

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**
Appellant. : **Of Franklin County, Case No. 02CR1153**

Appellant's Application For Reopening Pursuant To S.Ct.Prac.R. 11.06 – Volume 2

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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 **DAVID J. GRAEFF**, 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 3:31 p.m.

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Wednesday Afternoon Session
March 21 2012
3:31 p.m.

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STIPULATIONS

It is stipulated by and between counsel for the respective parties that the deposition of **DAVID J. GRAEFF**, a Witness herein, called by the Petitioner 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 **DAVID J. GRAEFF** 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 **DAVID J. GRAEFF**.

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DEPOSITION OF DAVID J. GRAEFF

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1 but I'll say them quickly anyway. Obviously we need a
2 verbal answer to everything. If I ask you a question
3 that's overly convoluted, I'm sure you won't hesitate
4 to tell me so, and I'll be happy to rephrase it. If
5 you need a break for any reason, let us know, and we'll
6 proceed to take a break.

7 You are an attorney, correct?

8 A. Yes.

9 Q. Can you tell us your educational and training
10 background?

11 A. My educational and what?

12 Q. And training as a lawyer?

13 A. I graduated from college in 1965 with a
14 history major. I was drafted into the Army in the mid
15 '60s. I spent a tour of duty overseas in Asia. When I
16 got out, I worked for a couple years before I went to
17 law school. I went to law school in 1969 at Capital
18 University. I graduated in 1972.

19 For about four years after that, I worked as
20 an assistant prosecutor in the Franklin County
21 Prosecutor's Office. Then for about a year and a half
22 I ran a congressman's office here in Columbus. Then in
23 1980, I went into private practice.

24 Since 1980, I have been involved mostly in

1 criminal work. In the mid '80s, I did about maybe a
2 third or maybe less than that in what was called
3 insurance defense work. I was involved doing that for
4 maybe seven years; and after that, I spent -- I've
5 spent almost my exclusive amount of time doing this
6 type of work.

7 Q. When you say this type of work, you're
8 talking about criminal work and death penalty capital
9 work?

10 A. With respect to criminal work and capital
11 work, around 1989, I was involved with a capital jury
12 trial here in Franklin County. About halfway through
13 the trial, she pled guilty to manslaughter. Since that
14 time, I would guess I had about maybe seven or eight
15 cases on the trial level, the death penalty level. One
16 of them was with Judge McGrath which nearly came to a
17 trial. That one would have been his first death
18 penalty case. The young man pled out right literally
19 when the jury was waiting to be sworn.

20 After that, I was involved in about four or
21 five capital direct appeals with the Ohio Supreme Court
22 and before the statute changed with the particular
23 Court of Appeals that was involved.

24 Currently I have -- I represent four

1 gentlemen on death row, three of them are in habeas
2 here in the southern district, and the other one is
3 still in the post-conviction level in Ohio.

4 Q. You indicated you've been in private practice
5 since 1980?

6 A. Yes, sir.

7 Q. Has that been self-employed or part of a
8 firm?

9 A. I've been self-employed since 1980.

10 Q. Do you recall representing James Conway in
11 his direct appeal?

12 A. Yes, sir.

13 Q. I will show you some documents as we work
14 through this, and I have some questions relative to
15 your appointment. I was going to ask you how many
16 capital cases you've done, and you sort of have gone
17 into that. Was it seven of them, the trial of them?

18 A. I want to give you an honest answer. I
19 believe it was in the neighborhood of seven cases.
20 It's been -- you know, I just started in 1989, around
21 in there. So I tried to recollect all of my cases that
22 I had with other attorneys, and I believe it's in the
23 neighborhood of seven previous.

24 Q. In those cases, were you appointed counsel?

1 Was that always the case?

2 A. In every one of the cases, I was appointed by
3 the particular common pleas judge.

4 Q. This case, you came to the representation of
5 Mr. Conway in February 2003. Does that sound correct?

6 A. Yes, sir.

7 Q. As of that time, were you Rule 20 or 65
8 certified?

9 A. I don't know what the rule is, because it
10 changed around that time, but, yes, sir, I was rule
11 certified.

12 Q. What was the nature of your certification?
13 Was it lead or co-counsel?

14 A. It was both appellate and co-counsel, and I
15 don't believe it was ever lead.

16 Q. You mentioned that you had some cases that
17 didn't proceed to trial or stopped short of a verdict.
18 Those considerations come into play for the lead
19 counsel, if you apply for it, I suppose, don't they,
20 just thinking back?

21 A. I honestly don't know how the lead co-counsel
22 differentiates; because on the ones that I've worked
23 with on these other attorneys, they're never really has
24 been a great deal of discussion on that. We just

1 worked. So I can't really -- I know I was not the lead
2 counsel. Now, with one of them, Terry Sherman, who is
3 a very aggressive person, he -- I had two with him, and
4 so he was clearly the person who was in charge. With
5 the others, I think it was mostly a coordinating
6 effort.

7 Q. You had done appellate capital work prior to
8 this case, correct?

9 A. Yes.

10 Q. Can you estimate how many cases?

11 A. The first one was State versus Mark Burke.
12 That got reversed later on in habeas. The next one was
13 State versus Warren Hennis, which I believe is still in
14 habeas. The next we know is State versus Jason Robb,
15 which is the Lucasville riot case, and then this one,
16 State versus Conway.

17 Q. In the course of your training and education
18 in doing capital cases, did you receive some training
19 or information relative to ABA standards for
20 representation of capitally accused persons on appeal
21 and post-conviction?

22 A. Yes. When that began to become a significant
23 factor in the late '80s, during the seminars that I
24 attended, both at the Ohio CLE and also with the one

1 that is held in November here statewide, in every one
2 of those, I recollect that the ABA standards were an
3 integral part of the training, even though, as I
4 understand it, Justice Roberts now does not believe it
5 is as significant as I actually believe it is.

6 Q. I hand you what is marked as Exhibit A. That
7 Guideline 10.15.1, Duties of Post-Conviction Counsel,
8 there's a page and about a third where it talks about
9 considerations of duties of post-conviction counsel,
10 and the rest of it is more or less commentary and
11 discussion. If you would take a moment and review
12 maybe first page and a half.

13 A. The first page and a half?

14 Q. Yeah. You can read the entire thing if you
15 want, but the guidelines, as I understand this
16 document, are basically contained in that part.

17 A. Right.

18 Q. Would you agree that the standards set out in
19 Exhibit A, that first page and a half, set out the
20 prevailing standards of practice?

21 A. I would, except for the last one, which says
22 the counsel should continue an aggressive investigation
23 of all aspects of the case. That simply does not
24 involve direct appeal work.

1 Q. Right. You were basically just working with
2 the record and investigation; and if this guideline
3 covers the broader territory such as doing a
4 post-conviction petition, perhaps that's what is
5 contemplated by that, but for purposes of direct
6 appeal, that would not apply?

7 A. The Supreme Court just came out with a case
8 yesterday, Martinez versus Ryan I think it is, where
9 other states have an issue as to when an effective
10 assistant counsel should be identified, and I believe
11 that guideline actually that I just mentioned covers
12 that type of situation.

13 Q. Other than the investigation part, which is
14 not involved in a direct appeal, which I guess we
15 should be clear is what you were involved in in this
16 case, correct?

17 A. I did go up a couple of times and drive
18 through the parking lot, and I went in particular to
19 the east side of the building several times because I
20 wanted to get a picture in my mind as to what was
21 occurring, because some of the witnesses were
22 confusing.

23 Q. When you say the building, you're referring
24 to the Dockside Dolls where the death occurred?

1 A. Yes, sir, on State Route 161.

2 Q. Would you say that the direct appeal of a
3 capital case directly differs from the work involved in
4 non-capital case appeals?

5 A. There's no comparison.

6 Q. How would you say they differ?

7 A. Because it's death that we're talking about.

8 Q. In what ways would you say that makes it
9 different in terms of the task at hand during the
10 direct appeal?

11 A. The money I got for this case -- I actually
12 lost money on this case with the amount of time that I
13 spent on this case. I think that when you take a case
14 like this, you owe an obligation to the State of Ohio
15 and to your client to know the case backwards and
16 forwards.

17 Q. To go into something specific -- and if
18 you're doing a non-capital appeal where you might try
19 to winnow issues to those which would be the most --

20 A. I'm sorry. I'm not hearing the end part of
21 your -- I lost you at winnowing.

22 Q. In a non-capital case where you might be
23 engaged in trying to get the issues that might most
24 capture the attention of the Court of Appeals in

1 winnowing them out from some other issues that might be
2 present or not depending on how one view's them, would
3 you say the approach is different in that respect in a
4 capital case?

5 A. Yes.

6 Q. Why would that be? Does part of that have to
7 do with the need to federalize the case, federalize the
8 issues, constitutionalize the issues?

9 A. That's exactly what I was thinking when you
10 asked the question. Federalizing the issues, not --
11 when you federalize an issue, there have been hundreds
12 of cases where the particular Court of Appeals has said
13 the only reason why Graeff put this federalization in
14 the head note or in the assignment of error is because
15 they wanted to move it on to habeas. And I think that
16 you owe an obligation as an officer of the court to
17 corroborate your federalization of the issues so that
18 you support it with particular case law and facts. I
19 think that is extremely important in direct capital
20 litigation. To be candid, when I've done direct
21 appeals on other non-capital cases, there have been
22 times when I don't federalize an issue because it's
23 purely an Ohio issue.

24 Q. Getting back to my sort of winnowing question

1 that I made earlier, is there a difference, therefore,
2 in doing a capital case because you are trying to be
3 more all inclusive? Would you agree with that in terms
4 of raising every issue that may exist as opposed to
5 trying to be more, for want of a better word, punchy
6 about it?

7 A. Sure. I think there's a point where you
8 reach where you irritate the panel; and as a result of
9 that, I'm sure that we could find multiple issues in --
10 whether it's trying an aggravated burglary or trying a
11 capital case, there are issues that you could bring up
12 that I would not bring up because of the other issues
13 that I think are more significant than the ones that
14 are possibly left out.

15 Q. Do you find occasionally in appeals that in
16 reviewing records that there are issues that we refer
17 to as defaulted because they were not -- that not a
18 proper record was made by counsel in terms of failure
19 to object and that certain thing?

20 A. When you read Sixth Circuit cases, the first
21 75% of the cases are often devoted to procedural
22 default.

23 Q. And would you agree that part of the duty of
24 counsel in a capital case is to try to, so to speak,

1 bring defaulted issues back to life?

2 A. Absolutely.

3 Q. What would be the way in which you would do
4 that, or what would be some ways in which you would
5 attempt to do that?

6 A. Well, under the procedural default standard,
7 it's the cause in prejudice, two-prong standard, if
8 that is what you're under reference.

9 Q. Well, in terms of the direct appeal, is one
10 of those to look at the issue of ineffective assistance
11 of counsel if counsel had not made an objection?

12 A. Absolutely.

13 Q. Would another involve application of a plain
14 error or structural error, or how would you define it?

15 A. Plain error does not involve -- plain error
16 under the Sixth Circuit ruling under Coleman versus
17 Thompson is not what we call an issue that can be
18 adjudicated on the merits. So in answer to your
19 question, yes, plain error if it is raised during the
20 course of the direct appeal is often -- in the habeas
21 is initiated because of, again, the fact that it's
22 plain error that was raised.

23 MR. TRIPLETT: Steve, I'm handing him Exhibit
24 B, but you already have it.

1 BY MR. TRIPLETT:

2 Q. I'm going to hand you, Mr. Graeff, what has
3 been marked as Exhibit B, entitled "Affidavit of
4 Kathryn Sandford," and ask you if you could look at
5 paragraphs 4 through 10 of that affidavit, and then I'm
6 going to ask you if you agree with the assertions made.

7 A. 4 through 10?

8 Q. 4 through 10.

9 A. I've read it.

10 Q. Do you agree with the assertions made in
11 terms of standards for appellate counsel that are made
12 in those paragraphs?

13 A. No. In November 6, she says, "Most trial
14 counsel in capital cases will be decided by criminal
15 law that is applicable to non-capital cases." I don't
16 agree with that.

17 Q. Okay.

18 A. Other than that -- 4 through 10 you asked me
19 to read. I basically agree with what she said.

20 Q. Thank you.

21 I'm not going to bother finishing out this
22 exhibit. I'm just going to ask you the question. You
23 were appointed in this case by Judge McGrath of the
24 Franklin County Common Pleas Court to be appellate

1 counsel along with Mr. Barstow in Mr. Conway's case; is
2 that correct?

3 A. Yes, sir.

4 Q. That occurred in February of 2003; would that
5 be right?

6 A. If you say so.

7 Q. I think I pulled out the exhibit, and I
8 showed it to Mr. Barstow, so I could fish it out again.
9 Do you know how your appointment came about in the
10 case?

11 A. Do I know the nature of the appointment?

12 Q. How it came about that you came to be
13 appointed to represent Mr. Conway?

14 A. Patty Miller was the bailiff for Judge
15 McGrath. She is deceased. She called me one day, and
16 I assume it was around this time, and she told me that
17 Mr. Conway had been convicted, and she wanted to know
18 if I was interested in the case, and I said yes, and
19 the only issue, if I recollect, was who the co-counsel
20 was going to be.

21 Q. Had that already been established, or did
22 that come after you were called?

23 A. I believe I was the first call.

24 Q. Do you recall how it was that Mr. Barstow

1 came to be co-counsel with you?

2 A. You know, I really don't.

3 Q. Okay.

4 A. I'm sorry. I don't.

5 Q. Had you worked with him previously?

6 A. I knew Mr. Barstow, but I never really worked
7 with him in a previous case.

8 Q. So it wasn't a situation where you asked to
9 have a particular person appointed, and you don't
10 recall -- or you don't recall?

11 A. I know it was something where I did not ask
12 for someone, but she obviously called me back and said,
13 Do you know Todd Barstow? And I'm sure I said yes, but
14 I can't independently recollect that.

15 Q. You were acquainted with him. Were you
16 social friends or just professional acquaintances?

17 A. Professional friends.

18 Q. Were you acquainted with trial counsel in the
19 case, Mr. Suhr and Mr. Rigg?

20 A. Yes, I was.

21 Q. And how would you describe your relationship
22 with Mr. Suhr or how --

23 A. Distant. With Mr. Rigg, he's a very close
24 friend.

1 Q. Were you acquainted with Attorney Chris
2 Cicero?

3 A. Yes.

4 Q. How would you describe your relationship or
5 acquaintanceship with Mr. Cicero?

6 A. I love sports, and most of our conversations
7 dealt with Ohio State football, women, and very little
8 dealing with the court system.

9 Q. So you had worked with him previously?

10 A. There were a couple times when after his
11 client had gotten convicted in other cases -- not in
12 this case, but in other cases, the family called me and
13 asked me either for advise or to help them in their
14 case. I believe in one instance I helped -- I assisted
15 a client of Mr. Cicero on a motion for new trial.

16 Q. When you took on the work of the direct
17 appeal for Mr. Conway, did you have an opportunity to
18 meet with him?

19 A. No.

20 Q. Was he in the Franklin County jail for longer
21 than what might be a normal period of time because he
22 had another case appealing; do you recall?

23 A. I don't recall that. I knew he had another
24 case pending. I know, if I remember right, Mr. Barstow

1 told me that he went and saw him briefly.

2 Q. But you didn't have any meetings with
3 Mr. Conway?

4 A. No.

5 Q. Did you have any correspondence with him by
6 letter?

7 A. Quite a bit.

8 Q. Was he providing input into his appeal and
9 issues and so forth?

10 A. He was very helpful.

11 Q. Compared to other, shall we say, clients
12 charged with serious criminal offenses, would you agree
13 that he's smarter than the average?

14 A. There's no question he was a very intelligent
15 young man. There was another capital case that I had
16 where the person had a high degree of intelligence, and
17 I've represented judges on appeal, and I would say that
18 Mr. Conway is right up there with the bunch.

19 Q. How would you describe your -- you said he
20 was very helpful. Did you have correspondence back and
21 forth with him on the issue, or just reviewed some
22 things he had sent you, or how would you characterize
23 it?

24 A. I would send him a letter, and he would write

1 back and give his thoughts on the issues; and if I
2 recollect, in many of the letters, I asked him when I
3 could visit with him. In my 40 years of practice, I
4 have found that there are some individuals who would
5 rather correspond than meet personally, and it was my
6 opinion that Mr. Conway in his letters, which were all
7 typewritten, beautifully done and organized,
8 communicated through that mode.

9 Q. So that was his preferred method of
10 communication?

11 A. Absolutely.

12 Q. Did you ever meet any of his family members?

13 A. At the oral argument to the Ohio Supreme
14 Court, which went pretty well even though we lost, I
15 believe an uncle came up to me and asked me some
16 questions after the case. He would not introduce
17 himself, but he told me that he was the uncle, and so
18 we chatted for a while, and he left.

19 Q. Is that the only recollection you have of
20 family contacts?

21 A. Yes.

22 Q. In doing your work as appellate counsel for
23 Mr. Conway, I presume you had an opportunity to read
24 the entire record of the case?

1 A. Yes.

2 Q. What is your methodology when it comes to the
3 transcript and record in a capital appeal?

4 A. Since computers have overtaken us, what I do
5 is I dictate to my secretary, and then she runs it off
6 or sends it to me or whatever, and then I edit that
7 product, and I keep editing it until I'm done.

8 Q. What is it you're talking about that you're
9 editing?

10 A. The brief.

11 Q. What about in terms of transcript review? Do
12 you do issues lists or notes or that sort of thing?

13 A. No. After Mr. Gatterdam sent me an e-mail
14 asking if I had any notes, I looked through my file,
15 and what I remember doing eight years ago was taking
16 notes of the transcript after the prosecution had
17 completed its case and the defense began and then the
18 mitigation hearing.

19 So in answer to your question, I took notes,
20 which I'm looking at right now, of that part of the
21 record, because obviously I think the defense was
22 important, and I think the mitigation hearing in these
23 cases is the most crucial aspect of the entire case.

24 If I may interject, the other thing is, is my

1 previous secretary has probably on her computer a lot
2 of the file; and if you want me to when we're done
3 here, I can call her and just tell her that any
4 questions that you have, if it's on the computer, as
5 far as letters that I wrote to Mr. Conway, I would be
6 glad to oblige.

7 Q. Would you also be willing to share any notes
8 and so forth that you made after your review?

9 A. If you can read my writing, you are more than
10 welcome to this document, okay?

11 Q. Okay. Thank you.

12 A. This is the original document, and, like I
13 said, it's the defense in the mitigation hearing. My
14 handwriting is atrocious, but I think you can decipher
15 it.

16 MR. GATTERDAM: If you don't have any
17 questions on that, I can while we're going along make
18 both of us a copy. Would you be okay with it?

19 (Discussion off the record.)

20 BY MR. TRIPLETT:

21 Q. I'm going to hand you what has been marked as
22 Petitioner's Exhibit D. Does that appear to be a true
23 and accurate copy of the motion you submitted for
24 payment of your fees for this case to the Supreme Court

1 after you completed your work on direct appeal?

2 A. It's true and accurate as far as the amount
3 of work that I did on this case; but as far as being a
4 true and accurate statement as far as the amount of
5 hours I spent on this case, it doesn't even come close.

6 Q. You understated it on there?

7 A. There was no way, because the most you can
8 get out of this is whatever. I forget what it is, but
9 I just went up to the amount and -- but it's nowhere
10 near -- I would say I spent more than five times as
11 much time on this case; but in answer to your question,
12 it is true and accurate as far as the amount of hours.

13 Q. It's an accurate reflection of what was
14 submitted to the Supreme Court for approval?

15 A. Yes, sir.

16 Q. Not accurate in terms of the amount of time
17 that -- you spent a whole lot more time than what you
18 billed?

19 A. Yes, sir.

20 Q. It appears from a review of it that you were
21 being paid at the rate of \$50 per hour. Does that
22 sound right?

23 A. I think that is correct.

24 Q. If you were to be retained to do a case like

1 this, what kind of hourly rate would you expect?

2 A. 50,000 would be a fee, maybe 75,000.

3 Q. In this case, the total of the bill was
4 substantially less than that?

5 A. I think it was 5,000.

6 Q. So it would be about ten times that?

7 A. Yes, sir.

8 Q. Given what it would take to run your office
9 and your practice, does \$50 per hour do that for you?

10 A. Doesn't even come close.

11 Q. So where your invoice or your bill to the
12 Supreme Court reflects 35 hours for reading of the
13 transcript, you would say that's an understatement?

14 A. It's not even close.

15 Q. So for reading over 3,000 pages of
16 transcript, it would have been actually substantially
17 more than that is what you're saying?

18 A. I can't even estimate how many hours I spent.

19 Q. Now, in the process of your work on this
20 appeal, did you meet with trial counsel?

21 A. Yes.

22 Q. I was going to ask you whether that's
23 reflected in the invoice, but if you'd care to look to
24 see.

1 A. Looking at the invoice, I remember that one
2 of the things that we did is I read the transcript, and
3 then -- I'm trying to recollect the procedure, but I
4 believe I gave him the trial transcript and then he
5 read it, and then I believe that I took parts of it
6 back that I needed.

7 Q. When you say you gave him, who are you
8 referring to?

9 A. I'm sorry. Mr. Barstow. There was one
10 transcript.

11 Q. They didn't give you each a separate copy of
12 it?

13 A. No. I could be wrong in that, but I'm almost
14 sure I'm not, because I remember giving it to
15 Mr. Barstow, and also I remember now when I say I am
16 doing issue 10, I remember we had agreed to formulate
17 the issues where I would do -- he would do the first
18 nine, and then I did the rest.

19 Q. What was the reason for deciding it on that
20 basis, or was there a particular --

21 A. In the past when I've worked with co-counsel,
22 most of the co-counsel I've worked with are pretty
23 committed; and so when you delegate authority though
24 someone, I have found that for the most part they have

1 a solid commitment. So for that reason, he and I -- I
2 remembered we discussed the first nine, and there were
3 a couple I was not really crazy over, one of them being
4 the oath that the bailiff was supposed to give. I
5 didn't think that that was --

6 Q. Referring to the issue that the bailiff
7 was -- the oath was administered to the juror by the
8 bailiff and not the judge?

9 A. Right, and Todd was very enthusiastic over
10 that. Mr. Barstow was very enthusiastic over that.
11 There was another one, but I can't remember what it
12 was. There was one issue that he raised that dealt
13 with jury instructions, which I think is very
14 important, which, if I remember right, the prosecutor
15 in their brief said that it was a matter of first
16 impression in the Ohio Supreme Court, and that was
17 Mr. Barstow's issue.

18 Q. Do you remember whether there was a division
19 of responsibility based upon issues that were more
20 capital related as opposed to issues that might arise
21 in any other sort of trial? And I ask that remembering
22 your previous answer relative to Ms. Sandford's
23 affidavit.

24 A. I probably was more involved in the capital

1 litigation issues.

2 Q. Now, I think I began this last round by
3 asking you whether you had met with trial counsel, and
4 you said that you had. Did you meet with them both or
5 one, or do you remember?

6 A. No, I don't think I said -- did you ask me if
7 I met with trial counsel?

8 Q. Yes.

9 A. Oh, I'm sorry. I misunderstood you. I
10 should have listened to you.

11 Q. You covered some stuff that I was going to
12 cover anyway, so that's fine.

13 A. I met with Mr. Barstow on a number of
14 occasions. Going back now, in answer to your question
15 as to whether I met with trial counsel, I believe that
16 I talked to Brian Rigg on one occasion where I remember
17 him saying that this is basically a bar fight and that
18 was the issue of voluntary manslaughter which
19 Mr. Barstow raised, which I think is a hell of an
20 issue.

21 Then I believe I met with Mr. Suhr one time
22 about the getters issue where McGrath denied him the
23 right to discuss Mr. Conway's testimony overnight.

24 Q. That was an issue that ultimately was raised

1 in the appeal?

2 A. Both of them were, that's correct.

3 Q. In terms of the record, other than obviously
4 you had acquired the transcript and there was only one
5 to be used by you and Mr. Barstow, what other steps did
6 you take in terms of review of the record of the case
7 for appeal?

8 A. I went over to the Common Pleas Court and I
9 read the entire file. I looked at some of the
10 microfiche that I needed to look at. There were a
11 couple things that Patty Miller, the bailiff again,
12 faxed me. I believe one of them was Mr. Tyack's motion
13 for a new trial, and then a few months later Tyack sent
14 me the decision of Judge McGrath dealing with the
15 denial of the motion for new trial. But I remember
16 spending a great deal of time in the clerk's office
17 reading the case file, and I believe part of it was in
18 Patty Miller's office, so I sat in a conference room
19 and read some of the file in the conference room.

20 Q. In addition to the case file, did you have an
21 opportunity to look at the exhibits submitted into
22 evidence of the record?

23 A. Yes.

24 Q. Did your review disclose any gaps or

1 unreported conferences or problems of any nature that
2 required that action be taken to correct or supplement
3 the record?

4 A. No.

5 Q. If Mr. Barstow recalled a situation where
6 there were some photographs in the record of the wrong
7 deceased person, do you have any recollection of that
8 coming up during a review of the record?

9 A. You said a deceased person?

10 Q. Mr. Barstow having indicated that when he
11 went to the clerk's office and looked at the record and
12 looked at the exhibits, he found there were
13 photographs, autopsy photographs, of an African
14 American male who obviously would not be the decedent
15 involved in this case and then that had to be
16 corrected? Was that something you recall?

17 A. I remember him telling me that, but I've
18 totally forgotten it.

19 Q. Would you agree there's a special duty with
20 regard to review of the record for some of these
21 concerns in a capital case as opposed to an ordinary
22 appellate case?

23 A. Absolutely.

24 Q. You had occasion in other appeals you've done

1 to have to make corrections or supplementations as a
2 result of that process?

3 A. Yes, sir.

4

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5

MERIT BRIEF OF JAMES T. CONWAY, III

6

WAS MARKED AS EXHIBIT E.

7

- - -

8 Q. I'm going to hand you Exhibit E, which is the
9 merit brief. I'll ask you if that does appear to be a
10 true and accurate copy of the merit brief that you and
11 Mr. Barstow filed on behalf of Mr. Conway in the
12 Supreme Court of Ohio?

13 A. It does.

14 Q. I want to ask you about what I'll call the
15 contemporaneous objection rule, that is, the need to
16 make objections in timely fashion in order to make them
17 effective. How does that come into play in your work
18 as appellate counsel on direct appeal?

19 A. Under Rule 30, if you don't object, you're
20 basically screwed; because in habeas corpus, it's one
21 of the issues that involve res judicata.

22 Q. In the case of this appeal, did the Franklin
23 County Prosecutor's Office frequently cite to the
24 failure of an issue to be preserved for direct appeal

1 because trial counsel had failed to timely object?

2 A. I don't know if it permeated the appeal. I'm
3 not convinced it permeated the appeal.

4 Q. It was there?

5 A. Oh, absolutely.

6 Q. This rule can have harsh effects, wouldn't
7 you agree, if there's not a timely objection lodged by
8 counsel?

9 A. No, I don't agree. I think that the Sixth
10 Circuit of all of the eleven circuits is very cognizant
11 of the stupidity of some of the rules that are
12 procedurally enforced in the court system; and as a
13 result of that, there are many cases where under the
14 cause doctrine, the Sixth Circuit has enforced that
15 portion of the rule.

16 Q. In order to avoid the rule's impact for
17 purposes of direct appeal, what do you do to deal with
18 that? Is assertion of an ineffective assistance of
19 counsel --

20 A. You either raise plain error or you raise
21 ineffective.

22 Q. So it would be one of those two things that
23 you would do to raise the issue, either ineffective
24 assistance or the plain error doctrine?

1 A. Since Arizona versus Fulmonte came out in
2 '91, you can raise structural error, which is not
3 waived, but it is a narrow issue. In Mr. Conway's
4 case, the issue of a public trial was a structural
5 error.

6 Q. What do you mean by that, issue of the public
7 trial?

8 A. One of the issues that was raised on direct
9 appeal and which Mr. Conway detailed in a statement to
10 the judge outside the presence of the jury was that he
11 was denied a public trial during certain portions of
12 the case because of certain witnesses that were kept
13 out of the trial.

14 Q. In terms of one of the ways of handling the
15 issue of failure to contemporaneously object, is there
16 any downside to raising ineffective assistance of
17 counsel where it appears?

18 A. Absolutely.

19 Q. Where would that be?

20 A. If you throw the kitchen sink at the Ohio
21 Supreme Court and raise issues which are clearly going
22 to be not viable, I believe in my humble opinion that
23 you are hurting your client.

24 Q. Now, I want to refer to a few specific

1 issues. Assuming counsel's failure to object to a
2 reference to -- well, let me back up. I should lay a
3 little foundation here.

4 You were aware that there was another pending
5 capital case facing Mr. Conway at the time his trial
6 was going on, correct?

7 A. I was aware of it before the trial and after
8 reading the record.

9 MR. MAHER: At this point, I'll just note for
10 the record that for sake of expediency, I will not
11 repeat the objections made in the previous deposition
12 that basically all go to the form of the question, that
13 the question is presupposing facts not in evidence. So
14 I'm not going to repeat those objections at this point,
15 but I would incorporate those objections from the
16 previous deposition into this one.

17 MR. TRIPLETT: Which assumes I'll ask them
18 the same way.

19 BY MR. TRIPLETT:

20 Q. With that said, that there was another case
21 going on involving Mr. Conway, do you believe it to be
22 a potentially meritorious issue for appeal if there was
23 not an objection by counsel to that reference made
24 by -- reference to that either impliedly or explicitly

1 by a witness?

2 A. First of all, Mr. Gatterdam e-mailed me the
3 issues that were raised in the ineffective of direct,
4 and I remember all of them; but for the life of me, I
5 cannot remember the one that you're making reference
6 to. So if you could kind of give me an idea of -- I
7 think you refer to transcript 1825, and I cannot
8 remember what was said.

9 Q. Okay.

10 MR. MAHER: Object.

11 A. Supposedly Prichard asked a question which
12 dealt with the other case.

13 Q. Exhibit J was marked in the deposition of
14 Mr. Barstow taken earlier this afternoon.

15 A. Now, who is it that's questioning and who is
16 it that's answering?

17 Q. My belief is that --

18 A. Prichard is the prosecutor?

19 Q. Prichard is the prosecutor and the person
20 answering the questions is Ronald Trent.

21 MR. MAHER: For the sake of identification,
22 while Mr. Graeff is reading these two transcript pages,
23 the exhibit is a two-page document, one of which is
24 page 1825 of the transcript and the second page which

1 is page 110 of the transcript. Those two pages
2 constitute the exhibit that Mr. Graeff is looking at.

3 A. With respect to Petitioner's Exhibit J, if I
4 recollect, Trent sent two letters to the prosecutor's
5 office in early April. His attorney, according to
6 Trent, didn't do anything. I think her name was Sarah
7 Boatcamp, and so what he did was he wrote directly to I
8 think Mark Wodarczyk who is an assistant prosecutor
9 there at the Franklin County Prosecutor's Office, and
10 when Wodarczyk contacted Prichard and said that I've got
11 two letters from this guy named Trent who's in the same
12 cell with Mr. Conway. On page 1825 in answer to a
13 question, "Why did you want to share that information?"
14 Trent says basically because he laughed at someone
15 else's pain from another killing. Evidently that was
16 the first letter, and my memory is now refreshed.

17 Q. Do you believe there is a deficient
18 performance and failure to object to that particular
19 reference?

20 A. Absolutely not.

21 Q. That's purportedly the reason you didn't
22 raise that in the appeal?

23 A. Pardon me? As a trial attorney, I think that
24 would be one of the worst things you could do, is

1 object, because what it does is it enhances the jury's
2 recognition of that. Mr. Trent, in my opinion, was a
3 miserable witness. He was a liar. Even an assistant
4 prosecutor -- and I could be wrong in this, but I
5 believe Tim Braun who's now with the Lucas County
6 Prosecutor's Office testified in the case outside the
7 presence of the jury, and he emphasized Mr. Trent's
8 credibility because -- and I could be wrong in this,
9 but I think he even signed an affidavit saying that
10 Trent was basically a scumbag.

11 Q. Was it your belief that it is not possible
12 then to have made an objection to this without unduly
13 calling attention to it, that is, by making a
14 non-speaking type of objection?

15 A. There are two reasons. One is what I just
16 said, and the other reason is because the courts are
17 almost uniform in saying that it's an isolated
18 incident. It's something that I've had happen to me
19 many times, and the only thing that I would guess you
20 could do would be to ask the judge to issue a
21 cautionary instruction, but I would be -- as a trial
22 attorney, I would be against that.

23 Q. Let's move on to another issue. You've
24 referenced the fact that Mr. Gatterdam had provided you

1 with a list of the issues prior to today's deposition.

2 A. Yes.

3 Q. In this case, the trial counsel for
4 Mr. Conway had filed a motion to suppress, but instead
5 of going forward with the issue, there was a
6 stipulation made to the admissibility of a transcript
7 of a motion to suppress from another case, the other
8 case I guess to which we were just alluding a moment
9 ago.

10 Do you think that counsel should have gone
11 forward with an evidentiary hearing in this case as
12 counsel for Mr. Conway representing him on those issues
13 as opposed to stipulating the admissibility of the
14 transcript of the evidence of the motion to suppress
15 proceeding in the other capital case?

16 A. I'll be honest with you. I did not think of
17 that as an issue when I reviewed the record. I know
18 Judge Crawford has been a judge there forever. He's
19 probably one of the most knowledgeable judges over
20 there as far as the law. Mr. Suhr is the one who
21 raised it and asked Judge McGrath to do what you just
22 said. And as I understand it, he wanted the rulings
23 that Judge Crawford had issued to be transferred or
24 consistent with this case. And I'll be honest with

1 you, I did not think of that as an issue.

2 Q. Is that because -- well, I just want to
3 clarify. When you said you didn't think of that as an
4 issue, is that because you didn't think it was an issue
5 being cognizant of it, or it just wasn't something that
6 came into your thinking in the course of doing the
7 multitude of issues you were doing?

8 A. The motion to suppress issue is not
9 ineffective assistance of counsel because of those
10 Supreme Court cases, Kimmel versus Morrison I think one
11 of the leading cases. And so the cases even say that
12 there's no constitutional obligation on the part of
13 trial counsel to even file a motion to suppress.

14 Now, having said that, to be honest with you,
15 I knew that Judge Crawford had ruled on these issues,
16 and I have a great deal of respect for Judge McGrath,
17 but I also knew Judge Crawford and I knew his legal
18 background, and so I assumed that Mr. Suhr knowing the
19 same things felt that it was perhaps the best way to do
20 this; but, again, I did not think of that as raising
21 that as an issue.

22 Q. Well, these ruminations, if you will, that
23 you're giving us now are not things you went through
24 back then; is that what you're saying?

1 A. Oh, no, no, no. I mean I specifically
2 remember reading the motion to suppress, and I remember
3 that colloquy. I have an independent recollection of
4 that. But, like I said, I felt that he was doing it
5 because of Crawford's knowledge, his expertise, and
6 some of the motions were what we call the multiple
7 issues that are involved in capital litigation. There
8 were some that -- like the motion for change of venue,
9 I remember that was discussed, but there was a motion
10 to suppress identification which I specifically
11 remember.

12 Q. Just to be clear for our record here, you
13 made several references to Judge Crawford, and Judge
14 Crawford was the judge in Mr. Conway's other pending
15 case; is that correct?

16 A. And I knew that David Young was one of the
17 two defense attorneys in the other death penalty case,
18 and I knew that David Young is a highly respected --
19 and I knew this at the time, I remember this, is a
20 highly respected defense attorney in this town, in this
21 state. He's now a judge. So I remember thinking about
22 that. But what I'm trying to say is I didn't think of
23 raising it as an ineffective assistance of counsel
24 issue.

1 Q. Well, if you're having the same issues or the
2 same general motion to suppress, in fact, I think they
3 may have called it -- they had some special term for
4 the motion to suppress that's alluding me right now,
5 but you probably remember it better than I, but where
6 you have two different sets of counsel, two different
7 judges, and you have two different sets of ways of
8 presenting the issues, would you not agree that in
9 general having a different shot in front of a different
10 judge perhaps presented a different way would be
11 preferable to simply relying on the record in another
12 case and, therefore, not doing that may be a deficient
13 way of handling the case?

14 A. I have problems with that, because I know the
15 background of both those men, and they sat next to each
16 other in the first year of law school and --

17 Q. The men you're talking about --

18 A. Judge Crawford and Judge McGrath were
19 classmates together. They sat next to each other
20 throughout the entire tenure at law school. They're
21 close friends, so obviously they discussed the case.
22 Now, I'm not saying that I know this, but I assume that
23 they discussed the case.

24 Q. So what you've said is that on this issue --

1 and I don't want to belabor it more than is necessary,
2 but what you said on this issue about not creating a
3 new record with respect to the issues of motion to
4 suppress that may be in common between the two cases?

5 A. I would not have raised that as an issue.

6 Q. You would not have raised that as an issue?

7 A. No, sir.

8 Q. Is that a complete statement of the reasons
9 that what you said that you would not do so?

10 A. Yeah. I've not done a good job of
11 explaining, because I simply would not have raised it
12 as an issue.

13 Q. The trial court in the case approved funding
14 for a firearms expert for Mr. Conway. Do you recall
15 that for the record?

16 A. Yes, sir.

17 Q. The State presented evidence I believe
18 through the testimony of Mr. Trent that Mr. Conway
19 fired shots at Mr. Gervais knowing they would go
20 through him and into -- I'm sorry. Yes, through
21 Mr. Gervais knowing they would go through him into
22 Mr. Williams, and the State cross examined Mr. Conway a
23 number of times as to the manner of his discharge of
24 the weapon.

1 Should defense counsel have called the
2 retained firearms expert to explain the issue that a 45
3 round perhaps would not be expected to go through one
4 body and into another?

5 A. No.

6 Q. Should defense counsel have presented that
7 same expert to testify as to how easily the 45 would
8 have been discharged?

9 A. No.

10 Q. So having said that, you don't see those as
11 issues that should have been raised in the direct
12 appeal?

13 A. I think if he would have testified, it would
14 have been worse.

15 Q. The firearms expert?

16 A. Yes.

17 Q. Was that apparent from the record to you, or
18 was that --

19 A. Yes.

20 Q. There was also an expert that the defense
21 wanted to use regarding a computer simulation. Do you
22 remember that --

23 A. Yes, sir.

24 Q. -- issue? I will characterize that as having

1 been precluded by the trial court, that evidence,
2 because defense counsel had not previously provided it
3 in discovery to the prosecution?

4 A. That's incorrect.

5 Q. Incorrect that they had not done so or
6 incorrect that that was not the basis of the exclusion?

7 A. Incorrect as far as the basis of the issue.

8 Q. There was a failure to provide discovery.
9 That was one of the issues involved; was it not?

10 A. As I remember, Prichard said something to the
11 effect that they just got it like Saturday or something
12 like that, which is no big deal as far as I'm
13 concerned. On page 2065 of the transcript, Prichard
14 says she just received it on Saturday, two days before.
15 If she can't review the information in a matter of two
16 days, then I can't comprehend that. I mean when you're
17 trying a case, whether a prosecutor or a defense
18 attorney, you're spending 18 hours a day working the
19 case.

20 So in answer to your question, Judge McGrath
21 did say that he was very irritated over the fact that
22 under Rule 702, they did not provide the proper
23 documents and the proper resume to the prosecution, but
24 I don't buy Prichard's statement that she gets it two

1 days before and somehow that's a discovery violation.
2 In a case that is a capital case where these guys have
3 been working, again, probably 18 hours a day.

4 Q. So your view is then that it would not have
5 been a discovery violation that would have constituted
6 a deficient performance for treatment to have been
7 provided as it was provided in this case?

8 A. I think that's a fair statement, plus the
9 fact that he then -- I can't remember the specifics,
10 but I know McGrath then opened the door a little bit to
11 allowing the guy to testify.

12 Q. What is your view of the judge's ruling on
13 the issue?

14 A. I can see where Judge McGrath -- these guys
15 are seasoned trial attorneys, and they know that under
16 expert testimony they have to provide the documents
17 beforehand and reciprocal discovery, and I understand
18 Judge McGrath's ire over the fact that it was two days
19 before they wanted this guy to testify.

20 Now, having said that, the Sixth Circuit
21 reversed an aggravated murder case a number of years
22 ago, the Clinsdale case, which is a famous case here in
23 Central Ohio which has been tried three times now; and
24 in one of them, in the first one, the judge, not Judge

1 McGrath, denied I believe it was a witness to testify
2 because they had not provided -- the defense had not
3 provided the witness within the seven days.

4 So in answer to your question, I understand
5 what he said; but then afterwards, he reviewed it and
6 allowed -- he stated that it would not be allowed as
7 substantive evidence, but that the defense would be
8 allowed to use it in final argument. That's at page
9 2070 of the transcript, and it's coming back to me now.

10 When I looked at the simulation, Judge
11 McGrath said that it's not consistent with either the
12 prosecution or the defense, and one of the ingrained
13 rules of judicial decisions in these type of issues is
14 if he believes that it's going to confuse the jury,
15 then he has the discretion to disallow that type of
16 video.

17 The other reason is, if I remember right, he
18 said that it didn't even conform to what the brother
19 was saying and what Mr. Conway was saying. So in my
20 opinion, he was actually almost doing the Conway
21 brothers a favor by keeping this out, because the
22 simulation shows what the expert believes his opinion
23 was with respect to Mr. Gervais, the decedent.

24 Q. Moving to another issue. In terms of voir

1 dire, jury voir dire, you've no doubt heard the
2 expression used in the defense bar of the automatic
3 death penalty juror?

4 A. Yes, sir.

5 Q. What does that mean to you?

6 A. It means the gentleman who is a member of the
7 NRA who believes that if you did the crime, you pay the
8 fine. It means that if he's sitting there, he should
9 just be automatically sentenced to death.

10 Q. Can a prospective jury in a capital case be
11 excluded on that basis?

12 A. Absolutely.

13 Q. In this case, we have the issue of Juror
14 Frank Finegold having agreed with the statement if
15 everything was found beyond a reasonable doubt, then
16 death would be the appropriate penalty. Should he have
17 been challenged for cause?

18 A. He was. The reason I remember Mr. Finegold,
19 I have a very byzantine memory, and the reason I
20 remember him is because of his name and because of the
21 idiotic thing he said in answer to one of the
22 questions. If I remember right, Mr. Suhr was
23 questioning him, and he said they should be executed
24 just because of the money; it's a lot cheaper to

1 execute them, and we can move along and have a better
2 society because of that, which I personally find just
3 repulsive and disgusting. If I remember right,
4 Mr. Suhr challenged him for cause, and Judge McGrath
5 overruled it.

6 Q. So your belief is that the record reflects
7 that there was a challenge for cause?

8 A. Yes, sir.

9 Q. And, therefore, counsel's performance was not
10 deficient, because he did challenge for cause?

11 A. I didn't hear the last part.

12 Q. Because he did challenge for cause, then
13 there's no deficiency of counsel's performance because
14 your recollection is that he did?

15 A. Well, that, and also, again, all of those
16 cases from both the Ohio Supreme Court and the United
17 States Supreme Court talk about voir dire being a
18 comprehensive thing as far as questioning.

19 Now, I agree with you that Mr. Finegold was
20 not exactly one of the premiere candidates for
21 objectivity; but, like I said, I remember him because
22 of his name and because of that statement. I remember
23 that there were two aspects to the voir dire, the first
24 one being they would bring in six, and then they would

1 question them; and then at the end of that stage and
2 the second stage, they had what we call the general
3 voir dire.

4 So I would assume that after he was
5 challenged for cause and he overruled it, they just
6 felt that adding another challenge or another whatever
7 would not be strategically appropriate as far as your
8 posture with Judge McGrath.

9 Q. Going back to the general work of your
10 representation of Mr. Conway, since the change in the
11 law that required doing direct appeal not to the Court
12 of Appeals but to the Supreme Court of Ohio, is it your
13 understanding that the rules permit the filing of a
14 reply brief by the appellant?

15 A. Yes.

16 Q. Was a reply brief filed in this case?

17 A. No.

18 Q. Do you remember why there was not a reply
19 brief filed in this case?

20 A. I do. I just felt that -- I'm a big believer
21 in reply briefs, but I thought that this was one where
22 we had identified the issues, and I thought in
23 particular that if we emphasized some of the issues
24 which I think are just dead bang winners, it would not

1 create the flare that I wanted in oral argument. So I
2 did not want to file a reply brief. I don't know how
3 Mr. Barstow felt about that, but I did not want to
4 file.

5 Q. After the decision of the Supreme Court,
6 there was not a motion for reconsideration filed?

7 A. No.

8 Q. Do you remember what the reason for that
9 would have been?

10 A. You know, I really don't.

11 Q. Okay.

12 A. I know that I immediately began working on
13 the cert.

14 Q. In your more-extensive-than-most-lawyers
15 experience in this type of case, is it fair, would you
16 say it's an uncommon thing for you to not file a motion
17 for reconsideration?

18 A. I would say most of the time there is a
19 motion to reconsider filed. I agree with you on that.

20 Q. Are there reasons specific to capital cases
21 why one might file a motion for reconsideration?

22 A. I don't think it's any -- to be honest with
23 you, I don't think it's any -- I know in a motion to
24 reconsider, you have to say that the court has made a

1 significant mistake either factually or legally,
2 they've used the wrong case law; and in reading the
3 decision, I read it a couple days ago again, I disagree
4 with many of the things they say in there, but they
5 didn't make, you know -- they used the cases that we
6 all use.

7 MR. TRIPLETT: I'm going to suggest we take a
8 five-minute break. I'll confer with Mr. Gatterdam, and
9 then we'll wrap up.

10 (Short recess taken.)

11 MR. TRIPLETT: I don't have any more
12 questions, Mr. Graeff. Mr. Gatterdam has a couple
13 things to follow up on.

14

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15

CROSS-EXAMINATION

16 BY MR. GATTERDAM:

17 Q. I'll try to be quick, David. Let's go back
18 to the issues again, and the first one you were asked
19 about is the trial counsel's failure to object when the
20 other murder was mentioned by Mr. Trent. Do you
21 remember that?

22 A. Yes.

23 Q. Would you agree with me that one of the
24 reasons I think you were talking about not going -- you

1 used the phrase "enhances the jury's recognition of
2 it," and you don't want the jury to hear more about
3 that issue, is that fair to say, because it's a pretty
4 prejudicial comment?

5 A. The answer to that is yes. I don't know --
6 Trent was just -- as my father says, he was table
7 scraps. He was one of the worst witnesses I've ever
8 listened to or read. So taking it in context of the
9 person who's saying it, what I would do as a trial
10 attorney is just let it go with the hopes that the jury
11 didn't hear it.

12 Now, if David Graeff were on the stand and he
13 said that, hopefully then there would be a little bit
14 more credibility attached to that statement than this
15 clown. So that's the reason -- I believe that they
16 made the right decision in not objecting.

17 Q. If David Graeff mentioned the other murder
18 and you were trial counsel, fair to say you would have
19 objected then because David Graeff has more
20 credibility?

21 A. I would hope so.

22 Q. And you may have asked the judge for a
23 mistrial, correct, depending on the circumstances?

24 A. Depending. I mean I don't think I would ask

1 him for a mistrial, because I've read capital cases
2 where this has happened, and it's been affirmed.

3 Q. Speaking of credibility of Mr. Trent, you
4 don't know what the jurors were thinking about
5 Mr. Trent's credibility?

6 A. I think I do, because of just -- his
7 testimony was -- it was just so obvious he was a
8 dirtball. He was a sleezy person, and I think it comes
9 out when you read the transcript.

10 Q. You would agree he was a major part of the
11 State's case against Mr. Conway?

12 A. I think he was a major part of the
13 prosecution's case.

14 Q. David, let me go on to the motion to
15 suppress. I guess I just want to clarify that issue.
16 Do you recall whether or not at the time the defense --
17 in the case you did on direct appeal, the time they
18 decided we don't want another suppression hearing, had
19 Judge Crawford actually ruled on the suppression issue?

20 A. It wasn't just on the suppression issue. I
21 thought that it was on a number of issues.

22 Q. Okay.

23 A. I thought it was a -- and I can't remember
24 the name either, but there is a --

1 Q. Multi-branch motion to suppress?

2 A. Yes, and there's a name that we use; and for
3 the life of me, I can't remember the damn thing, but I
4 believe that there were a number of issues that were
5 included in the motions that Mr. Young filed in the
6 other case, but I remember that a detective and some
7 other individuals testified in Judge McGrath's case on
8 the identification issue, and I remember a detective
9 talking about explaining how the computer
10 photographically was created and that kind of thing.

11 Q. Right.

12 A. So I distinctly remember reading a
13 suppression issue. So it would have to be other issues
14 that were involved in Judge Crawford's case that they
15 just wanted to, you know, go along with.

16 Q. Did you read Judge Crawford's opinion on
17 those other issues?

18 A. I did, but it was so long ago. I've tried to
19 remember, and I can't remember.

20 Q. Do you recall whether or not he suppressed
21 any evidence?

22 A. No, he did not.

23 Q. The computer simulation issue that you were
24 asked about -- and I think you cited to actually two a

1 page probably from your notes, which you're correct,
2 are very difficult to read. You cited to a page where
3 the judge said that he wasn't going to allow it as
4 substantive evidence, but he would consider it as to
5 argument. Am I fairly stating what you said?

6 A. That's correct.

7 Q. Okay.

8 A. In final argument.

9 Q. Yeah. And you cited page 2070, and let me
10 just -- I can either show it to you or read it and tell
11 you if that's -- go ahead and read it.

12 A. "Here's what I'm going to do: I'm not going
13 to permit this as substantive evidence in this case for
14 all the reasons I stated before, and that is in my
15 opinion in line with the case law not only in Ohio but
16 the case law around the United States with respect to
17 it, and I think even including the case cited by the
18 defense, but what I -- I will hold in abeyance here its
19 use in argument. Let's go on with the evidence." Is
20 that your memory of what he said?

21 A. Yes.

22 Q. And I don't know if you recall whether he
23 later expounded upon and let them use in argument or
24 not, but my question for you really is, if he

1 ultimately let him use it in argument, you agree
2 argument is argument, not evidence?

3 A. Oh, absolutely.

4 Q. And his ultimate ruling is the defense was
5 not permitted to use it as substantive evidence in the
6 case?

7 A. That person's testimony, correct.

8 Q. Moving on to the last area, the voir dire of
9 the jury, it's your memory that that juror,
10 Mr. Finegold, that the defense did attempt to excuse
11 that juror for cause, correct?

12 A. And I remember specifically, sir, saying
13 because of the money. That's what he said.

14 Q. Suhr or you mean the juror, the prospective
15 juror?

16 A. No. The juror comes up with this philosophy
17 that we should execute people because it's economically
18 feasible or better; and then towards the end of that
19 group of six, Suhr stands up and Suhr says, We move for
20 cause for Finegold, and then he said because of the
21 money, and so I assume he meant the economic thing.

22 Q. Okay.

23 A. And McGrath overruled.

24 Q. Now, you think that Suhr was correct in

1 moving to excuse that juror for cause, right? You
2 would have had concerns if a juror said that?

3 A. I would have moved to excuse the juror for
4 cause.

5 Q. And then having denied that as Judge McGrath
6 did as you indicate, what is the next step as defense
7 counsel if you really didn't like that juror, how do
8 you get rid of that juror?

9 A. I'm not sure -- how do I get rid of him?

10 Q. You can use preemptory challenge, correct?

11 A. Oh, sure.

12 Q. As far as you recall, this Juror Finegold was
13 a sitting juror on the case, so he was not removed
14 peremptorily, correct?

15 A. I don't know that.

16 Q. The record would speak for itself on that,
17 correct?

18 A. Yes.

19 MR. GATTERDAM: I have nothing further.

20 MR. MAHER: No questions.

21 David, do you want to read your testimony or
22 do you want to waive?

23 THE WITNESS: I'll waive.

24 (Signature waived.)

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Thereupon, at 5:12 p.m., on Wednesday, March
21, 2012, the deposition was concluded.

- - -

FRALEY, COOPER & ASSOCIATES

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(800) 852-6163

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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

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

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 executed³⁴⁰ 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

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.

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. Cl. 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

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

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 unrepresented 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

2003]

ABA GUIDELINES

1087

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-)
)
 JAMES CONWAY, III,) Trial Court Case No. 02CR-1153
)
)
 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).

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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
Counsel for Appellant

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


Notary Public



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

EXHIBIT

D

SUPREME COURT OF OHIO

MOTION, ENTRY, AND CERTIFICATION FOR APPOINTED COUNSEL FEES

ORIGINAL

State of Ohio,
Plaintiff

v.

James Conway
Defendant

APR 04 2006

MARCIA J MENGEL CLERK
SUPREME COURT OF OHIO

Supreme Court No. 03-0647

Appeals Court No. None

Trial Court No. 02 GR 1153

ON COMPUTER-RV

DEATH PENALTY CASE

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.

RECEIVED

B. R.C. 2903 - Attempted Murder

APR 04 2006

C. SUPREME COURT DECISION

MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

State c. Conway - affirmed

2006-Ohio-79
108 OhioSt.3d 214

TERMINATION DATE
03-08-06

ATTORNEY'S NAME

David J. Graeff

SOC. SEC. NO.

[REDACTED]

ATTORNEY'S SIGNATURE

David Graeff

ATTORNEY'S ADDRESS NUMBER AND STREET

P.O. Box 1948

CITY

Westerville

STATE

Ohio

ZIP

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 \$ SEE ATTACHED ENTRY and expense in the sum of \$ SEE ATTACHED ENTRY or a total allowance of \$ SEE ATTACHED ENTRY, which amount is ordered certified to the SEE ATTACHED ENTRY County Auditor for payment.

CHIEF JUSTICE

SEE ATTACHED ENTRY

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

Conway Apx. Vol. 7

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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 Glass
 Applicant's Signature Conway Apx. Vol. 7
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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
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FRANKLIN COUNTY, 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).

The Prosecution's case: Witnesses not at the scene.

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 or 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 whether 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
COMMITTS 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 lengthy 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 Wodarczyk, 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 Rosenberg'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,

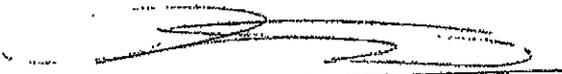
because the defendant's girlfriend had testified to the defendant's character, at 39.

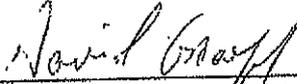
As a result of the above, it is respectfully asserted that the trial court committed error in not allowing the expert witness to testify; and in severely restricting the cross-examination of the primary Government witness. As a result, this case must be reversed and remanded for a new trial.

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,

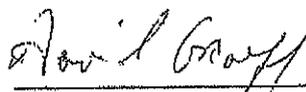

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CERTIFICATE OF SERVICE

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.



DAVID J. GRAEFF (0020647)

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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