him often. (T - 2801).

With respect to his education, Mr. Conway stated that his son, James, did very well in school and was "really bright". He was in ROTC, the band, and played football. (T -2802).

After high school, Mr. Conway stated his son went to Columbus State. (T - 2803).

James Conway, III, the defendant in the case, also has a little son, James Conway, IV, who "cries for him every night." (T - 2804).

James Conway, Jr. described his son's work history as being employed by Roc Concrete, which is owned by his uncle. (T - 2800).

At the conclusion of his testimony, he stated, "I never thought I'd be sitting here." (T - 2807).

Janice Conway, the next to testify, is the mother of James Conway, and is employed by the Columbus Public Schools, in the payroll department. (T - 2814).

She married her husband, the father of James, in May, 1977, and also stated that her husband was incarcerated previously. (T -

2815-16).

During the incarceration, the family stayed with her mother. In response to how James Conway handled the situation, she responded, "Like a little man." (T - 2816).

At the conclusion of her direct testimony, she stated, "I just love my son. I'm so sorry for what's happened, and I feel so bad for their family. I just don't want you to kill my son." (T - 2818).

James Conway gave an unsworn statement. He apologized for his actions; and stated, "It wasn't a premeditated thing." "It was something that just occurred." (T - 2825).

In further explanation, Mr. Conway stated, "It was, just exploded out of hand, went beyond anybody's control in a short period of time." (T - 2826).

On the next day, i.e. February 6, 2003, closing was given, along with the charge to the jury. (T - 2857).

During the deliberations, the jury had a question requesting the diagram of the parking lot. (T - 2880).

They returned with a verdict of death, (T - 2882), and after the jury was polled, (T - 2883), the trial court scheduled sentencing for February 18, 2003. (T - 2888).

At the sentencing hearing, and allocution, Mr. Conway's statement included the fact that he "feels there is a lot of provocation in this case." (T - 2892).

At the conclusion, the trial court sentenced Mr. Conway to death, (T - 2900), along with the sentencing on the other counts, i.e. ten years on count two, the attempted murder, along with a three year gun specification, plus a one year sentence on the weapons under disability conviction, i.e. count three.

An evidentiary hearing, dealing with the motion for new trial, was conducted on March 21, 2003, (Vol. XVII), and will be further discussed in the propositions of law.

PROPOSITION OF LAW ONE: THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR AN INSTRUCTION ON VOLUNTARY MANSLAUGHTER AND INVOLUNTARY MANSLAUGHTER, THEREBY DENYING APPELLANT HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION TEN OF THE OHIO CONSTITUTION.

At the conclusion of the trial phase, defense counsel requested the trial court to instruct the jury on the offenses of voluntary manslaughter, O.R.C. 2903.03, and involuntary manslaughter, O.R.C. 2903.04. (T - 2527). The trial court refused. (T - 2528). Appellant asserts that the trial court abused its discretion in denying his requests.

Abuse of discretion connotes more than a failure to act. It constitutes arbitrary and unreasonable actions by the trial court.

(A) Voluntary manslaughter is an inferior degree of aggravated murder. State v. Tyler (1990) 50 Ohio St. 3d 24. The Revised Code defines voluntary manslaughter as knowingly causing the death of another "while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force." In the instant case, sufficient evidence was introduced in the trial to convict appellant of voluntary manslaughter.

The State called Damien LeCaptain (T - 1135); Troy Ankrum (T - 1222); Becki Loar (T - 1397); and Earl Larimore (T - 1609) as

witnesses in their case in chief. All, except Larimore, had worked at Dockside Dolls on the night in question. Larimore was a customer that night. Both testified that at closing time, a huge fight erupted in the parking lot. Both testified that during this melee, a young white male was stabbed, that he showed his injury to his friends and that immediately another white male retrieved a firearm and began shooting at a black male. Somehow, and the witnesses differed as to how, Jason Gervais, a white male, was shot and killed by the same gunman. (T - 1141-42; 1235; 1407; 1611).

Mandel Williams also testified on behalf of the State. He admitted to stabbing Jimmy Conway, appellant's brother, in the parking lot of the club. He also described how appellant shot him. (T - 1507).

Appellant's brother also testified at trial. He described how he had gone to the club and met appellant there. He then related that while exiting the club at closing time, he had become involved in fisticuffs with a former high school classmate and that classmate's friends. Eventually, one of those friends, Mandel Williams, stabbed Jeff in the abdomen. (T - 2091-2106). Jeff then showed his injuries to his brother. (T - 2103). Jeff also pointed out to appellant the man he believed had stabbed him. (T - 2107). Jeff testified that his brother then procured a firearm and shot Williams and Gervais.

Appellant also testified at trial. He related that he and his

friends became involved in a fight outside the club at closing time. Appellant, upon realizing that his brother had been stabbed, procured a firearm and shot Williams and Gervais. (T - 2230). Appellant testified that he was "mad" that his brother had been shot. (T - 2267). He also stated that his memory of the shooting is a blur and that everything happened quickly. (T - 2267; 2286-7).

In analyzing voluntary manslaughter as a lesser included offense of aggravated murder, this Court has adopted a two part method. First, the reviewing court must determine if, objectively, the provocation was sufficient to bring upon a sudden passion or a sudden fit of rage. State v. Shane (1992) 63 Ohio St. 3d 630. Second, the reviewing court must then determine if the defendant was actually under the influence of sudden passion or a sudden fit of rage. Shane, supra. In the instant case, appellant argues that both prongs have been met. First, no one can seriously argue that learning that a sibling has been stabbed is insufficient to produce a sudden fit of rage. As this Court pointed out in Shane, "There are certain types of situations that have been regarded as particularly appropriate cases in which voluntary manslaughter instructions are often given. For example, assault and battery, mutual combat, illegal arrest and discovering a spouse in the act of adultery are some the classic voluntary manslaughter situations." Shane at 635. Here, appellant argues that both the assault and battery and mutual combat situations are present. No

one disputes that a large fight had broken out in the parking lot and that upwards of 20 people were fighting, including appellant's brother. Further, no one disputes that appellant's brother was assaulted just prior to the shooting, or that appellant's brother was involved in the mutual combat. As to the subjective portion, appellant's actions and words show that he was indeed under that influence of a sudden fit of rage. The State's own witnesses described how appellant, upon seeing his brother's wound, procured a pistol and began shooting at Mandel Williams. Additionally, appellant testified he was "mad" upon seeing his brother's injuries. Appellant's words, coupled with his quick and violent actions, clearly provide sufficient evidence upon which a jury could reject an aggravated murder charge and convict on a voluntary manslaughter charge. Clearly, the trial court abused its discretion in refusing to charge the jury as to voluntary manslaughter.

(B) Involuntary Manslaughter: This Court has also held that involuntary manslaughter is a lesser offense of aggravated murder. State v. Thomas (1988) 40 Ohio St. 3d 213. In the instant case, the trial court refused to instruct the jury on that offense. The trial court's reasoning was that: "As to involuntary manslaughter, the Court felt that there was no underlying offense, lesser included offense upon which an involuntary manslaughter charge could be based. For instance, there is no felonious assault in this case. This is aggravated murder. We are giving the lesser included

request of murder." (T - 2528). The trial court's reasoning is flawed in two respects. First, the trial court appeared to be under the belief that the involuntary manslaughter statute requires that the predicate offense be a lesser included offense of involuntary manslaughter. First, a plain reading of the statute shows that logic to be completely erroneous. Second, no Ohio case law exists to support the trial court's reasoning. An alternative interpretation of the trial court's reasoning is that the trial court correctly interpreted the predicate offense requirement, but believed that the evidence was insufficient as to whether or not appellant had committed a predicate offense. Clearly, the trial court missed the mark here as well. The indictment included a count of Weapon Under Disability, pursuant to Revised Code Section 29. That count is a possible predicate offense under an involuntary manslaughter theory. Additionally, appellant was indicted for attempted murder, another possible predicate offense. In stating that no predicate offense existed, the trial court was wrong beyond a doubt.

> PROPOSITION OF LAW TWO: THE VERDICT OF AGGRAVATED MURDER WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE, THEREBY DENYING APPELLANT DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION TEN OF THE OHIO CONSTITUTION.

The concept of sufficiency of the evidence is "that legal standard which is applied to determine whether the case may go to

the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." State v. Thompkins (1997) 78 Ohio St. 3d 380, 386. Sufficiency is a test of the adequacy of the evidence. Also, verdicts not supported by sufficient evidence violate defendant's due process rights. Tibbs v. Florida (1982) 457 U.S. 31.

In the instant case, the State failed to produce sufficient evidence as to the element of prior calculation and design. In State v. Jenkins (1976) 48 Ohio App. 2d 99, the Eighth District Court of Appeals formulated a three part test to determine if the element of prior calculation and design had been proven by sufficient evidence. Jenkins at 102. The first prong is to determine the accused knew the victim prior to the crime. Jenkins at 102. In the instant case, the State introduced no evidence that appellant knew Jason Gervais prior to the shooting. Appellant knew Mandel Washington only to the extent that he believed he was the person that had stabbed his brother only moments before. The second prong is to determine whether thought and preparation were given by the accused to the weapon he used to kill and/or the site on which the homicide was to be committed as compared to no such thought or preparation. Jenkins at 102. In this case, evidence was that appellant had not gone to Dockside Dolls with the intention of killing anyone. As to weapon selection, appellant testified that another person handed him the firearm and he began shooting. (T -

2240). No evidence was introduced that appellant brought the firearm to the scene or that he knew that the firearm was at the scene. The third prong is to determine whether the act was drawn out over a period of time as against an almost instantaneous eruption of events. Jenkins at 102. In this case, the testimony was that an enormous melee erupted in the parking lot of the club. (T - 1141-2; 1235; 1407; 1611). At some point, Mandel Williams stabbed appellant's brother. (T - 1507). Only minutes after being stabbed, Jeff Conway showed appellant his wound. (T - 2233-4). Seconds later, Jeff Conway identified Williams as the shooter to his brother, (T - 2235), who then grabbed the firearm and began shooting Williams immediately. Finally, the Jenkins court held that the above factors "must be considered and weighed together and viewed under the totality of all circumstances of the homicide." Jenkins at 102. (Cf. This Court's holding in State v. Taylor (1997) 78 Ohio St. 3d 15). In viewing all the facts and circumstances in this case, along with the helpful Jenkins factors, the State clearly failed to produce sufficient evidence that appellant acted with prior calculation and design in the shooting of Jason Gervais.

PROPOSITION OF LAW THREE: THE TRIAL COURT DENIED APPELLANT THE RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION TEN OF THE OHIO CONSTITUTION BY CONDUCTING CRITICAL STAGES OF THE TRIAL OUTSIDE THE PRESENCE OF THE APPELLANT.

On January 29, 2003, at 3:18 p.m., the trial court recessed to

discuss trial phase jury instructions with counsel. (T - 2522-3). On January 30, 2003, the trial court reconvened at 10:50 a.m. (T - 2526). The trial court stated that it had met with trial counsel for two hours on the 29th and an hour and a half on the 30th to discuss jury instructions. (T - 2527). Counsel then made closing argument and the trial court charged the jury. (T - 2534-2681). The jury reached a verdict, (T - 2682), and the trial court scheduled the mitigation hearing to commence at 9:00 a.m. on February 5th. (T - 2692). Just prior to the start of the mitigation hearing, appellant told the trial court that he had not been present for the jury instruction conference held on the 29th and 30th. (T - 2765). Neither appellant nor his counsel explicitly waived his presence at this conference. Appellant contends that he had a right to be present at that conference and the fact that he was not present is a denial of his rights under the United States and Ohio Constitutions.

A criminal defendant has a right under the United States Constitution to be present at all critical stages of his trial. Illinois v. Allen (1970) 397 U.S. 337. The Ohio Constitution, Article One, Section Ten also affords defendants that right. State v. Taylor (1997) 78 Ohio St. 3d 15; State v. Hill (1995) 73 Ohio St. 3d 433. Indeed, the United States Supreme Court has viewed the right to be present at trial as scarcely less important to the accused than the right of trial itself. Diaz v. United States

(1912) 223 U.S. 422. Ohio Rule of Criminal Procedure 43(A) codifies those Constitutional protections.

In the instant case, the trial phase instructions were of critical importance. A conviction on aggravated murder with a capital specification opens the door to death; conviction or acquittal leads to life. A critical stage, indeed. Given the fact that appellant contends that the instructions themselves were improper, his presence and assistance to his attorneys would have been invaluable. A fair and just hearing was thwarted by his absence. Snyder v. Massachusetts (1934) 291 U.S. 97.

> PROPOSITION OF LAW FOUR: APPELLANT'S TRIAL ATTORNEYS WERE INEFFECTIVE IN FAILING TO OBJECT TO INADMISSIBLE CHARACTER EVIDENCE CONCERNING THE DECEASED, THEREBY DEPRIVING APPELLANT THE RIGHT TO A FAIR TRIAL, THE EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION TEN OF THE OHIO CONSTITUTION.

At trial, the State called Benjamin Bechtel as a witness. (T - 1921-39). Bechtel testified that he was a friend of Jason Gervais and that he had accompanied Gervais and some other friends to Dockside Dolls on the evening of January 22nd. He testified that Gervais and his friends partied inside the club. At closing time, Bechtel lost sight of Gervais, and did not see him alive again. He saw some pushing and shoving at the club entrance, but did not witness the melee in the parking lot nor the shooting of Gervais.

However, Bechtel testified at length about the history,

character and activities of Jason Gervais. Bechtel and Gervais had been friends since high school and Bechtel described Gervais' high school activities, as well as his college studies and his newly founded business. Appellant's counsel did not object to this testimony nor did they cross-examine Bechtel. (T - 1939).

Appellant asserts that the testimony of Bechtel concerning Gervais' background, character and life were impermissible character evidence. In State v. White (1968) 15 Ohio St. 2d 146, this Court condemned the use of such evidence in a capital murder prosecution. This Court stated its reasoning as follows: "Such evidence is excluded because it is irrelevant and immaterial to the guilt or innocence of the accused and the penalty to be imposed. The principal reason for the prejudicial effect is that it serves to inflame the passion of the jury with evidence collateral to the principal issue at bar." White at 151. In this case, the character evidence provided by Bechtel concerning Gervais was irrelevant and immaterial. In closing argument, one of the assistant prosecutors reminded the jurors of Gervais' character and background. (T - 2547). The introduction of this evidence served only to inflame the passions of the jury in order to secure the verdict necessary to proceed to the second phase of the trial; the only scenario in this case in which the death sentence could be imposed.

To establish a violation of the Sixth Amendment right to counsel, a defendant must demonstrate that counsel's representation

was deficient and that it actually prejudiced him. Strickland v. Washington (1984) 466 U.S. 668, 687-88. Representation is deficient when it falls below an objective standard of reasonableness under prevailing norms. Carter v. Bell (2000) 218 F.3d 591, 6th Cir. The defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed to the defendant by the Sixth Amendment." Strickland at 687. In considering the "prejudice" factor, the Supreme Court held that even professionally unreasonable errors do not justify setting aside the judgment of a criminal proceeding "if the error[s] had no effect on the judgment." Strickland at 689. A defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Strickland at 689. The ultimate focus of the collective inquiry is the fundamental fairness of the proceeding. In that vein, an appellate court must determine whether the result of the proceeding is unreliable "because of a breakdown in the adversarial process that our system counts on to produce a just result." Strickland at 695.

Appellant submits that the acts or omissions of trial counsel described above were outside the range of competence expected of professional attorneys and especially those certified by this Court's Rule of Superintendance 20. As a result, said errors

undermine confidence in the outcome of appellant's trial.

PROPOSITION OF LAW FIVE: A JURY INSTRUCTION THAT REQUIRES A LIFE SENTENCE RECOMMENDATION BE UNANIMOUS MATERIALLY PREJUDICES A CAPITAL DEFENDANT'S RIGHT TO A FAIR TRIAL AND TO BE FREE FROM DEPRIVATION OF LIFE WITHOUT DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

R.C. §2929.03(D)(2) makes clear that a jury's recommendation of death must be unanimous. A recommendation of life need not be unanimous; rather, the jury should recommend life imprisonment if they are anything other than unanimously in favor of death. Thus, the jury must recommend life imprisonment if either; (1) the jurors unanimously agree that a death sentence is inappropriate; or (2) the jurors cannot all agree - they are split and deadlocked - on whether the death sentence is appropriate. It is not the law that the jury must be unanimous in its sentence recommendation for life imprisonment. State v. Brooks (1996) 75 Ohio St. 3d 148, 162 ("In Ohio, a solitary jury may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors. Jurors from this point forward should be so instructed."); State v. Springer (1992) 586 N.E.2d 96, 100 ("In cases where, as here, the jury becomes hopelessly deadlocked during its sentencing deliberations and is unable to unanimously recommend any sentence, including death, the penalty of death is clearly unauthorized and one of the two remaining (authorized) sentencing options must be imposed upon the offender

by the court.").

In this case, the trial judge instructed the jury as follows:

> The second verdict form reads:
> We, the jury, having reached a deadlock on whether or not the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, hereby unanimously recommend the following life sentence on count one (check one): (Id. at 1515) (emphasis added).

(T - 2868).

The court's instruction is problematic for two reasons. First, it tells the jury that a particular life sentence must be unanimous in violation of the above cited cases. Second, the trial court's instruction uses the term "deadlock", thereby ignoring the possibility that the jury may find unanimously that the aggravating circumstances do not outweigh the mitigation factors beyond all reasonable doubt. By so doing, the trial undermines the value of any mitigation the defense provided and essentially assumes that some jurors will find that death is the appropriate sentence.

Based on the above cases, as well as Mapes v. Coyle 171 F. 3d 408 (6th Cir. 1999), appellant's rights under the Ohio and Federal Constitutions were violated by giving an unanimity instruction during the penalty phase, thereby creating a substantial risk of an erroneous imposition of a death sentence. See Brooks, supra, at 1041.

PROPOSITION OF LAW SIX: THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY FAILING TO PROPERLY SWEAR IN THE JURY.

On January 10, 2003, appellant's trial began. (T - 1). Throughout the jury selection, the trial court's bailiff administered the oath to all jurors. (T - 155; 236; 293; 349; 442; 512; 556; 619; 734; 786; 1054).

Appellant initially points out that the trial jury in this case was not properly sworn. The transcript clearly indicates that the trial court's bailiff administered the oath. Ohio Revised Code §2945:28 is quite clear: "In criminal cases jurors and the jury shall take the following oath to be administered by the trial court or the clerk of the court of common pleas ... [emphasis added]." Therefore, the oath was not administered properly to the trial jury. A similar rule applies to witnesses. Evid. R. 603. As the Tenth District Court of Appeals Court has pointed out, failing to properly administer an oath to witnesses is "troublesome" and reflects on the trial court's failure to conduct proceedings in a manner commensurate with the seriousness of the matter. In re Williams (2001) 10th Dist. Ct. App., March 20, 2001, unreported. Williams was a permanent custody matter. Appellant contends that a criminal trial is at least as serious as that, and probably more so.

Appellant further contends that this error by the trial court is not harmless, as it is a structural error, not subject to the harmless error analysis. Structural error is error in the constitution of the trial mechanism, which affects the conduct of

the trial from the beginning to end. Arizona v. Fulminante (1991) 499 U.S. 279, 309-10. In this case, the failure to properly swear in the jury, affected the trial from beginning to end. Again, as this Court pointed out in Williams, the failure to properly swear in witnesses is, at best, troubling. No less troubling, and appellant argues even more troubling, is the failure to follow clear statutory procedure in administering the oath to jurors.

Appellant argues that only a new trial, a trial free of prejudicial and structural error, will afford him the Constitutional guarantees to which he is entitled.

> PROPOSITION OF LAW SEVEN: MULTIPLE INSTANCES OF DEFICIENT PERFORMANCE IN THE CONDUCT OF THE PENALTY PHASE OF A CAPITAL TRIAL COUPLED WITH PREJUDICE INURING TO THE DETRIMENT OF THE APPELLANT RESULT IN THE DENIAL OF THE RIGHT TO A FAIR TRIAL AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

To establish a violation of the Sixth Amendment right to counsel, a defendant must demonstrate that counsel's representation was deficient and that it actually prejudiced him. Strickland v. Washington 466 U.S. 668, 687-88 (1984). Representation is deficient when it falls below an objective standard of reasonableness under prevailing norms. See Carter v. Bell 218 F. 3d 581, 591 (6th Cir. 2000). The claimant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed to the defendant by the Sixth Amendment." Strickland 466 U.S. at 687. In

considering the "prejudice" factor, the Supreme Court held that even professionally unreasonable errors do not justify setting aside the judgment of a criminal proceeding "if the error[s] had no effect on the judgment." (Id. at 69). A petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the reasonable probability is "a probability sufficient to undermine confidence in the outcome." (Id.). The ultimate focus of the collective inquiry is the fundamental fairness of the proceeding. In this vein, a court must determine whether the result of the proceeding is unreliable "because of a breakdown in the adversarial process that our system counts on to produce just result." (Id. at 695).

Appellant submits that the following acts or omissions by trial counsel were outside of the range of competence expected of Sup. R. 20 qualified counsel and that said errors undermine confidence in the outcome.

A. IT IS INEFFECTIVE FOR COUNSEL NOT TO PRESENT RELEVANT MITIGATION EVIDENCE.

At the mitigation hearing, appellant presented testimony from his parents and his own unsworn statement. He presented no school records; psychological reports or other evidence to establish mitigating factor, especially (A)(7) factors, thereby ensuring a death verdict. Under Lockett, a jury must hear all relevant mitigation evidence, 98 S. Ct. at 2963-64, to allow for the "individualized sentencing" that the Eighth and Fourteenth

Amendments require.

B. IT IS INEFFECTIVE FOR TRIAL COUNSEL NOT TO OBJECT TO DEFECTIVE JURY INSTRUCTION.

As stated previously, the trial court repeatedly used the word "recommend" when it came to the jury's decision on the death penalty. Appellant's trial counsel did not object. (T - 150; 348-9; 441; 456; 617; 730; 781).

Likewise, the trial court instructed the jury during the penalty phase as follows:

> The second verdict form reads:
> We, the jury, having reached a deadlock on whether or not the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, hereby unanimously recommend the following life sentence on count one (check one): (emphasis added).

(T - 2868).

Again, trial counsel did not object. The instruction is defective. First, the instruction assumes that the jury will not find that the aggravating circumstances do not outweigh the mitigating factors, but, rather, a "deadlock" may occur. By so doing, the instruction tells the jury that number of jurors will believe that death is the appropriate sentence and the best appellant can do is a deadlock.

Second, the court tells the jury that a life sentence must be unanimous which obviously violates the tenets of State v. Brooks (1996) 75 Ohio St. 3d 148, 159-60. See also State v. Madrigal (2000) 87 Ohio St. 3d 378; State v. Taylor (1997) 78 Ohio St. 3d

15.

"Acquittal First" is not a component of Ohio law with respect to life sentence options. Appellant was prejudiced by this instruction because it invited jurors to not consider mitigating factors unless they first agree that death was inappropriate. The risk that the death penalty will be imposed in spite of factors that call for a less severe penalty is unacceptable and incompatible with the dictates of the Eighth and Fourteenth Amendments to the United States Constitution. See Mills v. Maryland (1988) 486 U.S. 367, 376.

> PROPOSITION OF LAW EIGHT: BY USING THE WORD RECOMMENDATION THROUGHOUT THE VOIR DIRE AND PENALTY PHASE INSTRUCTIONS, THE TRIAL COURT DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

An instruction that the jury verdict of death is a "recommendation" accurately reflects Ohio law. See State v. Henderson (1988) 39 Ohio St. 3d 24, 29-30; State v. Woodard (1993) 68 Ohio St. 3d 70, 77. However, trial courts, cognizant that the term "recommendation" could diminish the jury's overall sense of responsibility should instruct as follows: "[s]imply put, you should recommend the appropriate sentence as though your recommendation will, in fact, be carried out." State v. Carter (1995) 72 Ohio St. 3d 545, 559; State v. Clemmons (1998) 82 Ohio St. 438, 444.

In this case, the trial court failed to follow and adhere to

the dictates of Carter and Clemmons instead, the court, starting in voir dire, (T - 150; 348-9; 441; 456; 617; 730; 781), used the term "recommend" when explaining to the jury the significance of a verdict of death.

Appellant concedes that the trial court deleted the word "recommend" in its penalty phase instructions, but that instruction alone does not rectify the court's continued use of the term recommend. This problem was further compounded by the court not telling the jury that its verdict of death should be decided as if it was to be carried out.

The trial court's failure deprived appellant of his right to a fair trial under the Ohio and Federal Constitutions.

PROPOSITION OF LAW NINE: IMPOSITION OF THE DEATH SENTENCE VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE ONE, SECTIONS TWO, NINE AND SIXTEEN OF THE OHIO CONSTITUTION.

The Eighth Amendment of the United States Constitution and Section 9, Article 1 of the Ohio Constitution explicitly prohibit the infliction of cruel and unusual punishment upon a convicted criminal offender. The Eighth Amendment protections are applicable to the states through the Fourteenth Amendment. Robison v. California (1960) 370 U.S. 600. The principle underlying this prohibition, governmental respect for human dignity, must be this Court's guideline in determining whether a challenged punishment is constitutional, Furman v. Georgia (1972) 408 U.S. 238, rehearing

denied (1972) 409 U.S. 902 (Brennan, J., concurring); Rhodes v. Chapman (1981) 452 U.S. 337; Trop v. Dulles (1958) 356 U.S. 86.

The prohibition against cruel and unusual punishment promises to all that the state's power to punish will be exercised within the limits of civilized standards. Trop, supra. What constitutes cruel and unusual punishment is not a static concept but rather a concept which "must draw [its] meaning from the evolving standards of decency that mark the progress of a maturing society." (Id. at 101). This concept must be interpreted in a flexible and dynamic manner.

Punishment which is "excessive" constitutes cruel and unusual punishment. Coker v. Georgia (1977) 433 U.S. 584. A punishment is excessive if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the gravity of the offense. Coker, supra at 592. Thus, if the death penalty makes no measurable contribution to acceptable goals of punishment or if it is disproportionate to the seriousness of the offense committed, it is excessive and, therefore, unconstitutional.

Equal protection under the law, as guaranteed by the Fourteenth Amendment, requires that similarly situated persons be treated similarly. This right extends to the protection against cruel and unusual punishment. Furman, supra at 294 (Douglas, J.,

concurring).

> "The high service rendered by the "cruel and unusual" punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are even handed, nonselective, and not arbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."

Furman, supra at 256 (Douglas, J., concurring). A death penalty imposed in violation of the Equal Protection guarantee is cruel and unusual punishment.

Capital punishment, because it involves the taking of life, is qualitatively different from other punishments. Furman, supra at 287 (Brennan, J., concurring). "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind." (Id. at 306). (Stewart, J., concurring). "[I]n assessing the cruelty of capital punishment...We are not concerned only with the 'mere extinguishment of life'...But with the total impact of capital punishment from the pronouncement of judgment of death through the execution itself, both on the individual and on the society which sanctions its use." People v. Anderson (Cal. 1972) 493 P. 2d 880, cert. denied, (1972) 406 U.S. 958.

The Eighth Amendment concept of cruelty is not a prohibition against all suffering, but it is a prohibition against inflicting suffering greater than is necessary to serve the legitimate needs underlying a compelling state interest of society. Generally, society tolerated that degree of cruelty that is necessary to serve

its legitimate needs. However, when the level of cruelty is disproportionate to the crime and consequently does not serve the needs of society, courts must find the punishment to be "cruel" within the meaning of the cruel and unusual punishment clause. Robinson, supra.

The Ohio capital punishment scheme allows for imposition of the death penalty in an arbitrary and discriminatory manner, in violation of the protections mandated in Furman and its progeny. The virtually uncontrolled discretion of prosecutors in indictment decisions allows for arbitrary and indiscriminatory imposition of the death penalty.

The United States Supreme Court's decision in Woodson v. North Carolina (1976) 428 U.S. 280, made it clear that the fatal flaw of mandatory death penalty statutes is that without specific standards, the process of deciding who is to be sentenced to death is shielded from judicial review.

The right to life is a constitutionally protected fundamental right. Commonwealth v. O'Neal (Mass. 1975) 327 N.E.2d 662; Roe v. Wade (1973) 4120 U.S. 113, rehearing denied, (1973) 410 U.S. 959; Johnson v. Zerbst (1938) 304 U.S. 458; Yick Wo v. Hopkins (1886) 118 U.S. 356. The Fifth and Fourteenth Amendments to the Constitution state explicitly that neither the United States Government nor any of the individual state governments may deprive a person of his life without due process of law. "Aside from its

prominent place in due process clause itself, the right to life is the basis for all other rights. In the absence of life all other rights do not exist." Commonwealth v. O'Neal, supra at 688.

Due process guarantees prohibit the taking of life unless the state can show a legitimate and compelling interest. Commonwealth v. O'Neal, supra at 668; Commonwealth v. O'Neal II, (Mass. 1975) 339 N.E.3d 676, 678 (Tauro, C.J., concurring); State v. Pierre (Utah 1977) 572 P.2d 1338 (Maughan, J., concurring and dissenting), cert. denied (1978) 438 U.S. 882.

Due process and equal protection rights require that states not impose a capital sentence through procedures that create a substantial risk of arbitrary and capricious application. Gregg v. Georgia (1976) 428 U.S. 875 at 188 and 193-95; Furman, 408 U.S. 255, 274 and 309. The Ohio scheme does not meet these requirements. For example, by failing to require the conscious desire to kill or premeditation and deliberation as the culpable mental state, R.C. §2903.01(B) and R.C. §2929.04(A)(7) run afoul of the Federal and State Constitutions. Nor does the Ohio Code require that imposition of the death penalty only be allowed after proof beyond all doubt.

Another deficiency is that the statutes do not require the state to prove the absence of any mitigation factors and that death is the only appropriate penalty. The statutory scheme is also unconstitutionally vague which can lead to arbitrary imposition of the death penalty. Moreover, the statutes have impermissibly

devalued the importance of the death penalty. Moreover, the statutes have impermissibly devalued the importance of mitigation because no methods exist to ensure a proper "weighing and consideration" is accomplished. Because of these deficiencies, the Ohio statutory scheme does not meet the requirements of Furman and its progeny.

The Ohio statutes also violate the mandates of the constitutional protections by requiring proof of aggravating circumstances in the trial phase of capital trials. The United States Supreme Court has approved schemes which separate the consideration of statutory aggravating circumstances from the determination of guilt because of their ability to provide an individualized determination and to narrow the category of defendants eligible for the death penalty. See Zant v. Stephens (1983) 462 U.S. 861; Barclay v. Florida (1983) 463 U.S. 939, rehearing denied, (1983) 464 U.S. 874. Ohio's statutory scheme cannot provide for these constitutional safeguards.

By requiring proof of the aggravating specifications simultaneously with proof of guilt, Ohio has effectively prohibited a sufficient individualized determination in sentencing as required by post-Furman cases. See Woodson 428 U.S. at 961. The jury must be free to determine whether death is appropriate punishment for a defendant. By not requiring the state to establish guilt on the question of murder prior to the jury's consideration of the

aggravating circumstances, the jury is unconstitutionally barred from making the necessary individualized determination of appropriateness. This is especially prejudicial where, as in Ohio, the consideration of aggravating circumstances is accomplished without consideration of any mitigating factors.

The statutory scheme for capital felony murder also fails to comply with the requirements set forth in Lowenfield v. Phelps (1988) 484 U.S. 231, 98 L.Ed.2d 568, rehearing denied, (1988) 99 L.Ed.2d 286. Ohio's scheme allows an aggravating circumstance (R.C. §2929.04(A)(7)) to merely repeat an element of aggravated murder pursuant to R.C. §2903.04(B). No effective narrowing is performed when a capital defendant is indicted for felony murder and the felony murder specification. As a result, the scheme is unconstitutional.

The Ohio scheme is also unconstitutional because it imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial. A defendant who decides to plead guilty or no contest to an indictment which contains one or more capital specifications receives the benefit of having the trial court judge vested with the discretion to dismiss the specifications "in the interest of justice". Ohio Criminal Rule of Procedure 11(C)(3). Accordingly, the capital indictment may be dismissed regardless of the presence of absence of mitigation circumstances. No such corresponding provision exists if a capital

defendant elects to proceed to trial before a jury.

In Lockett v. Ohio (1978) 438 U.S. 586, Justice Blackmun, in his concurring opinion, found this discrepancy in Ohio's statute to be a constitutional infirmity. Justice Blackmun stated that this disparity in Ohio's statute violated the United States Supreme Court's pronouncement in United States v. Jackson (1968) 390 U.S. 570, (Id. at 617), and needlessly burdened the defendant's exercise of his rights to a trial by jury. Since the United States Supreme Court's decision in Lockett, the infirmity has not been cured, and Ohio's statute remains unconstitutional.

Another aspect of the unconstitutionality of Ohio's scheme concerns excessiveness and disproportionality issues. The Ohio Revised Code, through provisions in §§2929.021 and 2929.03, requires reporting of some data to the Court of Appeals and the Ohio Supreme Court; although as discussed above, there is a critical omission of a written life recommendation report for the panel. There are also substantial doubts as to the adequacy of the information received after guilty pleas to lesser offenses or after charge reductions at trial. §2929.021 requires the reporting of only minimal information on these cases. There is no system of adequate tracking under the Ohio scheme. This prohibits adequate appellate review.

Adequate appellate review is a precondition to a finding that a state death penalty system is unconstitutional. Zant at 884; 885;

Barclay, supra at 958. Review must be based on a comparison of similar cases and ultimately must focus on the character of the individual and the circumstances of the crime. (Id.).

Adequate appellate review is undercut by the failure of the Ohio statutes to require the jury recommending life imprisonment to identify the mitigating factors. Without this information, no significant comparison of cases, there can be no meaningful appellate review.

The proportionality system in Ohio is also constitutionally flawed because of the method used for case comparison. The Ohio Supreme Court in State v. Steffen (1987) 31 Ohio St. 3d 111, 509 N.E.2d 283, cert. denied, (1988) 485 U.S. 916, at paragraph one of the syllabus held that "the proportionality review required by R.C. §2929.05(A) is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed." By only reviewing those cases in which death is imposed, the capital defendant is prevented from receiving a fair proportionality review. No meaningful manner exists in which to distinguish those capital defendants who are deserving of the death penalty and those who are not. This violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

The appropriateness analysis used by the Ohio courts of appeals and the Ohio Supreme Court is also constitutionally infirm. R.C. §2929.05(A) requires the appellate courts of Ohio determine

the appropriateness of the death penalty in each capital case they review. The statute directs the court to "affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case."

The Ohio Supreme Court and the courts of appeals have failed to follow the dictates of the statute. The appropriateness review ultimately conducted in each case is very cursory. It does not "rationally distinguish between those for whom it is not." Spaziano v. Florida (1984) 468 U.S. 447, 460. Any death sentence upheld on appeal under these circumstances does not comport with the Fifth, Eighth and Fourteenth Amendments of the United States Constitution.

The Ohio scheme is also unconstitutional in that it fails to provide the sentencing authority with an option to choose a life sentence when there are only aggravating circumstances. By foreclosing the jury or three judge panel's ability to return a life sentence unless aggravating factors fail to outweigh the mitigating factors, Ohio's statutes violate the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I, of the Ohio Constitution and creates a mandatory death penalty. Merely concluding that the aggravating circumstances outweigh the mitigating factors may be inadequate, as

a jury or three judge panel may still conclude that "a comparison of the aggravating factors with the totality of the mitigating factors leaves it in doubt as to the proper penalty", i.e. in doubt as to whether death is the appropriate punishment in a specific case. Smith v. North Carolina (1982) 459 U.S. 1056 (Stevens, J., dissenting from denial of certiorari).

Under §2929.05 of the Revised Code of Ohio, courts affirming a death sentence in Ohio are required to find that death is the only appropriate remedy, but the original sentencer has no such statutory requirements, and they must. The jury or three judge panel must make this decision and must make it in a fashion that will allow it to be reviewed objectively at the appellate level. Due process requires that the same standards apply at both levels. Arbitrary decisions are likely at the appellate level if courts make assumptions as to what the sentencer considered.

The "fundamental issue" in a capital sentencing proceeding is this "determination of the appropriate punishment to be imposed on an individual." Spaziano v. Florida (1984) 468 U.S. 447. The sentencer must "rationally distinguish between those individuals for whom death is an appropriate sanction and those from whom it is not." (Id. at 352). Appropriateness of the penalty thus appears to be the core, an indispensable element of a constitutionally valid sentencing scheme. Yet, Ohio's laws do not provide the jury or three judge panel with an opportunity to consider this.

The Eighth Amendment of the United States Constitution and Section 9, Article I, of the Ohio Constitution prohibit infliction of cruel and unusual punishment.

The Fifth and Fourteenth Amendments of the United States Constitution, as well as Sections 2 and 16, Article I, of the Ohio Constitution, provide guarantees to equal protection of law and due process. These guarantees are further safeguards against imposition of the death penalty, even if it is not found to be inherently cruel and unusual.

Due process guarantees that, where fundamental rights are at risk, the life of the defendant may not be taken without substantive safeguards first being met. Governmental action cannot be justified unless the interest to be served is a compelling governmental interest. Further, that interest must be promoted through use of the least restrictive means that can effectively serve the state's interest. Moreover, the state has failed to show that a less interest means, such as life imprisonment, could not effectively serve the interest the state has asserted as justifying the death penalty. Due process also guarantees fair proceedings through which sentencing is accomplished. Where this occurs, the death penalty, as applied, constitutes cruel and unusual punishment.

Ohio's statutory scheme under which the death penalty is authorized fails to ensure the arbitrary and discriminatory

imposition of the death penalty will not occur. The procedures utilized under this scheme actually promote the death penalty contained in R.C. §§2903.01, 2020.02, 2929.021, 2929.03, 2929.04 and 2929.05 violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution. The death sentence in this case must be reversed.

> PROPOSITION OF LAW TEN: WHEN THE INDICTMENT INCLUDES A COUNT OF ATTEMPTED MURDER (NOT ATTEMPTED AGGRAVATED MURDER), AND THE TRIAL COURT CHARGES ON TRANSFERRED INTENT, IT IS CONSTITUTIONALLY IMPOSSIBLE FOR THE ACCUSED TO BE FOUND GUILTY OF THE ELEMENT PRIOR CALCULATION AND DESIGN, SINCE IT IS NOT INCLUDED IN THE OFFENSE OF ATTEMPTED MURDER THAT TRANSFERS, CONTRA THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

At the conclusion of the trial phase of this case, the judge charged on the doctrine of transferred intent. (T - 2648).

In the charge, the offense of attempted murder, found in count two of the indictment, was given to the jury. Under attempted murder, the element of purpose is included, and prior calculation and design is not. (T - 2949).

Thus, under the theory of the prosecution's case, they claimed that any intent that Mr. Conway had against Mandel Williams with respect to the attempted murder was transferred to the victim, Jason Gervais.

The most that can be transferred, because the indictment in

count two did not include the element of prior calculation and design, is purpose. Therefore, it is constitutionally and statutorily impossible for James Conway to be found culpable of aggravated murder, since at best, what transferred was merely purpose.

The jury found Mr. Conway guilty of attempted murder, (T - 2686), along with the other counts.

The facts of this case bear this out.

Both the prosecution and defense cases demonstrate there was chaos in the parking lot. Mandel Williams was active in provoking and escalating, by slashing Mr. Conway's brother, Jeff, with a knife.

The response by James Conway is characterized in count two of the indictment, i.e. the attempted murder against Mandel Williams. If the Franklin County Grand Jury had felt James Conway acted with prior calculation and design towards Mandel Williams, then they would have included prior calculation and design under count two, i.e. attempted aggravated murder.

In State v. Sowell (1988) 39 Ohio St. 3d 322, this Court reviewed the issue of transferred intent.

In the facts of that case, there was also an aggravated murder count, along with the attempt to murder another individual.

At pages 323-24, this Court states that Mr. Sowell was indicted for aggravated murder with a death penalty specification,

under R.C. 2929.04(A)(5), the course of conduct specification involving the purposeful killing or attempt to kill another. Importantly, Mr. Sowell was also indicted for attempted aggravated murder of the other individual.

Obviously, the attempted aggravated murder included the element of prior calculation and design.

At page 330 in Sowell, this Court stated that "Therefore, we hold that if one purposely causes the death of another and the death is the result of a scheme designed to implement the calculated decision to kill someone other than the victim, the offender is guilty of aggravated murder in violation of R.C. 2903.01(A)."

In the Sowell case, it cites State v. Solomon 66 Ohio St. 2d 214; 421 N.E.2d 139 (1981) as precedent.

In the facts in Solomon, he was indicted for aggravated murder, plus attempted murder, not attempted aggravated murder like the situation in State v. Sowell.

In affirming the conviction in Solomon, this Court cites Wareham v. State (1874) 25 Ohio St. 601, where, "this court held that a person could be convicted of second degree murder even if purpose and malice were directed at a person other than the actual victim. In so holding, the court stated, at page 607:

'***The intent to kill and the malice followed the blow, and if another was killed the crime is complete; and if deliberation

and premeditation are added to the essential ingredients of murder in the second degree, the crime would be murder in the first degree. The purpose and malice with which the blow was struck is not changed in any degree by the circumstance that it did not take effect upon the person at whom it was aimed. The purpose and malice remain, and if the person struck is killed, the crime is as complete as though the person against whom the blow was directed had been killed, the lives of all persons being equally sacred in the eye of the law, and equally protected by its provisions. A blow given with deliberate and premeditated malice and with the intent and purpose to kill another, if it accomplished its purpose, can not be said to have been given without malice and unintentionally, although it did not take effect upon the person against whom it was directed.***'

In this passage from Wareham, this court recognized that when there is malice and premeditation, even if it is aimed at someone other than the victim, the mental state of the killer is as culpable as if he premeditated the death of the actual victim. The court held that when this mental state is combined with the act of causing the death of another, the resulting offense is to be treated as if the death of the actual victim were planned."

Importantly, it should be stressed that although this Court, in the paragraph just quoted, uses premeditation in its analysis, the significant point in Wareham is the individual was convicted of

second degree murder.

This is relevant for several reasons.

First is that this Court has never directly ruled on how transferred intent should apply, if the applicable grand jury, in this case Franklin County, indicts on only attempted murder, and not attempted aggravated murder.

A case from the Franklin County Court of Appeals focuses in on the issue: State v. Mullins 76 Ohio App. 3d 633; 602 N.E.2d 769 (1992).

In the facts of that case, Mr. Mullins was originally indicted on the charge of aggravated murder with a gun specification, and ultimately the jury convicted him of murder with a gun specification, at 634.

Further, the facts demonstrate that Mr. Mullins was shooting at some individuals he called "the Detroit dudes", and a stray bullet killed a young child, at 635.

In analyzing the question of whether Mr. Mullins was culpable of the offense of murder, the Court states at page 636 the following:

"The more difficult question is whether appellant is guilty of purposely causing the death of Jasper Moffitt, thereby making him guilty of the greater offense of murder. No reason exists to believe that appellant wanted to kill a ten-year-old child, as opposed to the "Detroit dudes" in the white Cadillac who he

apparently believed were gunning for him. However, appellant may still be guilty of murder if the doctrine of transferred intent is applicable.

The doctrine of transferred intent indicates that where an individual is attempting to harm one person and as a result accidentally harms another, the intent to harm the first person is transferred to the second person and the individual attempting harm is held criminally liable as if he both intended to harm and did harm the same person.

The doctrine has been applied for many years in Ohio but has apparently been removed by the legislature from application in aggravated murder cases. In revising R.C. 2903.01(D), the legislature mandated:

'No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. *** [T]he jury *** is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed ***.'

The legislature did not remove the doctrine of transferred intent from application in determining the absence or presence of purpose to kill in murder, as opposed to aggravated murder, convictions. The limitation of the legislative reference to

aggravated murder implies to a point that the legislature intended for the doctrine of transferred intent to have applicability in situations involving lesser crimes such as murder."

Thus, the Mullins decision was affirmed, but because of the fact that the statute, limiting aggravated murder, i.e. R.C. 2903.01(D), did not apply to the Mullins factual situation.

At page 637, the appellate decision goes on to say that recent case law has even allowed transferred intent to be the basis for transferring prior calculation and design from one victim or intended victim to the victim who actually dies, even though the latter victim's death was not originally contemplated. The Mullins decision then cites State v. Solomon and State v. Sowell, noted above.

The important point here, is that the Mullins decision did not recognize that under the facts of the Solomon and Sowell cases, one was indicted for attempted aggravated murder and the other was indicted for attempted murder.

It is respectfully submitted that with respect to capital litigation, Ohio case law is consistent, as far as what transfers, dating all the way back to the Wareham decision in 1874.

Again, in State v. Sowell, a capital case, he was indeed indicted for attempted aggravated murder. The fact the Grand Jury indicted the present case only on attempted murder in count two, has resulted in the improper conviction of Mr. Conway for

aggravated murder.

Although the above statute noted in Mullins has been revised by the Ohio General Assembly, case law still supports the doctrine that the finder of fact has to specifically make the determination that prior calculation and design transfers. This clearly was not the case here since count two charges attempted murder. [H.B. 5 eff. 6/29/98 deletes section noted in Mullins, R.C. 2903.01(D)].

The constitutional right of the accused to have the jury decide all issues of fact regarding the offense has recently been affirmed in Ring v. Arizona (2002) 122 S.Ct. 2428; 153 L.Ed. 2d 556.

In that case, the United States Supreme Court held, regarding an Arizona death penalty case, that the Sixth Amendment's jury trial guarantee, requires all aggravating factors to be determined by the jury. The Court called the specific aggravating factors the functional equivalent of an element of a greater offense, and thereby requires the jury, and not the judge to make the significant factual determination.

In contrast, in Mr. Conway's case, because count two, the attempted murder offense, did not include the crucial element of prior calculation and design, the jury never had the opportunity to make the significant factual finding of prior calculation and design with respect to Mandel Williams, i.e. the attempted murder count.

The Supreme Court, in its decision, cites heavily from Apprendi v. New Jersey (2000) 530 U.S. 466, 147 L.Ed 2d 435; 120 S. Ct. 2348, which held that the Sixth Amendment does not permit defendants to receive a penalty greater than they would receive under the facts reflected by the jury's verdict, even if a judge's additional findings were characterized as sentencing factors.

At the outset of the opinion authored by Justice Ginsburg, she states at 2432, that in Apprendi the Court held that, "the Sixth Amendment does not permit a defendant to be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone."

She continues also at 2432, by noting, "Capital defendants, no less than non-capital defendants *** are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."

Further on in the opinion, specifically at page 2438, Justice Ginsburg notes that, in reviewing the history of the Sixth Amendment back to 1791, "the English jury's role in determining critical facts in homicide cases was entrenched. As fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established. Throughout its history, the jury

determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned."

A few paragraphs later, at 2439, Justice Ginsburg specifies that, "Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."

Finally, towards the end of her opinion, at 2441, the decision emphasizes "Apprendi repeatedly instructs in that context that the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury."

In the present case, it is clear that the Franklin County Grand Jury indicted Mr. Conway in count two for attempted murder, and specifically left out the element of prior calculation and design. The entire basis for finding Mr. Conway culpable, throughout the prosecution's case, focused on the transferred intent of count two to the aggravated murder charge found in count one.

Both Ohio case law and recent decisions from the United States

Supreme Court re-affirm the constitutional role that all factual determinations must be made by the jury, and not the judge.

In this case, the jury made the factual determination that the attempted murder of Mandel Williams did not include the element of prior calculation and design. The facts also bear this out. As a result, it is constitutionally and statutorily impossible for Mr. Conway to be found guilty of prior calculation and design in count one, and as a result, the case must be reversed and remanded for further proceedings.

In conclusion, under count two again, the indictment of attempted murder, does not include prior calculation and design, i.e. no implementation of a calculated decision to murder. Thus, the intent that was transferred to Jason Gervais accordingly does not include any scheme designed to kill, and the conviction for aggravated murder in count one cannot stand.

> PROPOSITION OF LAW ELEVEN: WHEN THE JURY IS INSTRUCTED ON TRANSFERRED INTENT REGARDING THE AGGRAVATING CIRCUMSTANCE, AND THE TRIAL COURT FINDS THE TRANSFERRED INTENT APPLIES TO THIS SPECIFICATION, THE CONVICTION ON THE SPECIFICATION CANNOT STAND SINCE EVIDENCE SHOWS A SINGULAR PURPOSE, CONTRA THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

In the court's charge to the jury, after giving the instruction on transferred intent, the trial court also stated to the jury that this doctrine also applies with respect to the one specification, i.e. the course of conduct, under R.C.

2929.04(A)(5). (T - 2646-48).

Later on in the trial, the court also noted for the record that the murderous intent was transferred to Jason Gervais. (T - 2899).

Previously, defense counsel had moved to dismiss the death penalty specification pursuant to Rule 29, and the trial court had denied this motion. (T - 2027-28).

Under the facts of this case presented by the prosecution, this was an improper ruling on the part of the trial court, because of how the jury was instructed, with respect to the "course-of-conduct" specification.

As noted, the jury was instructed to apply the doctrine of transferred intent to the specification, which ultimately means that only a singular purpose was made by the jury and its finding on the specification.

In order to be found responsible for a course-of-conduct specification, the facts must show that the accused was cognizant of more than a singular purpose in his actions.

There have been several cases from this Court that have reviewed course-of-conduct specifications, but have not raised this specific issue.

In State v. Beuke (1988) 38 Ohio St. 3d 29, 526 N.E.2d 274, there was one aggravated murder and two attempted murders, each occurring separately.

This Court affirmed, holding that the course of conduct specification was supported by the evidence presented, Beuke at 43.

Then, in State v. Benner (1988) 40 Ohio St. 3d 301, 533 N.E.2d 701, the issue of course of conduct specification was detailed by this Court.

Specifically at 305, this Court stated that "*** it is clear that no one could reasonably believe that every murder is 'part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.' Thus, we find that the specification in R.C. 2929.04(A)(5) does not give the sentencing court the wide discretion condemned in both Godfrey [(1980) 446 U.S. 420, 100 S.Ct. 1759] and Maynard [(1988) 486 U.S. 356]. Therefore, we hold that the course-of-conduct specification is not void for vagueness under either the Eighth Amendment to the United States Constitution or Section 9, Article I of the Ohio Constitution. The language of the statute is definitive and is circumscribed to cover only those situations which it fairly describes."

This Court is well aware of those capital cases regarding the Eighth Amendment, whose purpose is to channel the jurors' discretion.

In the present case, the trial court, in defining the specification, narrowed it so that only a singular purpose could be found by the jury. If intent is transferred as are the facts in

this case, it is legally impossible to be culpable of both. Put another way, all of the intent and/or purpose was transferred.

As a result, the trial court erred in overruling the motion to dismiss the death penalty specification, and as a result, the case must be reversed and remanded for appropriate relief.

> PROPOSITION OF LAW TWELVE: WHEN EVIDENCE IS ADMITTED THAT OCCURS AFTER THE TRIAL COURT HAS RULED THE WITNESS IS A GOVERNMENT AGENT, PREJUDICIAL ERROR OCCURS CONTRA THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

In the pre-trial proceedings in this case, there was a motion to suppress Ronald Trent's testimony, because he was a government agent. The trial court ruled that he became a government agent on May 16, 2002, and any testimony after that was not to be admitted. During the course of the defense case, the prosecution used the "Trent tapes", on cross-examination of Mr. Conway. Defense counsel objected to these tapes, because they occurred after the 5/16/02 date. The trial court ruled the Trent tapes could be used by the prosecution in questioning Mr. Conway, because it was consistent with his ruling, in that the issues discussed on the tapes related back before May 16, 2002. (T - 2372-74).

Before cross-examination regarding these Trent tapes, Mr. Conway listened to the tapes in open court, outside the presence of the jury. These tapes consisted of conversations he had with Ronald Trent on 5/17, 18, 19, 23 and 24, 2002. (T - 2378-95).

When cross-examination continued in front of the jury, he was

questioned with respect to these tape recordings, again occurring after 5/16/2002. (T - 2410-19).

The above created prejudicial error and was an improper ruling on the trial court, contra several United States Supreme Court cases.

The first is Massiah v. United States (1964) 377 U.S. 201, 84 S.Ct. 1199.

Briefly, in Massiah, he engaged in conversations in the absence of his attorney, with one of his co-defendants while in an automobile, and was unaware that the co-defendant was cooperating and a government agent. There was a radio transmitter concealed in the automobile, which allowed a federal agent to listen in to the conversations. Incriminating statements made by Mr. Massiah, and over the objection of counsel at the trial, resulted in his conviction.

The United States Supreme Court ruled that the conversations were inadmissible.

At page 205, the Court states, "We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel. It is true that in the Spano case the defendant was interrogated in a police station, while here the damaging testimony was elicited from

the defendant without his knowledge while he was free on bail. But, as Judge Hays pointed out in his dissent in the Court of Appeals, 'if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jail-house. In this case, Massiah was more seriously imposed upon ... because he did not even know that he was under interrogation by a government agent.'"

In the instant case, Mr. Conway was indicted on March 5, 2002, (R - 1), before the May 16, 2002 date that the trial court ruled Mr. Trent became a government agent.

The next case of import is United States v. Henry 447 U.S. 264, 100 S. Ct. 2183 (1980).

In that case, Mr. Henry was arrested, indicted for bank robbery, and was incarcerated when an individual, Nichols, an inmate, and a paid informant for the FBI, had conversations with Mr. Henry.

These conversations were incriminating, and Nichols, the government agent, testified to them at the trial of Mr. Henry.

The Henry decision reversed his conviction, stating that the prosecution had deliberately elicited incriminating statements from him contra the holding in Massiah, Henry at 270.

The decision states that when the individual acting as the informant for the prosecution, has an incentive to produce useful information, this coupled with the fact that confinement brings

into play subtle influences, will make an individual "particularly susceptible to the ploys of undercover Government agents", Henry at 274.

Importantly, in Henry, the prosecution's argument included the fact that the FBI agent had not intended that Nichols, the plant, was to question Henry. In response to this, the Henry decision emphasizes that the government must have known that Nichols would take affirmative steps to secure the incriminating information, Henry at 271.

The Massiah and Henry decisions were then amplified in Maine v. Moulton 474 U.S. 159; 106 S.Ct. 477 (1985).

The facts in Moulton show he was indicted, released on bail, and after his co-defendant went to authorities to cooperate, a body recorder was placed on him and conversations recorded with Mr. Moulton.

The alleged reason for these recorded conversations was to gather information regarding anonymous threats which the co-defendant-government agent had received, and also to gather information regarding Mr. Moulton's plan to kill a prosecution witness.

Significantly, in reversing, the United States Supreme Court held that even if there is a valid purpose authorities possess in having the co-defendant-agent wired, this does not immunize the recordings of Mr. Moulton's incriminating statements from the

holdings in Massiah and Henry.

It was clear the right to counsel had attached, and the incriminating statements were inadmissible at trial.

In the syllabus of the Moulton case, the Supreme Court ruled "The assistance of counsel is necessary to safeguard the other procedural safeguards provided to the accused by the criminal justice process. ***to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. ***the right to counsel means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him.

Once the right to counsel has attached and been asserted, the State must honor it. At the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."

Towards the end of the syllabus, the Moulton decision holds, "the State clearly violated respondent's Sixth Amendment right when it arranged to record conversations between respondent and its undercover informant."

Significantly, the Court continued that, "There is no merit to the argument that the incriminating statements obtained by the police should not be suppressed because the police had other, legitimate reasons for listening to respondent's conversations with

Colson, namely, to investigate respondent's alleged plan to kill the State's witness and to insure Colson's safety. This same argument was rejected in Massiah, supra, where the Court held that to allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert the need to investigate other crimes to justify their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right."

In the instant matter, the trial court reasoned, that because of the recorded conversations at the jail between Mr. Conway and Mr. Trent, related back to issues before May 16, 2002, this somehow justifies their admission at trial. The cases cited above, especially the Moulton decision, clearly refute this argument. Indeed, if this type of conduct on the part of the government would be allowed to continue, there would be no way in which the above three United States Supreme Court decisions could be followed. The State would merely say that either the issues related back to the time period before the individual became a government agent, or they could say they were investigating other future crimes. The situation in Mr. Conway's case is clearly within all of these above cited cases.

At page 170 of the Moulton decision, the Court states the right to counsel guaranteed by the Sixth and Fourteenth Amendments,

"means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him", citing Brewer v. Williams 430 U.S. 387, 398; 97 S.Ct. 1232 (1977).

Finally, at page 180, the Moulton decision holds, "To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in Massiah."

In conclusion, with respect to Mr. Conway's situation, the prosecution stated their reasons for the recorded conversations were the relation back of the other issues, and also because of alternative measures. The above Supreme Court decisions clearly disallow this, and the result is that the evidence introduced at the trial itself, after 5/16/02, is prejudicial and the case must be reversed and remanded for a new trial. [See Fellers v. United States 2004 WL 111410, 1/26/2004].

PROPOSITION OF LAW THIRTEEN: WHERE TESTIMONY IS PRESENTED THAT AUTHORITIES WORKED WITH A GOVERNMENT AGENT TO ELICIT INCRIMINATING REMARKS, INCLUDING FUTURE CONDUCT, FROM THE ACCUSED, THE RESULT IS A VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

In addition to the argument noted in the previous issue, the

evidence admitted after May 16, 2002, the cut-off date that the trial court had created, included future alleged crimes, and an elaborate scheme devised by the authorities, to highlight this at trial.

As noted in the statement of facts, according to Ronald Trent's testimony, in his conversations with Mr. Conway, the latter wanted Brian McWhorter killed. (T - 1821).

In addition, there were the allegations that Mr. Conway wanted to have another person confess to the crime. (T - 1835).

As a result of the above, Mr. Trent struck a deal with Deputies Scott/Floyd "to obtain information", i.e. to elicit testimony from Mr. Conway. (T - 1831).

In response to all of the above, Mr. Trent testified that a video was made of a deputy sheriff (Shively) acting dead. A picture of this was shown to Mr. Conway while Ronald Trent was visiting him in the county jail after the latter had been released. (T - 1835; 1842).

The reasoning the trial court used to admit all of this evidence after, again the government agent time had been established, was consciousness of guilt, and also the testimony regarding "future crimes", related back before 5/16/02. (T - 2374).

This evidence was introduced in contravention of United States v. Henry 447 U.S. 264 (1980), infra; and Brewer v. Williams 430 U.S. 387 (1977).

In Henry (as noted earlier), the government contacted an informant who was an inmate confined in the same cell as the defendant. The government instructed the informant to be alert to any statements made, but not to initiate conversations. The defendant made incriminating statements to the informant.

The syllabus in Henry holds that the defendant's statements to the informant should not have been initiated, because they intentionally created a situation likely to induce respondent to make incriminating statements without the assistance of counsel. This violated his Sixth Amendment right.

In the Henry decision itself, at 270, the Supreme Court states, "The question here is wether under the facts of this case a Government agent 'deliberately elicited' incriminating statements from Henry within the meaning of Massiah. Three factors are important. First, Nichols [the Government agent] was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols."

The Court, at 271, states that "Even if the agent's statement that he did not intend that Nichols would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result. ***

Nichols was not a passive listener; rather, he had 'some

conversations with Mr. Henry' while he was in jail and Henry's incriminatory statements were 'the product of this conversation.'"

In the present case, as has been previously noted, the deputies, Scott/Floyd, went out of their way to work in concert with Ronald Trent. The purpose was a deal to elicit as much incriminating information as they possibly could from Mr. Conway. All of this was introduced during the course of the prosecution's case, primarily through Ronald Trent's testimony.

It should also be noted that the prosecutor emphasized it in his final argument, by noting the picture of the supposedly dead Deputy Shively. (T - 2546).

When one considers the constitutional holding in Henry, this clearly overrides the trial court's reasoning that consciousness of guilt should permit this type of prejudicial testimony.

The Henry decision compares its situation with Hoffa v. United States 385 U.S. 293, 302 (1966), when it states that, "It is quite a different matter when the Government uses undercover agents to obtain incriminating statements from persons not in custody but suspected of criminal activity prior to the time charges are filed."

However, the claims identified in Hoffa, "***are not relevant to the inquiry under the Sixth Amendment here - whether the Government has interfered with the right to counsel of the accused by 'deliberately eliciting' incriminating statements," Henry at

272.

Again, in Henry at 274, the decision states that, "*** confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents. *** that on this record the incriminating conversations between Henry and Nichols were facilitated by Nichols' conduct and apparent status as a person sharing a common plight. That Nichols had managed to gain the confidence of Henry *** is confirmed by Henry's request that Nichols assist him in his escape plans when Nichols was released from confinement."

In the present case, Mr. Trent testified he came into contact with Mr. Conway while he dressed the latter's wounds, and they talked every day, and actually found out that they were cousins. (T - 1817-18).

In the concurring opinion of Justice Powell in Henry, he cites as support Brewer v. Williams 430 U.S. 387 (1977).

Specifically, at 276 in Henry, the concurring opinion notes, "in Brewer v. Williams, supra, we applied Massiah to a situation in which a police detective purposefully isolated a suspect from his lawyers and, during a long ride in a police car, elicited incriminating remarks from the defendant through skillful interrogation. We suppressed the statement because the government 'deliberately and designedly set out to elicit' information from a suspect. 430 U.S., at 399."

The situation in Henry and Brewer v. Williams is consistent with what the authorities did to Mr. Conway in this case. He was isolated from his attorney, and as a result, after discussions with Mr. Trent, there was a deliberate and intentional scheme to extract all kinds of incriminating evidence from Mr. Conway.

As was stated by the Henry decision, towards the end, at 275, this was not a case where "'the constable ... blundered,' ***; rather it is one where the 'constable' planned an impermissible interference with the right to the assistance of counsel."

As a result of the above, it is respectfully asserted that prejudicial error occurred in the admission of this damaging testimony after 5/16/02, over the objection of Mr. Conway, and the result is a new trial is in order.

> PROPOSITION OF LAW FOURTEEN: CONSTITUTIONAL ERROR OCCURS AT VOIR DIRE, WHERE PROSPECTIVE JURORS ARE NOT QUESTIONED REGARDING RACIAL BIAS REGARDING AN INTERRACIAL CRIME, CONTRA THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

In Turner v. Murray 476 U.S. 28 (1986), the syllabus shows the defendant was charged with a capital murder, fatally shooting a white proprietor of a jewelry store in the course of a robbery.

The trial judge, in Virginia, refused defendant's request to question the prospective jurors on racial prejudice.

In reversing and remanding, the United States Supreme Court held that "a defendant accused of an interracial capital crime is entitled to have prospective jurors informed of the victim's race

and questioned on the issue of racial bias. This rule is minimally intrusive," at 28.

Further in the syllabus, the Court held at 28-29, "While it is not necessary that petitioner be retried on the issue of guilt, there was an unacceptable risk of racial prejudice infecting the capital sentencing proceeding, and the inadequacy of the voir dire requires that his death sentence be vacated. This unacceptable risk arose from the conjunction of three factors: the fact that the crime charged involved interracial violence, the broad discretion given the jury under Virginia law at the sentencing hearing, and the special seriousness of the risk of improper sentencing in a capital case."

In the Turner decision itself, the decision notes Ristaino v. Ross 424 U.S. 589 (1976) which had previously held, "the mere fact that a defendant is black and that a victim is white does not constitutionally mandate ... an inquiry [into racial prejudice]."

The Turner decision contrasted Ristaino, saying, "inquiry into racial prejudice [in Ristaino], at voir dire was not constitutionally required because [of] the facts of the case." It did not suggest a significant likelihood that racial prejudice might infect the defendant's trial, because racial issues were not "inextricably bound up with the facts at trial", at 32.

The Turner decision notes at 33 that what sets the case apart from Ristaino, is that in addition to petitioner's being accused of

a crime against a white victim, the charge was a capital offense.

Due to the above, "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate, but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. *** More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.

The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence," at 34-35.

As a result, at 36-37, the Turner decision holds "that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. The rule we propose is minimally intrusive; as in other cases involving 'special circumstances,' the trial judge retains discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively. See Ham v. South Carolina 409 U.S. at 527. Also, a defendant cannot

complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry. ***

Our judgment in this case is that there was an unacceptable risk of racial prejudice infecting the capital sentencing proceeding."

In the instant matter, it is clear racial tension-bias permeated the entire case, from the first prosecution witness until the conclusion of the sentencing hearing.

Mandel Williams is black, and Mr. Conway is white.

As the statement of facts notes, all of the prosecution witnesses who were present at the night club testified to the presence of two distinct racial groups, both inside the club, and ultimately outside in the parking facility.

The altercations were black against white. The serious physical violence, initiated by Mandel Williams, a black man, with his stabbing of Mr. Conway's brother, Jeff, was escalated by Mandel Williams, because of racial words exchanged by both groups.

One of the prosecution witnesses, even attempted to keep the white group from entering the night club on the night in question, because he knew that racial tension would result inside. According to his testimony, there had been problems in the past. As the statement of facts indicates, he was unsuccessful.

There was no specific questioning with respect to this highly

charged issue at voir dire. There were only general voir dire questions, which, as noted above, the Supreme Court has stated is unacceptable in lieu of the importance of this issue.

In the Ristaino case, the Supreme Court noted that the mere fact that one individual was black and the other white does not automatically create the constitutional need for these proper voir dire questions. Ristaino at 598.

However, again, in this case, because it is a capital case, and because the racial tension-bias permeated the entire case, it is constitutionally required that an adequate voir dire identify unqualified jurors. Morgan v. Illinois 504 U.S. 719 (1992), 726; 729 and Aldridge v. United States 283 U.S. 308, at 310 (1931).

Finally, Powers v. Ohio 499 U.S. 400 (1991), established the constitutional holding that a white defendant has the right to question and be ensured that the jury composition is free of racial prejudice. As a result of the failure to question specifically on the above issue, minimally, Mr. Conway's death sentence must be vacated.

PROPOSITION OF LAW FIFTEEN: A TRIAL COURT COMMITS PREJUDICIAL ERROR IN REFUSING A CONTINUANCE AT THE OUTSET OF MITIGATION, WHEN THE RECORD SHOWS EFFORTS AT RETAINING FRESH COUNSEL, CONTRA THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Before the mitigation hearing began, a discussion occurred outside the presence of the jury, regarding Mr. Conway's attempts at obtaining fresh counsel for the purpose of presenting

mitigation. (T - 2749).

Defense counsel informed the judge that efforts were being made by Mr. Conway to hire another attorney, and for that reason to postpone mitigation.

Mr. Conway then discussed the reasons he desired new counsel, and detailed some of the criticisms he had of present counsel. One of his references was he was not allowed to participate in discussions on the charge to the jury. He then went into a lenghty discussion about how witnesses were being intimidated. Included in that discussion was the fact that the trial judge had received a phone call from a private attorney, who explained to the court how long it would take for him to be prepared for the upcoming mitigation. Mr. Conway also made specific reference that he was not present at the jury instruction conference. (T - 2751-65).

Ultimately, the motion to continue the case was denied by the trial court. (T - 2776).

There have been several decisions issued by this Court in capital litigation that relate to this issue.

In State v. Murphy (2001) 91 Ohio St. 3d 516; 747 N.E.2d 765, this Court stated at page 523 that, "The determination of whether to grant a continuance is entrusted to the broad discretion of the trial court. State v. Unger (1981) 67 Ohio St. 2d 65, *** 423 N.E. 2d 1078, syllabus. Relevant factors include 'the length of delay requested, prior continuances, inconvenience, [and] the reasons for

the delay.' State v. Landrum (1990) 53 Ohio St. 3d 107, 115, 559 N.E.2d 710, 721.

Moreover, 'an indigent defendant has no right to have a particular attorney represent him and therefore must demonstrate 'good cause' to warrant substitution of counsel.' United States v. Iles (C.A.6, 1990), 906 F.2d 1122, 1130, quoted in State v. Cowans (1999) 87 Ohio St. 3d 68, 72, 717 N.E.2d 298, 304. If his complaint is unreasonable, the trial judge may deny the requested substitution. State v. Deal (1969) 17 Ohio St. 2d 17, 46 Ohio Op. 2d 154, 244 N.E.2d 742, syllabus. In evaluating a request for substitute counsel, the court must balance 'the accused's right to counsel of his choice [against] the public's interest in the prompt and efficient administration of justice.' United States v. Jennings (C.A.6, 1996) 83 F.3d 145, 148. 'The trial court's decision is reviewed under an abuse-of-discretion standard.' Cowans 87 Ohio St. 3d at 73, 717 N.E.2d at 304, citing Iles 906 F.2d at 1130, fn 8.

In the present case, the length of delay requested does not appear to be unreasonable, the prior continuances although granted before the trial began, again were not unreasonable, any inconvenience was not demonstrated, while the reasons for the delay are clearly substantial.

Although the dialogue between the trial court and the attorneys was lengthy, there was no definitive statements given as to why the trial court refused the request for postponement.

The reasons for the delay, expressed by Mr. Conway, included the fact that he, being dissatisfied with his current attorneys, wanted to work closely with fresh counsel to present relevant mitigation.

As the statement of facts notes, there was a minimal amount put on during mitigation. Mr. Conway's father and mother testified, and Mr. Conway gave an unsworn statement.

This testimony was brief.

This fact relates directly back to the reasons, again, why Mr. Conway desired a postponement in this crucial part of the case.

The Court in Murphy, supra, went on to state at page 523 that, "Although there is no right to a 'meaningful attorney-client relationship,' Morris v. Slappy (1983) 461 U.S. 1, 13-14, 103 S. Ct. 1610, 1617, 75 L. Ed. 2d 610, 621, a 'total lack of communication preventing an adequate defense' is a factor the court should consider in evaluating a defendant's request for substitute counsel."

In more recent cases from this Court, the decisions have focused on the breakdown in communications as the principal basis for review of the motion to continue to obtain new counsel.

In State v. Williams (2003) 99 Ohio St. 3d 439, [Robert], this Court reviewed a situation where Mr. Williams wanted to obtain new counsel at a pre-trial hearing.

Specifically, at page 449, this Williams decision states, "We

find that the trial court acted within its discretion in requiring Williams to choose between retaining his counsel and having his case delayed. First, Williams never demonstrated that the trial court was required to appoint new counsel. At trial, Williams complained that his attorneys failed to have his confession suppressed; however, Williams did not establish a complete breakdown in communications with counsel or 'good cause' to substitute counsel."

In another Williams case [Shawn], this Court found that the trial court had abused its discretion in not substituting counsel. State v. Williams 99 Ohio St. 3d 493, 2003-Ohio-4396.

In this case, the facts show, at 512, that "When the jury returned its guilt-phase verdict, Williams punched Spiros Cocoves, one of his defense attorneys, in the face. The assault happened in the courtroom and in front of the jury."

Motions to withdraw were then filed, and Mr. Cocoves asserted that there had been a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel.

In ruling that the trial court had abused its discretion in refusing to allow substitution, the Court states at page 513 that, "Indeed, the incident had already begun to diminish the effectiveness of defense counsel. Cocoves and Wingate told the court that they ordinarily would have spent most of the weekend

before the penalty phase with their client discussing mitigating factors. Here such discussions were especially important because Williams had previously refused to talk to counsel about mitigation. *** counsel's inability to discuss the case with Williams exemplifies why the motions to withdraw should have been granted."

In the present case, although there is not sufficient detail, it is clear that Mr. Conway wanted new counsel because of how they had handled his defense up to that date. The minimal testimony brought forth in the mitigation hearing is a primary example of failure to communicate with his attorneys.

Significantly, the trial court failed to take into account all of the factors that are to be reviewed, in either accepting or denying a continuance.

The possible breakdown in communications, is but one of those factors.

As a result of the above, it is respectfully asserted that minimally this case must be remanded for a full hearing in front of the trial court, to make a determination as to the specific reasons why Mr. Conway's request was denied.

The record shows that he was genuine in his request for this since a fresh attorney was retained to handle the motion for a new trial which resulted in an evidentiary hearing on March 21, 2003, approximately six weeks after the mitigation hearing of February 5,

2003.

For the above reasons, it is respectfully requested that this Court reverse and remand for a hearing to make this determination; or make the finding that the trial court abused its discretion, and that the continuance should have been granted for fresh counsel to pursue the mitigation hearing.

> PROPOSITION OF LAW SIXTEEN: THE TRIAL COURT COMMITS CONSTITUTIONAL ERROR WHEN IT ORDERS, ON AN OVERNIGHT RECESS, THE ACCUSED NOT TO CONSULT WITH HIS ATTORNEYS, CONTRA THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

James Conway took the stand in his own defense during the first phase of the trial on January 27, 2003. (T - 2224).

After his direct examination, and partially through his cross-examination, a short break occurred. Outside the presence of the jury, the trial court stated, "Mr. Rigg knows he's not to talk about his testimony." (T - 2291). Then at the conclusion of the trial for that day, Mr. Conway was still being cross-examined. Again, out of the presence of the jury, the trial court ordered Mr. Conway not to discuss testimony with anyone. "And you can -- Mr. Conway, you can leave the stand. You're not to discuss your testimony with anybody" -- The defendant: "Okay." The court: -- "till you resume the stand, you're in the middle of examination. Do you understand that?" The defendant: "Yes." The court: "All right." (Decision Denying Defendant's Motion For New Trial; 7/14/03 at page 4; R - 462; T - 2358).

The next morning, January 29, 2003, out of the presence of the jury, defense counsel objected to the fact he was not allowed to talk to his client. The court essentially denied that he said that. In further explanation, after the motion for new trial was heard several weeks later and the court issued its decision, it stated the following in said decision: "Clearly the court did not order the defendant not to see his counsel or converse or meet with him. The only restriction given was in regard to discussing his testimony. The defendant was in the middle of cross-examination at the time of recess. The defendant understood the admonition and acknowledged the same. No instruction or orders of any kind were directed to defendant's counsel. Nor was there any such order given off the record. [Emphasis supplied].

"Defense counsel has submitted case law to the court supplementing his motion on this issue. None of the defendant's tendered case authority stand for the proposition that the common type of admonition given to the witness in the case at bar, even where the witness is a defendant in a criminal case, presents some constitutional infirmity. Quite the opposite. The one case upon which defendant heavily relies inapposite. In Geders v. United States (1975) 425 U.S. 80, the defense counsel was prohibited from visiting his client during overnight recess. The holding in Geders stated that it was improper to prohibit a defendant from speaking with his attorney 'about anything' during a 17-hour overnight

recess. (Emphasis added). Moreover, in Perry v. Leeke (1988) 488 U.S. 272 the court held that it was proper for the court to prohibit the defendant from consulting with anyone during a 15-minute recess called at the end of the defendant's direct examination.

"It is a long standing proposition of law that the court may protect the integrity of a witness examination once begun, to prevent the process from suffering ongoing coaching or rehearsal. In no way was the defendant prevented from talking with or consulting his lawyer. Defendant's position was not well taken legally or factually and demonstrates no prejudice. The court's application of the simple standard witness instruction preserves the integrity of the examination process", (Decision Denying Defendant's Motion For New Trial, at pages 4-5).

A close reading of both the Geders and Perry decisions demonstrate that the trial court committed constitutional error in ordering the client not to discuss his testimony with his own counsel. Prejudice need not be demonstrated because of the fact it is a denial of the right to counsel through governmental action.

In Geders, the syllabus shows that the trial court ordered the defendant to not consult with his counsel about anything during an overnight recess. The defendant in Geders was in the middle of his testimony.

The Geders decision specifically holds "To the extent that

conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper 'coaching,' the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel."

In the decision itself, at page 87, the Court states, "The aim of imposing 'the rule on witnesses,' as the practice of sequestering witnesses is sometimes called, is twofold. It exercises a restraint on witnesses 'tailoring' their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid. See Wigmore [6 J, Evidence] §1838; F. Wharton, Criminal Evidence §405."

Regarding the overnight recess, the Geders decision explains its importance: "It is common practice during such recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed.", at 88.

Then, with the issue of improper coaching, the Court explains at 89-90, "There are other ways to deal with the problem of possible improper influence on testimony or 'coaching' of a witness short of putting a barrier between client and counsel for so long a period as 17 hours. The opposing counsel in the adversary system is not without weapons to cope with 'coached' witnesses. A

prosecutor may cross-examine a defendant as to the extent of any 'coaching' during a recess, subject, of course, to the control of the court. Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had, in fact, coached the witness as to how to respond on the remaining direct examination and on cross-examination."

At the conclusion of the Geders decision, the Court stated that "We need not reach, and we do not deal with, limitations imposed in other circumstances. We hold that an order preventing petitioner from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment.", at 91.

In Perry v. Leeke, supra, the Court dealt with the situation where, unlike the overnight recess, the trial judge, after declaring a fifteen minute recess, ordered that the defendant not be allowed to talk to anyone including his lawyer during said break.

In ruling in favor of the trial judge in this particular issue, the Perry Court held in its syllabus that with respect to Geders, "A showing of prejudice is not an essential component of a violation of the Geders rule, in light of the fundamental

importance of the criminal defendant's constitutional right to be represented by counsel."

The Court then distinguished the situation in Geders which was direct governmental interference by the court, in contrast to the situation in Perry v. Leeke where a showing of prejudice was a component under Strickland v. Washington (1984) 466 U.S. 668.

At paragraph two of the Perry syllabus, at 273, the decision holds that, "the Federal Constitution does not compel a trial judge to allow a criminal defendant to confer with his attorney during a brief break in his testimony. *** Thus, although it may be appropriate to permit such consultation in individual cases, the trial judge must nevertheless be allowed the discretion to maintain the status quo during a brief recess in which there is a virtual certainty that any conversation between the witness and his lawyer would relate exclusively to his ongoing testimony. The long interruption in Geders was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that the defendant does have a constitutional right to discuss with his lawyer - such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain - and the fact that such discussions will inevitably include some consideration of the of the defendant's ongoing testimony does not compromise that basic right in that instance,". [Emphasis supplied].

It is the last part of the above holding which is significant to the facts in Mr. Conway's case.

There is no question that the trial court ordered defense counsel not to discuss Mr. Conway's testimony in the overnight recess. This is in direct contravention to the Geders decision and also even the Perry v. Leeke decision.

In the Perry v. Leeke decision itself, after discussing that no prejudice need be shown in a Geders situation, the decision reasons that during brief breaks during the course of the trial, "*** it is entirely appropriate for a trial judge to decide, after listening to the direct examination of any witness, whether the defendant or a nondefendant, that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties, including his or her lawyer.", at 282.

Towards the end of the decision however is what causes this trial court's order to not discuss testimony with Mr. Conway, an unconstitutional governmental action. "It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess. See Geders v. United States 425 U.S. at 88. The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right.", at 284 [Emphasis supplied].

Thus, in his decision overruling the motion for new trial, stated earlier, when the trial court stated his only restriction given was in regard to discussing his testimony, this is an improper ruling because it is directly contra the rulings, both in Geders and Perry.

Prejudice need not be shown, since it is not a standard in ineffectiveness that is needed in Strickland that is required; it is the fact that the trial judge has ordered, thus creating governmental interference with the right to counsel guaranteed under the Sixth and Fourteenth Amendments, that has been violated.

As a result of the above, it is respectfully asserted that this issue is meritorious, and that this case be reversed and remanded for a new trial.

> PROPOSITION OF LAW SEVENTEEN: CONSTITUTIONAL ERROR OCCURS WHEN THE RECORD REVEALS GOVERNMENTAL INTRUSION ON THE RIGHT TO A PUBLIC TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

In Waller v. Georgia (1984) 467 U.S. 39; 104 S. Ct. 2210 and in State v. Cassano (2002) 96 Ohio St. 3d 94; 2002 Ohio 3751; 772 N.E.2d 81, the constitutional right to a public trial was reviewed.

In Waller, the syllabus held in part that, "Under the Sixth Amendment, any closure *** over the objections of the accused must meet the following tests: the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; the closure must be no broader than necessary to

protect that interest; the trial court must consider reasonable alternatives to closing the hearing; and it must make findings adequate to support the closure."

In the Waller decision itself, specifically at 44, the Court states that it has "not recently considered the extent of the accused's right under the Sixth Amendment to insist upon a public trial, and has never considered the extent to which that right extends beyond the actual proof at trial."

Further on the Waller decision states that although the previous cases had proceeded largely under the First Amendment, "*** there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public. The central aim of a criminal proceeding must be to try the accused fairly, and 'our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.'

> ''The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions....''

In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury."

The Waller decision then reverses and remands for a new hearing for more explicit findings on the part of the original

trial judge.

In State v. Cassano, supra, this Court, at 104, notes, "We have long recognized that the right to a public trial is a fundamental guarantee of both the United States and Ohio Constitutions. State v. Lane (1979) 60 Ohio St. 2d 112, 14 O.O.3d 342, 397 N.E.2d 1338, paragraph two of the syllabus."

Further on, this Court states, "In this case, we conclude that the trial court erred in closing the suppression hearing without conducting a separate hearing, making findings justifying such closure, and considering alternatives to closure. See Waller 467 U.S. at 48, 104 S. Ct. 2210 ***. However, reversal is not required because Cassano invited the error by requesting closure. A party cannot take advantage of an error he invited or induced. State v. Seiber (1990) 56 Ohio St. 3d 4, 17, 564 N.E.2d 408. Accord State v. Murphy (2001) 91 Ohio St. 3d 516, 535, 747 N.E.2d 765 (accused 'actively responsible' for error cannot complain).

"Moreover, closure did not affect the fairness, integrity, or public reputation of the trial. United States v. Olano (1993) 507 U.S. 725, 736, 113 S. Ct. 1770, 123 L. Ed. 2d 508. The evidence received was later heard at the public trial. Even when a defendant objected to closure, reversal of the conviction was required only when a new public suppression hearing would result in suppression of material evidence not suppressed earlier. See Waller 467 U.S. at 49-50, 104 S. Ct. 2210, 81 L. Ed. 2d 31. Nothing in the record

suggests that another hearing would affect the result in this case."

Although the issue here involves interference with the right to a public trial, the actual interference was caused by the government, with the trial court not responding properly with respect to specific findings.

As noted earlier, an evidentiary hearing was conducted pursuant to a motion for new trial.

With respect to this issue, two individuals testified for Mr. Conway: Gretchen Roese (T - 2952); and Susan Doering (T - 2966).

Gretchen Roese's mother is Rebecca Steele, a public defender. Ms. Roese testified in January, 2003, she was sitting watching the James Conway trial. While inside the courtroom, according to her testimony, assistant prosecutor Pritchard turned to her and said, "Do you have a problem?". (T - 2952-53).

She testified Ms. Pritchard then questioned her and her friend, Susan Doering.

She further noted that one had to have an ID to get into the courtroom. (T - 2954-55).

On cross-examination, she affirmed she sat through the entire case. (T - 2960).

On re-direct, she also noted that the prosecutors told the deputies the witnesses had give IDs for entrance. (T - 2962).

Susan Doering attended the James Conway trial; she is a friend

of the Conway family. (T - 2966-67).

Ms. Doering stated when she showed her ID, assistant county prosecutor Pritchard took her into the ante-room with another assistant prosecutor. (T - 2968).

On re-direct, she mentioned that an assistant prosecutor was the one who told her she had to leave the courtroom. [For possibility of being a witness]. (T - 2980).

In response to the above, the prosecutor placed James Lowe, one of the assistant prosecutors who tried the case, on the stand. (T - 2986).

Mr. Lowe testified they had "tremendous problems trying to find witnesses" in the case. They would not come forward. (T - 2987).

In the decision by the trial court denying defendant's motion for new trial, the court addressed this issue beginning at page 6: "The last issue pursued by the defense is that the defendant was denied a 'public trial'. Defendant claims that certain defense supporters and witnesses were denied access to the courtroom and thus created a constitutional infirmity affecting his due process and right to a fair trial.

"The trial was conducted in the background of there being significant security concerns because the defendant was alleged to have planned and threatened to kill witnesses for this trial in a scheme hatched through a prosecutor's informant while the defendant

was in jail awaiting trial. The court had placed deputies at the courtroom door to check for weapons."

At page 7 the decision continues: "The court did not order any person barred from the trial in this case. Furthermore, the only court order was that there be a separation of witnesses and that counsel alert the court to the fact that any potential witnesses that would enter the court be identified and asked to wait until the time for their testimony. The deputies at the door had been given a list of the witnesses' names and were instructed to determine whether any of the people entering to view the trial were, in fact, on the witness list. If they found out that a person was on the witness list then counsel was to be alerted and a determination made as to whether the person was going to testify or not."

In conclusion at page 8, the trial judge stated, "There was simply no evidence produced that anyone was inappropriately barred from attending the trial so as to invoke a constitutional infirmity with respect to the defendant's right to a public trial." [Decision Denying Motion For New Trial. R - 462].

The problem with the above decision is the trial court did not issue sufficient findings in regard to the actual conditions inside the courtroom during the course of the trial.

Just before the mitigation hearing commenced in this case, Mr. Conway personally addressed the court. He went into a long

discussion on how he noticed the witnesses being intimidated, and other aspects of the control inside the courtroom. (T - 2752).

Although this is a situation where the courtroom was not "closed" by the trial judge through a specific order, the conduct on the part of government authorities created a situation which on its face shows improper constitutional restraint.

What is needed here is a reversal and remand for a evidentiary hearing to determine the actual atmosphere inside the courtroom while the trial proceedings were occurring.

As noted earlier, courtrooms are opened to the public, and only in unusual circumstances is any type of restraint constitutionally permitted on the public's free ingress and egress.

For the above reasons, it is respectfully requested that this case be remanded so that a further evidentiary hearing can review this significant constitutional issue.

PROPOSITION OF LAW EIGHTEEN: PREJUDICIAL ERROR OCCURS WHEN AN ASSISTANT PROSECUTOR, PREVIOUSLY ACTIVE IN THE CASE, TESTIFIES IN THE CASE IN CHIEF, CONTRA THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

During the course of the prosecution's case, David DeVillers testified. Until July of 2002, he was an assistant prosecuting attorney for Franklin County, since 1990. (T - 1972-73).

Since July of 2002, he has been employed as an assistant U.S. attorney. (T - 1972).

He gave a definition of discovery, and then testified that the

prosecutor does not give out his complete file. (T -1974; 1976).

He then reviewed State's Exhibit DD as the discovery that was mailed to Mr. Conway's then-attorney, Chris Cicero, i.e. on April 5th [2002]. (T - 1977-78).

He further noted that there was no summary of "what happened" in this discovery packet. (T - 1979).

Further on in his direct, he said another assistant county prosecutor, Mark Wodarcyk, approached him, and said that Trent had information on the Dockside Dolls case. This was supposedly through Trent's attorney. (T - 1982).

He stated a deal was ultimately made with Trent, approximately in late June of 2002. (T- 1988).

Mr. Conway was arrested on February 23, 2002. (T - 1989).

On cross-examination, DeVillers confirmed that Trent's attorney was Ms. [Sarah] Beauchamp. (T - 1990).

Mr. DeVillers was the last witness for the State, and they rested shortly thereafter. (T - 2004).

This Court has stated previously that a prosecution attorney is not to testify during the course of a prosecution.

In State v. Coleman (1989) 45 Ohio St. 3d 298, paragraph 2 of the syllabus states the following:

> "A prosecuting attorney should avoid being a witness in a criminal prosecution, but where it is a complex proceeding and substitution of counsel is impractical, and where the attorney so testifying is not engaged in the active trial of the cause and it is the only testimony available, such testimony is admissible and not in violation of DR 5-102."

In the Coleman decision itself, it notes that the Hamilton County Prosecutor testified in the case because he was needed as a witness to identify certain handwritten motions prepared by appellant, at 301.

Further, at 301-02, this Court notes that, "While this is a situation which should be avoided, the testimony may be 'permitted in extraordinary circumstances and for compelling reasons, usually where the evidence is not otherwise available.' United States v. Johnson (C.A. 7, 1982) 690 F. 2d 638, 644. Such circumstances existed in this case."

This Court explained that "Since this testimony was necessary to lay a foundation for the expert's testimony, and the prosecuting attorney was the only person available to testify as to the identity of the author of the motions, we find that the trial court did not err in admitting such testimony."

In the present case, there were no compelling reasons why it was necessary to have this assistant U.S. attorney testify.

The supposed reason for this was to show the jury that Mr. Trent had not had access to any discovery that may have been given to Mr. Conway during their joint incarceration, and in particular

a "summary" of what had occurred at Dockside Dolls. [Cross of Ronald Trent T - 1877-1901].

The testimony of Mr. DeVillers could easily have been avoided by simply stipulating to the State's exhibit and/or having the trial court instruct the jury that criminal discovery in Ohio does not include summaries of "what occurred".

None of this was done, and as a result, the attorney who was the lead prosecutor, and most actively involved in the case itself before he moved on to the U.S. Attorney's Office, was allowed to testify as the last witness for the prosecution.

The prejudice is obvious since his status as a former employee of the prosecutor's office adds credibility to Trent's testimony.

It is only in extraordinary situations that a prosecutor should be allowed to testify in his status as a prosecutor in a criminal jury trial.

The fact that Mr. DeVillers did in this case, results in prejudicial error, and this case must be reversed and remanded for a new trial.

PROPOSITION OF LAW NINETEEN: INEFFECTIVE ASSISTANCE OF COUNSEL OCCURS AT THE TRIAL PHASE, WHERE THE RECORD REVEALS COUNSEL FELL BELOW THE STANDARD, AND PREJUDICE RESULTS, CONTRA THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

There were several instances during the trial phase of this case, where counsel did not provide effective assistance to Mr. Conway.

(A) The first major occurrence was during the course of voir dire. During voir dire, and even before, the trial attorneys for Mr. Conway failed to request the court for them to voir dire on the racial issue.

As stated previously, racial tension permeated this case. Even in the opening statements of the prosecutor, there was mention of racial slurs. (T - 1085). Also, again as noted, there were numerous examples of the racial problem in the nightclub itself that spilled over into the parking lot. Just one of those witnesses, as an example, was Troy Ankrim. He testified during the prosecution's case of "high tension", and also noted further on the racial slurs that were being exchanged. (T - 1234-37).

His is but an example of the witnesses that were there, who detailed the problems of racial tension.

To not voir dire prospective jurors on this issue is a constitutional violation, and the failure on the part of the defense counsel to so request resulted in prejudice to Mr. Conway. [Also see Justice Lundberg Stratton's dissent in State v. Smith (2000) 89 Ohio St. 3d 323, at 340-42].

(B) As previously noted, in the cross-examination of Mr. Conway, there were numerous Trent tapes that were presented to him, both on a voir dire basis before his cross continued, and also during the examination itself.

These were obviously crucial to the fact-finder. During the

course of discussion on these tapes, one of the defense attorneys stated, outside the presence of the jury, that Mr. Conway never even listened to the tapes before. In other words, this was his first time hearing them. This failure on the part of defense counsel to have Mr. Conway review these tapes before the trial began is in direct contravention of the effective assistance of counsel standards that have been set up by both this Court and the United States Supreme Court. (T - 2396).

(C) As just noted, David DeVillers testified as a former prosecutor in the case in chief. (T - 1972).

Before he took the stand, there was no objection on the part of defense counsel. The case law from this Court, indeed in its syllabus, Coleman, supra, states clearly that only in extraordinary circumstances is a prosecutor permitted to testify.

Defense counsel failed to even object and/or recognize that Mr. DeVillers was not permitted on the stand.

The prejudice is apparent, as stated in a previous proposition of law, and is especially compounded because he testified that he was the head of the "gang unit" when he was an employee of the Franklin County Prosecutor's Office. (T - 1973).

It thus gives the juror the knowledge that when he was actively involved in the Conway case, before he moved over to the Federal system, that Mr. Conway was a member of a gang in Columbus. The prejudice towards this type of inference again is apparent.

The failure on the part of defense counsel to object to his testimony resulted in representation which fell below the standard, and severely harmed Mr. Conway's case.

(D) As stated previously in another proposition, Mr. Conway was not present during the jury instruction conference conducted before the jury was given their instructions in the trial phase. In a conversation on the record with the trial judge, among other things, Mr. Conway stated he had not been present for the jury conference when he specifically wanted to be there. He has a constitutional right to be present at all critical stages of the trial, and obviously this was one of those critical stages. (T - 2765-68).

Just as an example of the issues that were significant in this case, the trial court had previously denied the request for voluntary and involuntary manslaughter. (T - 2527-28).

Mr. Conway's presence at this jury instruction conference would have given him the opportunity to discuss with counsel his own views, which obviously he is constitutionally entitled to give.

The first indication on the record that he was not even present at these conferences occurred subsequent to the court's denial, when again he informed the judge in open court that he had not been present for the conferences.

In order to establish ineffective assistance of counsel, the accused must demonstrate that the counsel's performance fell below

the standard of reasonable competence and that there is a reasonable probability that, but for such deficiency, the outcome of the proceedings would have been different. Strickland v. Washington (1984) 466 U.S. 668, 687, 104 S.Ct. 2052; State v. Bradley (1989) 42 Ohio St.3d 136, 538 N.E.2d 373.

For the above reasons, it is respectfully asserted that Mr. Conway received ineffective assistance of counsel at the trial phase, and the case must be reversed and remanded for a new trial.

PROPOSITION OF LAW TWENTY: THE TRIAL COURT COMMITS PREJUDICIAL ERROR IN DENYING A MOTION FOR MISTRIAL BETWEEN THE JURY AND MITIGATION PHASES OF THE TRIAL, WHERE THE RECORD REVEALS A JUROR HAD DISCUSSED SENTENCING WITH AN ALTERNATE, CONTRA THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Just before the mitigation hearing began in this case, on February 5, 2003, a discussion and hearing was conducted outside the presence of the jury panel, regarding improper juror conversations. (T - 2697-98).

One of the members of the regular jury panel, Ms. Guisinger, was brought out into the courtroom, and questioned regarding conversations she had with an alternate, a Ms. Benedetti. Juror Guisinger stated that while with juror Benedetti, the latter had discussed the previous verdicts on the part of the panel. According to this juror, Ms. Benedetti told her, "I could never do what you just did." Ms. Benedetti, at the time, was the first alternate. (T - 2698).

After this, Ms. Benedetti was then brought into the courtroom outside the presence of the jury panel and the other alternates. When questioned about this, she denied it saying that the other one is the one that initiated the conversation about the verdicts, not vice versa. (T - 2706).

In further questioning, she admitted deliberating with other alternates, even though the trial judge had explicitly told them not to do so. This "deliberating" was done just between the alternates. Ms. Benedetti's verdict would have been not guilty, and she discussed with the two other alternates. (T - 2709-10). [There had originally been four alternates, one became sick towards the end of one afternoon during trial, and he was excused from further service. Fourth alternate Richard Barnes excused by agreement. (T - 1388; 1383)].

After juror Benedetti was sent back, juror Guisinger was then recalled to be questioned. After the court questioned her about whose idea it was to discuss the above improperly, juror Guisinger denied initiating it. (T - 2725).

Juror Benedetti was then brought back out, and the trial court excused her, over her objections. (T - 2727).

Shortly thereafter, a motion for mistrial was requested by defense, specifically with regard to juror Guisinger, and this was overruled, with the trial court ordering the mitigation hearing to proceed. (T - 2729-35).

The issue of improper communications with a member of the jury panel was reviewed by this Court in State v. Murphy (1992) 65 Ohio St. 3d 554.

In Murphy, the jurors had been allowed to communicate with family members during the penalty phase.

At page 575, this Court, citing Remmer v. United States (1954) 347 U.S. 227; 74 S. Ct. 450, at 229, stated, "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. Mattox v. United States 146 U.S. 140 [13 S. Ct. 50, 36 L.Ed. 917]; Wheaton v. United States, 8 Cir., 133 F.2d 522, 527." [Emphasis added].

The Murphy decision then states that the presumption of prejudice in Remmer obtains only where communication with the juror concerns the matter pending before the jury. Murphy then cites State v. Jenkins (1984) 15 Ohio St. 3d 164; 473 N.E.2d 264, at 236-37: "To prevail on a claim of prejudice due to an ex parte communication between judge and jury, the complaining party must

first produce some evidence that a private contact, without full knowledge of the parties, occurred between the judge and jurors which involved substantive matters."

In Murphy, this Court concluded that the communications that were at issue occurred between the jurors and members of their family was not about the case, and as a result there was no demonstration of prejudice.

This issue was further detailed by this Court in State v. Hessler (2000) 90 Ohio St. 3d 108; 734 N.E.2d 1237.

At 121-22, this Court, citing Remmer again, noted that "when improper contacts with a jury are discovered by the parties after the verdict, the trial court must conduct a hearing to determine the effect of those contacts. However, more recent cases have determined that the complaining party must show actual prejudice. See Smith v. Phillips (1982) 455 U.S. 209, 215, 102 S. Ct. 940, 945, 71 L.Ed.2d 78, 85; United States v. Olano (1993) 507 U.S. 725, 738, 113 S. Ct. 1770, 123 L.Ed.2d 508, 522; United States v. Sylvester (C.A.5, 1998), 143 D.3d 923, 934."

In the instant case, there is little dispute that improper contact occurred between an alternate and the juror Guisinger, who was kept on the panel for the mitigation hearing.

The discussion the juror had with the alternate was substantive in nature, and the trial judge was so informed after he had given specific instructions not to so communicate.

The prejudice here is evident on the record since juror Guisinger was informed by the alternate Benedetti that the latter would never vote the way the panel did in the trial phase. Regardless of how one views how this affected juror Guisinger, the undisputed fact remains that she received information from an outside source dealing with the very heart of what they were about to deliberate on at the conclusion of the mitigation hearing.

As a result of the above, it is respectfully asserted that the trial court erred in not declaring a mistrial at the time, and his failure to order a sentence based on the verdict in the first phase constituted constitutional error, and this case must be reversed and remanded for appropriate relief.

PROPOSITION OF LAW TWENTY-ONE: THE TRIAL COURT COMMITS PREJUDICIAL ERROR IN DENYING THE DEFENSE AN EXPERT WITNESS ON A COMPUTER SIMULATION; AND IN RESTRICTING CROSS-EXAMINATION OF A PRIMARY PROSECUTION WITNESS, CONTRA THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

(A) Part of the defense case was a computer simulation, which was Defense Exhibit 38. Basically, this was a reconstruction of how the offense actually occurred on the parking lot at Dockside Dolls.

There were several discussions out of the presence of the jury, (T - 2051; 2218), which resulted in the denial on the part of the trial court in admitting it as evidence, along with the qualifications of the expert to testify. (Defense Exhibit 38/39; T - 2513).

The denial on the part of the trial court severely restricted the right of the defense to present its case.

Although this is a relatively new aspect of demonstrative evidence, the Court of Appeals for Cuyahoga County, in a lengthy decision, permitted the use of this type of testimony: State v. Clark (1995) 101 Ohio App. 3d 389; 665 N.E.2d 795. [Discretionary Appeal Not Allowed, 72 Ohio St. 3d 1748; 650 N.E.2d 1367].

In that case, the Court of Appeals was reviewing a murder conviction.

At page 399 of the decision, it states the following: "James T. Wentzel testified next for the state. Wentzel is a forensic photographer and crime scene reconstructionist at the Cuyahoga County Coroner's Office. Wentzel used an IBM 286 computer and AutoCAD software to reconstruct the instant crime scene. Wentzel explained that AutoCAD is a brand name for computer-assisted drafting software which maintains sixty percent of the market share. AutoCAD is used by automobile and aircraft manufacturers, and it is also used to construct buildings and bridges. In essence, Wentzel explained, AutoCAD is an electronic drafting table.

*** In reconstructing the crime scene, Wentzel arranged the victim so that the entrance and exit wounds lined up with the hole in the bathroom wall. He explained that the bullet hole in the wall is the end point of the line and that the victim would have to be somewhere on the line. The room's dimensions, however, placed

physical limitations on the location of the victim at the time of the shooting. Also taken into consideration was the victim's physical dimensions, such as height and weight. Finally, Wentzel used thirty inches as the minimum muzzle-to-target distance as taken from Rosenburg's test results.

At this point in his testimony, Wentzel used numerous poster-sized exhibits, which were blown-up printouts of the computer-generated drawings of the bathroom, to explain to the jury the results and conclusions of his report."

At the time of the the Clark trial, at page 413, "Wentzel testified that he is aware of one other individual who uses similar software and who does consulting work for the National Transportation Safety Board. According to Wentzel, this individual uses another software program to simulate aircraft crashes and has testified in court using very similar methodology. However, Wentzel's particular computer and the AutoCAD software have never been used, to his knowledge, in a courtroom. Wentzel was unable to say one way or the other whether the use of AutoCAD software has been specifically accepted in the scientific community. Wentzel has never testified before a court concerning AutoCAD software."

Further on, at 413, the Court of Appeals notes that "This court's decision in Deffinbaugh v. Ohio Turnpike Comm. (1990) 67 Ohio App. 3d 692, 588 N.E.2d 189, provides strong support for our conclusion that Wentzel was properly qualified to testify as an

expert witness in the field of crime scene reconstruction using computer-assisted drafting."

Then, at 416, the Clark decision states, "In this light, it must be pointed out that other jurisdictions have created guidelines which should be of assistance to Ohio courts in determining whether a witness will be permitted to testify as to his reconstruction of an accident or crime scene, using a computer-generated simulation or reconstruction. In Commercial Union Ins. Co. v. Boston Edison Co. (1992) 412 Mass. 545, 591 N.E.2d 165, the Supreme Court of Massachusetts held:

'[W]e treat computer-generated models or simulations like other scientific tests, and condition admissibility on sufficient showing that: (1) the computer is functioning properly; (2) the input and underlying equations are sufficiently complete and accurate (and disclosed to the opposing party, so that they may challenge them); and (3) the program is generally accepted by the appropriate community of scientists.' Id. At 548, 591 N.E.2d at 168.

At least one additional court has adopted the same test, see Kudlack v. Fiat S.p.A. (1994) 244 Neb. 822, 842-843, 509 N.W.2d 603, 617.

Both of the above courts applied the enunciated guidelines and determined that computer simulations were properly admitted at trial."

In the decision denying defendant's motion for a new trial journalized 7/14/2003, the trial court with respect to this issue at pages 2-3 stated, "The court denied the entire simulation as having been not shared in a timely fashion with the State of Ohio so as to disadvantage the State; as not comporting with the evidence; and, as running the danger of misleading the jury. The defendant was fully able to pursue his theory that he acted in defense of another, the basic facts of which, the jury totally rejected." (R - 462).

The trial court, again in denying this expert, ruled directly contra to what has been stated in other appellate courts as noted in the Clark decision.

When the court states the simulation is not comporting with the evidence, he is stating his own opinion which runs against what the defense was trying to present; as to the danger of misleading the jury, the appellate court has continuously stated that is why cross-examination is appropriate in this and in many other examples dealing with this type of expert testimony.

As a result of the above, it is respectfully asserted that the trial court erred in not allowing this type of testimony, and the result prejudices Mr. Conway.

(B) The other reason why Mr. Conway's defense was severely restricted involves how the trial court limited the cross-examination of Ronald Trent, the government agent.

The defense had presented evidence which showed that Mr. Trent was a witness whose credibility was, to say the least, highly suspect.

Tim Braun, a former assistant prosecutor for Franklin County, (T - 1987-97), testified in pre-trial proceedings that Mr. Trent had previously tried to take responsibility for a crime he did not commit. There was an affidavit saying that he did not believe what Mr. Trent was telling him about a shooting, and that Trent indeed was lying. This was filed 7/10/2001. (T - 100-04).

In lieu of the above, when Mr. Trent testified for the prosecution, the defense wanted to be allowed to cross-examine him on specific instances of his previous lying.

Although the general rule, which the prosecution stated to the judge, Evid. R. 608(B) does preclude this type of questioning, there are exceptions where this type of testimony is permitted on cross-examination. 608(B) further notes that, in the discretion of the court, cross-examination is permissible if the issue involves witnesses truthfulness or untruthfulness.

This is precisely the issue that would have been presented if defense counsel were permitted to go beyond the normal strictures as 608(B).

An example of this is found in State v. Jackson (1991) 57 Ohio St. 3d 29; 565 N.E.2d 549, where this Court stated a prosecutor could cross-examine about specific instances of relevant conduct,

because the defendant's girlfriend had testified to the defendant's character, at 39.

As a result of the above, it is respectfully asserted that the trial court committed error in not allowing the expert witness to testify; and in severely restricting the cross-examination of the primary Government witness. As a result, this case must be reversed and remanded for a new trial.

CONCLUSION

For the above reasons, it is respectfully requested that either a new trial be granted or that Mr. Conway's sentence be reduced as requested.

Respectfully submitted,

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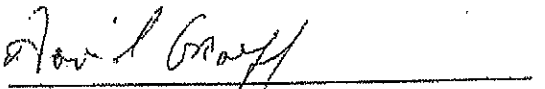
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served upon Jennifer L. Coriell and Susan E. Day, Franklin County Prosecuting Attorney's Office, 373 South High Street, 13th Floor, Columbus, Ohio 43215 this 2nd day of February, 2004.



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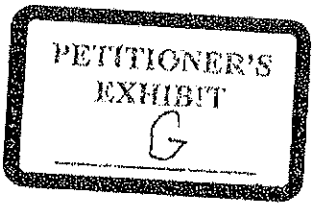

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GENERAL INFORMATION

Case: **2003-0647** Death Penalty Case (offense committed on or after 1/1/95)
Filed: 04/10/03
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State of Ohio v. James T. Conway, III

PARTIES and ATTORNEYS

onway, James T. (Appellant)
Represented by:
Barstow, Todd (55834) , Counsel of Record
Graeff, David (20647)

State of Ohio (Appellee)
Represented by:
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Day, Susan (23451)
Maloon, Jennifer (72791)
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PRIOR JURISDICTION

Jurisdiction Information	Prior Decision Date	Case Number(s)
Franklin County, 10th District	02/27/2003	02CR1153

DOCKET ITEMS

- Most documents that were filed in Supreme Court cases after December 1, 2006, are scanned. They are available for viewing via the online dockets, generally within one business day from their date of filing.
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- A symbol in an online docket denotes a scanned filing or an electronic version of a Supreme Court order. Clicking the icon opens an image of the filing or order.

Date Filed	Description
04/10/03	Notice of appeal of James T. Conway III *Filed by:* Conway, James
04/10/03	Copy of praecipe to court reporter *Filed by:* Conway, James
04/10/03	Copy of entry of appointment of counsel *Filed by:* Conway, James
04/11/03	Copy of notice of appeal sent to clerk of court of common pleas
04/11/03	Order to clerk of court/custodian to certify record
06/06/03	Motion for extension of time to transmit record *Filed by:* Conway, James
	06/12/03: Granted; time for transmitting record is extended to 10/7/03
06/16/03	Notice of appearance of Jennifer L. Coriell and Susan E. Day *Filed by:* State of Ohio
10/13/03	Record
10/13/03	Clerk's notice of filing of record
12/30/03	Stipulation to extension of time to file merit brief to 02/02/04 *Filed by:* Conway, James
02/02/04	Appellant's merit brief *Filed by:* Conway, James
03/29/04	Stipulation to extension of time to file merit brief to 4/22/04 *Filed by:* State of Ohio
04/22/04	Appellee's merit brief *Filed by:* State of Ohio
08/30/04	Supplemental record
04/01/05	Supplemental record
04/01/05	Clerk's notice of filing of record
05/17/05	Notice of oral argument to be held Tuesday, August 23, 2005
08/23/05	Oral Argument Held
03/08/06	DECISION: Affirmed; sentence to be carried into execution June 6, 2006. See opinion at 2006-Ohio-791
03/13/06	Return receipt received by Todd Barstow, Esq.
03/13/06	Return receipt received by Jennifer Coriell
03/21/06	Certified copy of judgment entry/mandate sent to clerk
03/23/06	Return receipt received by Clerk of Courts
03/24/06	Return receipt received by Sandra Shaffer
03/24/06	Return receipt received by John Barron

03/27/06	Return receipt received by Warden
/29/06	Motion for stay of execution scheduled for June 6, 2006 *Filed by:* Conway, James
	04/03/06: Granted
04/04/06	Application for attorney fees by David J. Graeff
	05/10/06: Granted in the amount of $5,010.00
04/05/06	Return receipt received by Clerk of Courts
04/05/06	Return receipt received by Todd Barstow, Esq.
04/05/06	Return receipt received by Warden
04/05/06	Return receipt received by Jennifer Coriell
04/06/06	Return receipt received by Sandra Shaffer
04/06/06	Return receipt received by John Barron
04/10/06	Application for attorney fees by Todd W. Barstow
	05/10/06: Granted in the amount of $5,163.26
04/14/06	Return of record to clerk of court/custodian
06/01/06	Application for reopening under S.Ct.Prac.R. XI(6) *Filed by:* Conway, James
	08/23/06: Denied
6/12/06	Notice of filing petition for certiorari in U.S.S.C.
6/29/06	Opposition to application for reopening *Filed by:* State of Ohio
10/10/06	Notice of U.S.S.C. denial of petition for writ of certiorari
10/23/06	Motion to set execution date *Filed by:* State of Ohio
	12/13/06: Denied
10/31/06 View	Memo opposing motion to set execution date *Filed by:* Conway, James

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1 Q. Did you indicate in that letter that you had
2 information on the Dockside Dolls case?
3 A. Yes, ma'am. It doesn't say Dockside Dolls,
4 it says a murder case.
5 Q. Okay. Does it say which murder case?
6 A. Yeah, it's -- oh, I'm sorry, yes, it does.
7 Q. Which one?
8 A. It says, "Dockside Dolls, where the OSU
9 student 'Jarvis' was killed and 'Williams' was wounded."
10 Q. "Where OSU" --
11 A. -- "student 'Jarvis' was killed and
12 'Williams' was wounded."
13 Q. Okay. And that's in that letter?
14 A. Yes, ma'am.
15 Q. You mailed that to me?
16 A. Yes, ma'am.
17 Q. Did we talk immediately at that point?
18 A. No, ma'am.
19 Q. Were you still telling your attorney you
20 wanted to talk with us?
21 A. Yeah.
22 Q. Why did you want to share that information?
23 A. Basically because he laughed at someone
24 else's pain from another killing.
25 Q. Did you write me another letter?

1 MR. RIGG: I know.
2 THE COURT: It's a blanket motion.
3 MR. RIGG: I just wanted to make sure --
4 THE COURT: Is there some recognition by the
5 State that some of this evidence is not going to be
6 offered or may not be admissible?
7 MS. PRICHARD: The two things discussed will
8 be offered. There are some other matters. The Defendant
9 has another death penalty case and some other cases
10 pending. I will instruct the witness to stay away from
11 those other things that have nothing to do with this one,
12 they're a separate murder, but it is going to require
13 some leading of the witness in certain areas just to
14 tiptoe around those things.
15 THE COURT: To control the testimony.
16 MS. PRICHARD: If I say, what did he tell
17 you in jail, he's going to spew into evidence --
18 THE COURT: What I'm getting from the State
19 is not all of this is relevant or admissible in this
20 case.
21 MS. PRICHARD: Correct.
22 THE COURT: So they're going to try to
23 control that. And I have nothing in terms of specificity
24 in front of me with respect to these issues at this
25 point. So I guess the only thing at this point, I'm

PETITIONER'S EXHIBIT L

1 PROSPECTIVE JUROR HALL: Well, again, I kind
2 of fit in the middle category. It's not something that I
3 think that I would take lightly in order to sentence
4 someone to death. I think that's a very, very serious
5 thing to do. I think it's possible for me to do so
6 provided that the evidence is clear enough, compelling
7 enough to present something like that as an alternative.
8 MS. PRICHARD: Okay. You want to gather all
9 the information at the sentencing phase and give that
10 careful consideration, weigh that out --
11 PROSPECTIVE JUROR HALL: Yes.
12 MS. PRICHARD: -- come to a decision. Then
13 you could sign your name to a verdict form if that was
14 your decision?
15 PROSPECTIVE JUROR HALL: Yes, I could.
16 MS. PRICHARD: Okay, thank you, sir.
17 Mr. Finegold, what are your thoughts?
18 PROSPECTIVE JUROR FINEGOLD: I'm in favor of
19 the death penalty. Again, it would have to be a clearcut
20 decision that the person was guilty. But if they were
21 actually guilty, my feelings go to the victim and I would
22 feel that I would have no problem signing my name to a
23 death sentence.
24 MS. PRICHARD: Okay. And if we get to that
25 second phase, the jury would have already determined he's

1 death would be the appropriate penalty?
2 PROSPECTIVE JUROR FINEGOLD: Um-hmm.
3 MR. SUHR: Okay.
4 Now, Barbara Weygandt --
5 PROSPECTIVE JUROR WEYGANDT: Yes.
6 MR. SUHR: -- you indicated that you were
7 kind -- you kind of felt like Mr. Finegold here. Is that
8 what you would feel?
9 PROSPECTIVE JUROR WEYGANDT: I didn't think
10 I did.
11 MR. SUHR: Oh, I'm sorry. I thought you
12 said --
13 PROSPECTIVE JUROR WEYGANDT: No.
14 MR. SUHR: Okay. What --
15 PROSPECTIVE JUROR WEYGANDT: I don't think
16 so.
17 MR. SUHR: What did you say?
18 PROSPECTIVE JUROR WEYGANDT: I would have to
19 know the circumstances. I have no idea. I've heard
20 nothing about this crime. I would want to know
21 everything. I would want to know information about the
22 individual. There's so many different circumstances
23 connected to a crime, you know, I'm just not going to
24 jump in and say, yeah, this is the way it should be. But
25 I'm not against the death penalty.