IN THE SUPREME COURT OF OHIO
2007

STATE OF OHIO, Case No. 03-346

Plaintiff-Appellee,

-vs-

MICHAEL TURNER, DEATH PENALTY CASE

Defendant-Appellant.

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING APPLICATION FOR REOPENING

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street–13th Fl.
Columbus, Ohio 43215
Phone: 614-462-3555
Fax: 614-462-6103
E-mail: sltaylor@franklincountyohio.gov

and

STEVEN L. TAYLOR 0043876
(Counsel of Record)
Assistant Prosecuting Attorney

COUNSEL FOR PLAINTIFF-APPELLEE

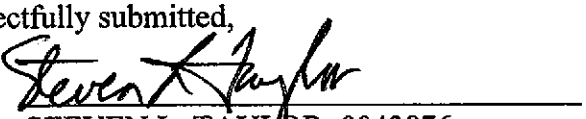
DAVID C. STEBBINS 0005839
and
WILLIAM S. LAZAROW 0014625
400 South Fifth Street, Suite 202
Columbus, Ohio 43215
Phone: 614-228-9058

COUNSEL FOR DEFENDANT-APPELLANT

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING APPLICATION FOR REOPENING

For the reasons stated in the attached memorandum, the State opposes the untimely application for reopening filed by defendant on September 7, 2007.

Respectfully submitted,



STEVEN L. TAYLOR 0043876
(Counsel of Record)
Assistant Prosecuting Attorney
Counsel for Plaintiff-Appellee

MEMORANDUM IN SUPPORT

This Court affirmed defendant Michael Turner's convictions and death sentence on May 11, 2007. *State v. Turner*, 105 Ohio St.3d 331, 2005-Ohio-1938 ("*Turner I*"). Over two years later, on September 7, 2007, defendant filed an application for reopening. The application itself is 9+ pages in length. But it is accompanied by an affidavit, over 21 pages in length, authored by attorney David Stebbins, who is one of defendant's current counsel. In the affidavit's 110 paragraphs of single-spaced type, Stebbins contends that defendant's appellate counsel were ineffective in failing to raise two suppression issues regarding his statements to police, in failing to raise six claims of trial counsel ineffectiveness, and in failing to raise challenges to Ohio's death penalty scheme.

The application for reopening and accompanying affidavit are largely a "cut" and "paste" exercise from a petition for habeas corpus relief filed by attorney Stebbins in federal court. Indeed, much of the affidavit consists of large-scale repetition of some of the issues being raised in the federal habeas petition, see Excerpts of Amended Habeas petition, and much of this language was a substantial repetition of Claims 1, 2, 3, 4, 11, 15, 16, and 17 from the post-conviction petition filed by the Ohio Public Defender in

October 2003. See Excerpts of Original and Amended PCR Petition, attached. See, e.g., Stebbins affidavit, at ¶ 50 ("it is an understatement to say * * *"), and Amended Habeas Pet., at ¶ 122 (same), and PCR Pet., at ¶ 38 (same).

Given this chain of events, the defense knows that it is raising a number of claims that are improper here. For example, the suppression issues and accompanying IAC claims related to the suppression issues are based on transcripts of police interviews that only entered the case as part of the post-conviction litigation. Yet, despite knowing that these were documents only offered in post-conviction proceedings, the defense presents them here as if they were part of the original trial-court proceedings and as if they were available as potential claims of error to the direct-appeal appellate counsel. "[A] bedrock principle of appellate practice in Ohio is that an appeals court is limited to the record of the proceedings at trial." *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, ¶ 13, citing *State v. Ishmail* (1978), 54 Ohio St.2d 402. Defendant's direct-appeal appellate counsel cannot be faulted for having failed to argue matters that were not in the original trial-court record. *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, ¶¶ 10, 11.

The defense's effort to pass off post-conviction materials as original trial-record materials deserves condemnation. The State hastens to add that Ohio courts have already rejected defendant's post-conviction claims, with the common pleas court denying the post-conviction petition on September 22, 2004, with the Tenth District affirming that denial on February 21, 2006, see *State v. Turner*, 10th Dist. No. 04AP-1143, 2006-Ohio-761 ("*Turner II*"), and with this Court declining review on August 2, 2006. *State v. Turner*, 110 Ohio St.3d 1439, 2006-Ohio-3862. If the defense could not succeed on post-conviction review even when such materials were in the record, one wonders how

defendant's direct-appeal counsel could be expected to succeed when such materials were not in the original trial-court record available on appeal.

In missing the 90-day deadline by over two years, and then by filing a reopening application that is largely a redux of outside-record post-conviction claims already rejected elsewhere, the defense is wasting the time of this Court and the prosecution.

A. Lack of Good Cause for Untimely Filing

The judgment of affirmance was filed on May 11, 2005. Pursuant to S.Ct.Prac.R. XI(6)(A), defendant's application for reopening was due within 90 days thereafter, which was mid-August 2005. But defendant did not file the application until September 7, 2007, over two years past the deadline. Given this untimeliness, defendant is required to make "[a] showing of good cause for untimely filing * * *." S.Ct.Prac.R. XI(6)(B)(2).

In an effort to show "good cause," defendant relies on various assertions blaming his former appellate counsel Edwards and Barstow for the delay. But this Court has already held that a defendant has no constitutional right to counsel in the preparation and filing of an application for reopening. *Morgan*, supra; *State v. Hoffner*, 112 Ohio St.3d 467, 2007-Ohio-376, at ¶ 6. In the absence of a right to counsel, defendant himself "must bear the burden of a failure to follow state procedural rules." *Coleman v. Thompson* (1991), 501 U.S. 722, 753-54. This Court has repeatedly held that indigency and/or *pro se* status and/or ignorance of the law do not qualify as "good cause." *State v. Reddick* (1995), 72 Ohio St.3d 88, 91; *State v. Forney* (1995), 72 Ohio St.3d 563, 564; *State v. Franklin* (1995), 72 Ohio St.3d 372, 373. The inability to secure further appellate representation does not establish "good cause." *State v. Twyford*, 106 Ohio St.3d 176, 2005-Ohio-4380, ¶ 8.

Even when the appellate counsel has continued with the representation of the

defendant, this Court has determined that such continued representation is not "good cause." In *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, this Court concluded that a defendant is expected to file the reopening application on a pro se basis if necessary:

> {¶7} * * * Consistent enforcement of the rule's deadline by the appellate courts in Ohio protects on the one hand the state's legitimate interest in the finality of its judgments and ensures on the other hand that any claims of ineffective assistance of appellate counsel are promptly examined and resolved.
>
> {¶8} Ohio and other states "may erect reasonable procedural requirements for triggering the right to an adjudication," *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422, 437, 102 S.Ct. 1148, 71 L. Ed. 2d 265, and that is what Ohio has done by creating a 90-day deadline for the filing of applications to reopen. Gumm could have retained new attorneys after the court of appeals issued its decision in 1994, or he could have filed the application on his own. What he could not do was ignore the rule's filing deadline.
>
> {¶9} To be sure, as Gumm contends, "counsel cannot be expected to argue their own ineffectiveness." *State v. Davis* (1999), 86 Ohio St.3d 212, 214, 1999 Ohio 160, 714 N.E.2d 384. Other attorneys -- or Gumm himself -- could have pursued the application, however. Nothing prevented them or him from doing so, and in fact other attorneys did pursue federal habeas relief on Gumm's behalf beginning in 1998. Those attorneys or others could have filed a timely application under App.R. 26(B) for Gumm in 1994. * * *
>
> {¶10} * * * The 90-day requirement in the rule is "applicable to all appellants," *State v. Winstead* (1996), 74 Ohio St.3d 277, 278, 1996 Ohio 52, 658 N.E.2d 722, and Gumm offers no sound reason why he -- unlike so many other Ohio criminal defendants -- could not comply with that fundamental aspect of the rule. (Emphasis in bold added)

See, also, *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, ¶ 7 (same).

Even more so here, defendant or his current or former successor counsel could be expected to meet the deadline. Defendant's post-conviction counsel (the Ohio Public

Defender's Office) was in place even before the May 11, 2005 judgment of this Court, since that counsel filed the post-conviction petition in October 2003 and was pursuing a post-conviction appeal in the Tenth District at the time of the May 11, 2005 judgment. Post-conviction counsel was so attuned to the direct-appeal proceedings that he filed a motion to stay execution of sentence in this Court in this very appellate case on the *very same day*, May 11, 2005. (See Motion, attached) This quick entrance by defendant's post-conviction counsel shows that he was very well aware of the outcome of the direct appeal and therefore would have been aware of the starting of the reopening clock. But no application was timely filed. As a result, defendant fails to show good cause. See *State v. Myers*, 102 Ohio St.3d 318, 2004-Ohio-3075, at ¶ 7 (no good cause because of postconviction counsel's delay in filing application).

Even when more and different counsel entered the picture, no application was forthcoming in a prompt manner. Attorneys Carol Wright and William Lazarow entered an appearance in this very appellate case by filing a substitution of counsel on August 15, 2006. (Notice attached) They were formally appointed as counsel in the federal habeas proceedings on January 25, 2007. (Federal-court docket attached) Attorney Stebbins was substituted for Wright as counsel on April 3, 2007. (Id.) The original habeas petition was filed on June 15, 2007, and an amended petition was filed on July 31, 2007. (Id.) Yet, through all of these months of representation by attorneys Wright, Lazarow, and Stebbins, a delay of over one year elapsed before an application for reopening was filed. So, from the very day the judgment of affirmance was entered on May 11, 2005, defendant has had counsel available to him in one form or another. And, even before that very day, defendant had been raising post-conviction claims that mirror most of the

claims now being raised in the application for reopening. If the defense desired to pursue an application for reopening based on post-conviction claims or based on tired and worn constitutional challenges to Ohio's death penalty scheme, the defense need not have delayed over two years before doing so.

While defendant complains that appellate counsel Edwards and Barstow failed to file a motion for reconsideration or a petition for writ of certiorari, that complaint is irrelevant. The failure to invoke the extraordinary procedures of reconsideration and certiorari is irrelevant to whether defendant had good cause for not timely filing the reopening application. And blaming Edwards and Barstow is beside the point as well, since the Public Defender's Office stepped into the direct-appeal case immediately by filing a motion for stay. While defendant complains that Edwards and Barstow failed to seek successor counsel, the Public Defender could not have entered the case any more quickly.

Defendant further complains that Edwards and Barstow "did not inform Turner of his right to pursue an Application to Reopen * * *." Notably absent from this assertion, however, is any claim that defendant was actually ignorant of the reopening procedure. Defendant could have learned of that procedure through the Public Defender's Office.

Defendant also blames the Public Defender's Office for failing to file the application for reopening in a timely manner. But the Public Defender's Office was in the midst of post-conviction litigation, contending that the post-conviction claims were properly raiseable on post-conviction review. To have filed an application for reopening based on some of those same post-conviction claims would have detracted from those contentions. In this light, the decision not to seek reopening appears to have been tactical. The concept of "good cause" does not include the notion that the defense can wait until whenever it finds it

more tactically advantageous to file the application. In any event, an error on the part of Public Defender's Office would not be "good cause" anyway, as defendant had no entitlement to counsel to begin with and must bear the risk of error by counsel as a result.

And even if blaming the Public Defender's Office would amount to "good cause," such "good cause" evaporated over one year ago when attorneys Wright and Lazarow entered an appearance in the direct-appeal case. "Good cause can excuse the lack of a filing only while it exists, not for an indefinite period." *State v. Davis* (1999), 86 Ohio St.3d 212, 214, quoting *State v. Fox* (1998), 83 Ohio St.3d 514, 515.

Whether it was through defendant himself or through the many counsel defendant has had access to in the many months since May 11, 2005, the defense was expected to meet the 90-day deadline. *Gumm*, supra. The State requests that this Court enforce the 90-day deadline, just as it has done in other death-penalty cases, even when this Court has previously appointed counsel to prepare the untimely application. *State v. Cunningham*, 2007-Ohio-4285, at p. 7; *State v. Ahmed*, 105 Ohio St.3d 1450, 2005-Ohio-763; *State v. Bryan*, 103 Ohio St.3d 1490, 2004-Ohio-5605.

B. Standards for Reopening

The two-pronged test in *Strickland v. Washington* (1984), 466 U.S. 668, governs whether the defendant has raised a "genuine issue" of appellate counsel ineffectiveness. *State v. Hill* (2001), 90 Ohio St.3d 571, 572 (citations omitted). An appellate counsel need not raise every non-frivolous issue. *Jones v. Barnes* (1983), 463 U.S. 745, 752; *State v. Allen* (1996), 77 Ohio St.3d 172, 173. A heavy measure of deference is given to the judgment of counsel. *State v. Sanders* (2002), 94 Ohio St.3d 150, 151-52.

C. **Defendant's Ineffective Appellate Counsel Claims Lack Merit.**

Suppression Issues: Emblematic of the weakness of this reopening application are the claims that appellate counsel should have argued that defendant's statements to police should have been suppressed. There was no suppression motion in the trial court, thereby waiving the issue, and the interview transcripts were not in the appellate record. Moreover, defendant had pleaded guilty, and the evidence of guilt was overwhelming. The Tenth District has already recognized that the suppression issues would have made no difference. *Turner II*, at ¶ 38. Appellate counsel cannot be criticized for having failed to raise these suppression issues without an adequate appellate record and without any prejudice.

IAC Claims Regarding Suppression Issues: Appellate counsel likewise could not be faulted for failing to argue that trial counsel had been ineffective in failing to move to suppress the statements. The appellate record did not include the interview transcripts, and so the appellate record did not show that a motion to suppress would have succeeded. In any event, trial counsel acted reasonably in deciding not to seek suppression of the statements, which presented a pro-defense gloss, albeit weak, on the incident and which, if introduced by the prosecution, would have allowed defendant's version to get before the trier of fact without defendant being subjected to cross-examination. Also, defendant cannot show a reasonable probability of a different outcome, as the Tenth District stated: "[T]he evidence of appellant's guilt, notwithstanding the statements appellant now argues should have been suppressed, was overwhelming. That evidence included other statements appellant made before and after the attack, including an admission to the murders, an eyewitness to the beginning of the murders, physical evidence, and a 911 telephone call [Jennifer] Turner made as she and Seggerman were being attacked in

which she identified 'Mike' as her attacker and begged him to stop." *Turner II*, at ¶ 38.

IAC and Failing to "Reserve" Right to Withdraw Jury Waiver and Plea: Defendant wrongly claims that he has a right to condition a jury waiver or guilty plea on a favorable outcome in the case. A jury waiver cannot be withdrawn after the trial begins. R.C. 2945.05; *State v. Frohner* (1948), 150 Ohio St. 53, paragraph five of the syllabus. A post-sentence motion to withdraw plea will not be allowed merely because the defendant wanted to test the weight of punishment. *State v. Smith* (1977), 49 Ohio St.2d 261, 264. A defendant cannot simply "reserve" the right to change his mind. *State v. Davis* (1996), 12th Dist. No. CA95-07-124. To be sure, in cases in which the prosecution and defense have reached a *plea agreement* and have *agreed* on a sentence less than death, the agreement will sometimes include a "withdrawal" provision if the three-judge panel ends up desiring to impose the death penalty. Once accepted by the court, such a plea bargain becomes enforceable as a matter of due process. *Santobello v. New York* (1971), 404 U.S. 257. But there was no such plea bargain here. Appellate counsel had no basis to argue trial counsel ineffectiveness here.

IAC and Jury Waiver: The defense concedes that the record is "devoid of any facts as to what, if anything, defense counsel advised Turner regarding his constitutional waiver of his right to a jury." Stebbins affidavit, at ¶ 61. But the defense then sets forth what it contends occurred in such conversations, see id. at ¶ 62, and contends that trial counsel was ineffective. The defense does not explain how appellate counsel could be expected to raise such an outside-record claim of error on direct appeal.

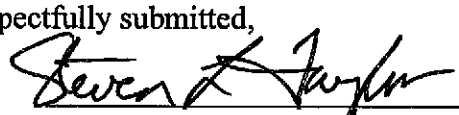
In addition, this outside-record claim arises out of defendant's self-serving post-conviction affidavit, which the Tenth District correctly rejected, stating that "the record

contains significant evidence relating to the voluntary nature of appellant's waiver" and that defendant's "affidavit lacks credibility because it conflicts in a number of respects with facts established in the record." *Turner II*, at ¶¶ 16, 40. "The record reflects that appellant's jury waiver was knowing and voluntary." Id. at ¶ 40. This Court rejected a challenge to the validity of the jury waiver as well. *Turner I*, at ¶¶ 22-35.

IAC and "Extreme Intoxication": Defendant errs in contending that appellate counsel should have raised an IAC claim regarding extreme intoxication. Stebbins' affidavit bases this claim on an interview transcript and an "investigative follow-up," both of which were outside-record matters that could not be raised on appeal. In any event, the inevitable conclusion from all of the evidence was that defendant's intoxication was not so pronounced, given defendant's meticulous planning and deliberate actions in carrying out his plan. Defendant's voluntary intoxication is at most a weak mitigating factor. *Turner I*, at ¶ 93. "Turner's advance preparations suggest that intoxication had little, if anything, to do with these murders." Id.

Constitutional Challenges: Appellate counsel in fact did raise various constitutional challenges, including the claimed inadequacy of Ohio's proportionality review, see Brief, at pp. 27-28 (attached), and this Court summarily rejected them. *Turner I*, at ¶ 64.

Respectfully submitted,



STEVEN L. TAYLOR 0043876
(Counsel of Record)
Assistant Prosecuting Attorney
Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this 2nd day of Oct., 2007, to David C. Stebbins and William S. Lazarow, 400 South Fifth Street, Suite 202, Columbus, Ohio 43215, Counsel for Defendant-Appellant.

Steven L. Taylor

STEVEN L. TAYLOR 0043876
Assistant Prosecuting Attorney

STATE OF OHIO,
COUNTY OF FRANKLIN, SS:

AFFIDAVIT

Now comes Steven L. Taylor, Affiant herein, and having been duly cautioned and sworn, states as follows:

1. That he is an Assistant Prosecuting Attorney for Franklin County, Ohio.

2. That he is counsel of record in *State v. Michael Turner*, Supreme Court Case No. 03-346.

3. That he is attaching true and accurate copies of the following materials to the State's Memorandum Opposing Application for Reopening: (1) a printout of this Court's docket; (2) a printout of the docket from the United States District Court for the Southern District of Ohio in *Turner v. Hudson*, Dist. Ct. No. 2:07-cv-00595; (3) an excerpt of the direct-appeal appellate brief filed by defendant Turner's former appellate counsel in the present case on August 11, 2003; (4) the motion for stay of execution filed on defendant Turner's behalf in this Court on May 11, 2005; (5) the notice of substitution of counsel filed on defendant Turner's behalf in this Court on August 15, 2006; (6) excerpts of the original post-conviction petition filed on defendant Turner's behalf in Common Pleas No. 01CR-3615 on October 20, 2003; (7) excerpts of the amended post-conviction petition filed on defendant Turner's behalf in Common Pleas No. 01CR-3615 on December 4, 2003; (8) excerpts of the amended federal habeas petition filed on defendant Turner's behalf in *Turner v. Hudson*, Dist. Ct. No. 2:07-cv-00595, on July 31, 2007.

FURTHER AFFIANT SAYETH NOT.

STEVEN L. TAYLOR
Assistant Prosecuting Attorney
Affiant

The foregoing was SWORN and SUBSCRIBED to before me by Steven L. Taylor, Affiant, a person who is personally known to me, this 1st day of October, 2007.

NOTARY PUBLIC

LAURA M. RAYCE
Attorney at Law
Notary Public, State of Ohio
My Commission Has No Expiration
Section 147.03 R.C.

OHIO SUPREME COURT DOCKET

The Supreme Court of Ohio
Clerk's Office
65 South Front Street, 8th Floor
Columbus, Ohio 43215-3431
614.387.9000
614.387.9530

Sandra H. Grosko
Interim Clerk of Court

Search Results: Case Number 2003-0346

The Supreme Court of Ohio
CASE INFORMATION

GENERAL INFORMATION

Case: **2003-0346** Death Penalty Case (offense committed on or after 1/1/95)
Filed: 02/19/03
Status: Case Is Disposed

State of Ohio v. Michael R. Turner

PARTIES and ATTORNEYS

Turner, Michael R. (Appellant) Represented by: Wright, Carol (29782) , Counsel of Record Barstow, Todd (55834) Edwards, William (30048) Lazarow, William (14625)
State of Ohio (Appellee) Represented by: Taylor, Steven (43876) , Counsel of Record Gilbert, Seth (72929) O'Brien, Ronald (17245) Saling, Heather (64976)

PRIOR JURISDICTION

Jurisdiction Information	Prior Decision Date	Case Number(s)
Franklin County, 10th District	01/15/2003	01CR063615

DOCKET ITEMS

A-1

- Most documents that were filed in Supreme Court cases after December 1, 2006, are scanned. They are available for viewing via the online dockets, generally within one business day from their date of filing.
- Supreme Court orders that were issued after January 1, 2007, are also available via the online docket as PDFs. Although original orders issued by the Court bear the signature of the Chief Justice, the signature usually will not appear in the online versions. In all other respects, the online versions will be identical to the original signed orders on file with the Clerk's Office.
- A  symbol in an online docket denotes a scanned filing or an electronic version of a Supreme Court order. Clicking the icon opens an image of the filing or order.

Date Filed	Description
02/19/03	Notice of appeal of Michael R. Turner *Filed by:* Turner, Michael
02/19/03	Copy of entry of appointment of counsel *Filed by:* Turner, Michael
02/19/03	Copy of praecipe to court reporter *Filed by:* Turner, Michael
02/20/03	Copy of notice of appeal sent to clerk of court of common pleas
02/20/03	Order to clerk of court/custodian to certify record
04/21/03	Record
04/21/03	Clerk's notice of filing of record
07/10/03	Stipulation to extension of time to file merit brief to 08/11/03 *Filed by:* Turner, Michael
07/14/03	Motion for stay of execution set for January 15, 2004 *Filed by:* Turner, Michael
	07/24/03: Granted
07/21/03	Designation of counsel of record Steven L. Taylor; Heather R. Saling will remain as co-counsel *Filed by:* State of Ohio
08/11/03	Appellant's merit brief *Filed by:* Turner, Michael
09/19/03	Stipulation to extension of time to file merit brief to 10/30/03 *Filed by:* State of Ohio
10/30/03	Motion for return of items improvidently transmitted in the appellate record *Filed by:* State of Ohio
	12/24/03: Granted; Clerk shall return items to Clerk of the Franklin County Common Pleas Court
10/30/03	Appellee's merit brief *Filed by:* State of Ohio
12/31/03	Return of portions of record to clerk of court/custodian
10/06/04	Application for interim attorney fees filed by W. Joseph Edwards
	12/10/04: Granted in the amount of $3,575.00.

A-2

11/16/04	Notice of oral argument to be held January 18, 2005
01/07/05	List of additional authorities *Filed by:* State of Ohio
01/18/05	Oral Argument Held
05/11/05	**DECISION: Affirmed; sentence to be carried into execution 8/9/05. See opinion at 2005-Ohio-1938.**
05/11/05	Motion for stay of execution pending disposition of available state remedies *Filed by:* Turner, Michael
	06/06/05: Granted
05/13/05	Return receipt received by Steven Taylor
05/13/05	Return receipt received by William Edwards, Esq.
05/27/05	Certified copy of judgment entry/mandate sent to clerk
06/01/05	Return receipt received by Clerk of Courts
06/02/05	Return receipt received by John Barron
06/02/05	Return receipt received by Sandra Shaffer
06/08/05	Return receipt received by Clerk of Courts
06/08/05	Return receipt received by William Edwards, Esq.
06/09/05	Return receipt received by John Barron
06/09/05	Return receipt received by Sandra Shaffer
06/10/05	Return receipt received by Steven Taylor
06/13/05	Return receipt received by Warden
07/11/05	Application for attorney fees by Todd Barstow
	10/03/05: Granted in the amount of $2,953.23
08/08/05	Return of record to clerk of court/custodian
08/07/06	Motion to set execution date *Filed by:* State of Ohio
	10/04/06: Denied
08/15/06	Notice of substitution of Carol A. Wright and William Lazarow for David Bodiker and Richard Vickers as counsel for appellant *Filed by:* Turner, Michael
08/15/06	And designation of Carol A. Wright as counsel of record *Filed by:* Turner, Michael
08/15/06	Memo opposing motion to set execution date *Filed by:* Turner, Michael
07/30/07 View	Motion for appointment of counsel for application to reopen *Filed by:* Turner, Michael
View	08/13/07: Granted; David C. Stebbins and William S. Lazarow of Columbus, Ohio are appointed to represent appellant in this case

A-3

08/08/07 View	Memo opposing motion for appointment of counsel for application to reopen *Filed by:* State of Ohio
09/07/07 View	Application for reopening under S.Ct.Prac.R. XI(6) *Filed by:* Turner, Michael

Back

Supreme Court | State of Ohio

Question or Comments?

ECMS Online 1.2.9

A-4

FEDERAL DISTRICT COURT DOCKET

CASREF, HABEAS

U.S. District Court
Southern District of Ohio (Columbus)
CIVIL DOCKET FOR CASE #: 2:07-cv-00595-MRB-MRM

Turner v. Warden
Assigned to: Judge Michael R. Barrett
Referred to: Magistrate Judge Michael R Merz
Cause: 28:2254 Ptn for Writ of H/C - Stay of Execution

Date Filed: 01/23/2007
Jury Demand: None
Nature of Suit: 535 Death Penalty - Habeas Corpus
Jurisdiction: Federal Question

Petitioner

Michael R Turner

represented by **Carol Ann Wright**
1450 Liberty Center
1001 Liberty Avenue
Pittsburgh, PA 15222
412-894-0780
Fax: 412-355-2505
Email: Carol_Wright@fd.org
TERMINATED: 04/03/2007
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

David Clark Stebbins
400 South Fifth Street - 2
Suite 202
Columbus, OH 43215
614-228-9058
Email: david@dstebbins.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

William Sheldon Lazarow
400 S Fifth Street
Suite 202
Columbus, OH 43215
614-228-9058
Fax: 614-221-8601
Email: billlazarow@aol.com
ATTORNEY TO BE NOTICED

V.

Respondent

Warden
Stuart Hudson

represented by **Sarah Hadacek**
Ohio Attorney General's Office
30 E Broad Street

B-1

Columbus, OH 43215
614-728-7055
Email: shadacek@ag.state.oh.us
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas E Madden
Ohio Attorney General's Office
30 East Broad Street, 23rd Floor
Columbus, OH 43215
614-728-7055
Fax: 614-728-8600
Email: tmadden@ag.state.oh.us
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
01/23/2007	1	Remark/ Civil Cover Sheet. (rew) (Entered: 01/23/2007)
01/23/2007	2	MOTION for Leave to Proceed in forma pauperis by Petitioner Michael R Turner. (rew) (Entered: 01/23/2007)
01/23/2007	3	NOTICE of Intention to file habeas petition. (rew) (Entered: 01/23/2007)
01/23/2007	4	MOTION to appoint Counsel by Petitioner Michael R Turner. (rew) (Entered: 01/23/2007)
01/24/2007	5	ORDER REFERRING CASE to Magistrate Judge Michael R. Merz. Signed by Judge Michael R. Barrett on 1/24/2007. (ba,) (Entered: 01/24/2007)
01/25/2007		Notation ORDER granting 2 Motion for Leave to Proceed in forma pauperis. Signed by Judge Michael R Merz on 1/25/2007. (Merz, Michael) (Entered: 01/25/2007)
01/25/2007	6	ORDER APPOINTING COUNSEL, GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS, AND SETTING CERTAIN PROCEDURES - Carol Wright is appointed to act as trial attorney with William Sheldon Lazarow serving as co-counsel for Michael R Turner. The Clerk shall serve a copy of this Order on James Canepa, Section Chief, Capital Crimes Section . Signed by Judge Michael R Merz on 1/25/07. (dp1) (Entered: 01/25/2007)
01/29/2007	7	MOTION Modify Appointment Order re 6 Order on Motion to Appoint Counsel, by Petitioner Michael R Turner. (Wright, Carol) (Entered: 01/29/2007)
01/29/2007		Notation ORDER granting 7 Motion to modify rate of compensation for Wm. Lazarow to $163.00. Signed by Judge Michael R Merz on 1/29/2007. (Merz, Michael) (Entered: 01/29/2007)
02/01/2007	8	NOTICE of Appearance by Sarah Hadacek Respondent Warden

B-2

		(Hadacek, Sarah) (Entered: 02/01/2007)
02/01/2007	9	NOTICE of Appearance by Thomas E Madden Respondent Warden (Madden, Thomas) (Entered: 02/01/2007)
02/02/2007	10	Pretrial Conference set for 3/6/2007 09:30 AM by telephone before Judge Michael R Merz. Counsel in this case shall be contacted at the number listed on the docket unless the Court is otherwise informed. The parties shall file a Fed. R. Civ. P. 26(f) Report not later than 2/2/2007. Signed by Judge Michael R Merz on 2/2/07. (dp1) Additional attachment(s) added on 2/2/2007 (dp1). Modified on 2/2/2007 to correct R26 filing date (dp1). Modified on 2/5/2007 to correct signed date (dp1). (Entered: 02/02/2007)
02/02/2007		Notice of Correction - Text of 10 has been corrected to accurately reflect the date of filing R26(f) report as appears in document: 3/2/2007 (dp1) (Entered: 02/02/2007)
02/24/2007	11	MOTION to Continue *Preliminary Pretrial Conference* by Petitioner Michael R Turner. (Wright, Carol) (Entered: 02/24/2007)
02/25/2007		Notation ORDER granting 11 Motion to Continue pretrial conference to March 7, 2007, at 9:00 a.m. Signed by Judge Michael R Merz on 2/25/2007. (Merz, Michael) (Entered: 02/25/2007)
02/26/2007	12	RULE 26(f) REPORT *Joint Agreement* by Respondent Warden. (Hadacek, Sarah) (Entered: 02/26/2007)
03/07/2007		Minute Entry for proceedings held before Judge Michael R Merz : Initial Pretrial Conference held on 3/7/2007 and attended via telephone by Carol Wright, William Lazarow, Sarah Hadacek and Thomas Madden. (Court Reporter MRM070307-081110.) (dp1) (Entered: 03/07/2007)
03/07/2007	15	SCHEDULING ORDER: Initial petition shall be filed not later than 6/15/2007. Amendments to initial petition due 8/1/2007. Respondent's answer and return of writ due 11/1/2007. Petitioner's reply due 2/1/2008. Discovery due by 1/3/2008. All evidentiary hearing motions shall be due 3/1/2008. Signed by Judge Michael R Merz on 3/7/07. (dp1) (Entered: 03/07/2007)
04/02/2007	16	MOTION to Substitute Attorney by Petitioner Michael R Turner. (Wright, Carol) (Entered: 04/02/2007)
04/03/2007		Notation ORDER granting 16 Motion to Substitute Attorney. Added attorney David Clark Stebbins for Michael R Turner. Attorney Carol Ann Wright terminated . Signed by Judge Michael R Merz on 4/3/2007. (Merz, Michael) (Entered: 04/03/2007)
04/19/2007		CJA 30: Authorization to Pay Carol A. Wright in Death Penalty Proceedings Voucher # 070130000004, interim 1. Signed by Judge Michael R Merz on 04/16/07. (jmc1,) (Entered: 04/19/2007)
06/15/2007	17	PETITION for Writ of Habeas Corpus, filed by Petitioner Michael R Turner, Respondent Warden. (Stebbins, David) (Entered: 06/15/2007)

B-3

06/16/2007	18	MOTION for Leave to File *Substitute Petition* by Petitioner Michael R Turner. (Stebbins, David) (Entered: 06/16/2007)
06/16/2007	19	PETITION for Writ of Habeas Corpus *Substitute Petition*, filed by Petitioner Michael R Turner, Respondent Warden. (Stebbins, David) (Entered: 06/16/2007)
06/19/2007		Notation ORDER granting 18 Motion for Leave to File Substitute Petition. Signed by Judge Michael R Merz on 6/19/2007. (Merz, Michael) (Entered: 06/19/2007)
07/31/2007	20	First PETITION for Writ of Habeas Corpus *Amended*, filed by Petitioner Michael R Turner, Respondent Warden. (Lazarow, William) (Entered: 07/31/2007)
08/08/2007		CJA 30: Authorization to Pay William Lazarow in Death Penalty Proceedings Voucher # 070315000002.. Signed by Judge Michael R Merz on 07/30/2007. (gh1,) (Entered: 08/28/2007)

B-4

EXCERPT OF DIRECT-APPEAL APPELLATE BRIEF

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Appellee,	:	
	:	Case No. 03-0346
vs.	:	
	:	
MICHAEL R. TURNER,	:	
	:	
Appellant.	:	

MERIT BRIEF OF APPELLANT MICHAEL R. TURNER

W. JOSEPH EDWARDS
Attorney at Law
Supreme Court No. 0030048
495 South High Street, Suite 100
Columbus, Ohio 43215
Telephone: (614) 224-8166
Facsimile: (614) 224-8340

RON O'Brien
Prosecuting Attorney
Supreme Court No. 0017245
HEATHER R. SALING
Prosecuting Attorney
Supreme Court No. 0064976
Franklin County Prosecutor's Office
373 South High Street, 14th Floor
Telephone: (614) 462-3555

COUNSEL FOR APPELLEE

TODD W. BARSTOW
Attorney at Law
Supreme Court No. 0055834
4185 East Main Street
Columbus, Ohio 43215
Telephone: (614) 338-1800
Facsimile: (614) 338-2247

COUNSEL FOR APPELLANT

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 that 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 vs. 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 vs. 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. Section 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 identity 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 vs. Steffen* (1987), 31 Ohio St.3d 111, 509 N.E.2d 383, 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.

C-3

MOTION FOR STAY OF EXECUTION OF SENTENCE

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	CASE NO. 03-346
Appellee-Respondent,	:	Court of Appeals Case No. 04AP-1143
v.	:	Common Pleas Case No. 01CR-06-3615
MICHAEL R. TURNER,	:	
Appellant-Petitioner.	:	**This is a death penalty case.**

MOTION FOR STAY OF EXECUTION OF DEATH SENTENCE PENDING DISPOSITION OF AVAILABLE STATE REMEDIES

RON O'BRIEN
Prosecuting Attorney
Franklin County, Ohio

SETH GILBERT (0072929)
Assistant Prosecuting Attorney

Franklin County Prosecutor's Office
373 South High Street, 13th Floor
Columbus, Ohio 43215
(614) 462-3555
COUNSEL FOR APPELLEE

DAVID H. BODIKER
Ohio Public Defender

RICHARD J. VICKERS (0032997)
Assistant State Public Defender
Counsel of Record

Office of the Ohio Public Defender
8 E. Long Street, 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394
Fax: (614) 644-0703
COUNSEL FOR APPELLANT-PETITIONER

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	CASE NO. 03-346
Appellee-Respondent	:	Court of Appeals Case No. 04AP-1143
v.	:	Common Pleas Case No. 01CR-06-3615
MICHAEL R. TURNER,	:	
Appellant-Petitioner.	:	**This is a death penalty case.**

MOTION FOR STAY OF EXECUTION OF DEATH SENTENCE PENDING DISPOSITION OF AVAILABLE STATE REMEDIES

Appellant, Michael R. Turner, respectfully moves this Court for an Order continuing his stay of execution pending exhaustion of his available state remedies. On October 20, 2003, Mr. Turner timely filed his O.R.C. § 2953.21 post-conviction petition in the Court of Common Pleas, Franklin County, Ohio. Those proceedings are now on appeal to the Tenth Appellate District. The reasons for this motion are set forth in the attached Memorandum.

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender

RICHARD J. VICKERS (0032997)
Assistant State Public Defender
Counsel of Record

Office of the Ohio Public Defender
8 East Long Street, 11th floor
Columbus, Ohio 43215
(614) 466-5394
Counsel for Appellant-Petitioner

D-2

MEMORANDUM

On May 11, 2005, this Court affirmed Michael Turner's convictions and death sentence and set an execution date of August 9, 2005 for Mr. Turner. (Exhibit A). Previously, this Court granted a stay of execution for Mr. Turner, pending his direct appeal.

Mr. Turner now moves this Court for an order continuing his stay of execution pending the exhaustion of available post-conviction remedies, including all appeals. Under State v. Steffen, 70 Ohio St. 3d 399 (1994), Mr. Turner is entitled to a stay of execution until he has "exhausted ... one round of post-conviction relief, and one motion for delayed reconsideration ... in the court of appeals ...." Id. at 412. See also State v. Glenn, 33 Ohio St. 3d 601 (1987).

On October 20, 2003, Mr. Turner filed his Petition to Vacate or Set Aside Sentence Pursuant to Ohio Revised Code Section 2953.21 (Exhibit B). The trial court denied the petition without a hearing. Mr. Turner filed a timely notice of appeal to the Tenth Appellate District. State v. Turner, Case No. 04 AP-1143 (Franklin App. Ct.). Oral argument in the appeal was held on April 28, 2005. (Exhibit C) The appeal is pending. If the court of appeals affirms the trial court's denial of relief, Mr. Turner intends to file a discretionary appeal and a memorandum in support of jurisdiction with this Court pursuant to SCt. R. III. Thus, a stay is needed to ensure that the issues raised in his post-conviction petition are fully resolved. This Court has granted similar motions. See, e.g., State v. Raglin, 85 Ohio St. 3d 1429 (1999).

WHEREFORE, Mr. Turner respectfully requests that this Honorable Court grant a stay of execution pending the exhaustion of available state remedies, and more specifically, his post-conviction proceedings, in accordance with State v. Steffen, 70 Ohio St. 3d 399 (1994).

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender

RICHARD J. VICKERS (0032997)
Assistant State Public Defender
Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MOTION TO CONTINUE STAY OF EXECUTION FOR DISPOSITION OF AVAILABLE STATE REMEDIES was sent by First Class, United States Mail to Ron O'Brien, Franklin County Prosecuting Attorney, and Seth Gilbert, Assistant Prosecuting Attorney, 373 South High Street, 13th Floor, Columbus, Ohio 43215, on the 11th day of May, 2005.

Richard J. Vickers (0032997)
Assistant State Public Defender
Counsel for Appellant-Petitioner

The Supreme Court of Ohio

State of Ohio

v.

Michael R. Turner

Case No. 03-346

JUDGMENT ENTRY

APPEAL FROM THE
COURT OF COMMON PLEAS

This cause, here on appeal from the Court of Common Pleas for Franklin County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Common Pleas is affirmed consistent with the opinion rendered herein.

Furthermore, it appearing to the Court that the date heretofore fixed for the execution of judgment and sentence of the court of common pleas has passed.

IT IS HEREBY ORDERED by the Court that said sentence be carried into execution by the Warden of the Southern Ohio Correctional Facility or, in his absence, by the Deputy Warden on Tuesday, the 9th day of August, 2005, in accordance with the statutes so provided.

IT IS FURTHER ORDERED that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Warden of the Southern Ohio Correctional Facility and that said Warden shall make due return thereof to the Clerk of the Court of Common Pleas for Franklin County.

IT IS FURTHER ORDERED by the Court that a mandate be sent to the Court of Common Pleas for Franklin County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Common Pleas for Franklin County for entry.

(Franklin County Court of Common Pleas; No. 01CR063615)

THOMAS J. MOYER
Chief Justice

EXHIBIT
A

D-5

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

STATE OF OHIO,	:	Case No. 01CR-06-3615
Plaintiff-Respondent,	:	Judge Patrick M. McGrath
-vs-	:	POST-CONVICTION PETITION
MICHAEL R. TURNER,	:	O.R.C. § 2953.21
Defendant-Petitioner.	:	THIS IS A CAPITAL CASE

I. CASE HISTORY

TRIAL:

Charge (include specifications)	Disposition
Count 1 – Aggravated murder 2903.01.	Guilty
Specification –	
(1) Purposeful killing of or the attempt to kill two or more persons 2929.04(A)(5)	Guilty
(2) Prior attempt of purposeful killing of or the attempt to kill two or more persons 2929.04(A)(5)	Guilty
(3) The victim was a witness to an offense who was purposely killed to prevent the victim's testimony 2929.04(A)(8)	Guilty
Sentence	Death
Count 2 – Aggravated murder 2903.01.	Guilty
Specification –.	
1) Purposeful killing of or the attempt to kill two or more persons 2929.04(A)(5)	Guilty
(2) Prior attempt of purposeful killing of or the attempt to kill two or more persons 2929.04(A)(5)	Guilty
Sentence	Death

EXHIBIT
B

D-6

JOHN O'GRADY
CLERK OF COURTS

FRANKLIN COUNTY

CLERK OF THE COURT OF THE TENTH DISTRICT COURT OF APPEALS
FRANKLIN COUNTY, OHIO
APPEALS DIVISION

MARCH 24, 2005

CASE NUM: 04APA-10-1143
TRIAL COURT NUM: 01CR3615

STATE OF OHIO -VS- MICHAEL R TURNER

THIS APPEAL HAS BEEN SCHEDULED FOR ORAL ARGUMENT ON THURSDAY APRIL 28, 2005 AT 09:00 A.M. IN COURTROOM 23B AT 373 SOUTH HIGH STREET.

ARGUMENT TIME IS FIFTEEN MINUTES PER SIDE. PARTICIPANTS SHALL NOTE THEIR APPEARANCE WITH THE RECEPTIONIST PRIOR TO ARGUMENT.

ARGUMENT MAY BE WAIVED; SEE LOCAL RULE 10.
ARGUMENT WILL NOT BE PERMITTED IF NO BRIEF HAS BEEN FILED.

John O'Grady
Clerk of the Court of the Tenth District Court of Appeals
Appeals Division
373 South High Street 23rd Fl
Columbus OH 43215-6312

04APA-10-1143
TURNE - ORAL ARGUMENT

D-7

RICHARD J. VICKERS
8 EAST LONG STREET
11TH FLOOR
COLUMBUS OH 43215

EXHIBIT
C

NOTICE OF SUBSTITUTION OF COUNSEL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	
v.	:	Case No. 2003-0346
MICHAEL R. TURNER,	:	THIS IS A DEATH PENALTY CASE
Appellant.	:	

NOTICE OF SUBSTITUTION OF COUNSEL

Carol Wright (0029782)
(Counsel of Record)
318 Berger Alley
Columbus, Ohio 43215
(614) 224-2999
(614) 224-1153

and

William Lazarow (0014625)
Attorney at Law
400 S. Fifth Street, Suite 202
Columbus, Ohio 43215
(614) 228-9058

Counsel for Appellant
Michael Turner

Ronald O' Brien
Franklin County Prosecuting Attorney
Steven L. Taylor (0043876)
Seth Gilbert (0072929)
Assistant Prosecuting Attorneys
373 S. High Street, 13th Flr.
Columbus, Ohio 43215
(614) 462-3555

Counsel for Appellee
State of Ohio

E-1

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	
v.	:	Case No. 2003-0346
MICHAEL R. TURNER,	:	THIS IS A DEATH PENALTY CASE
Appellant.	:	

NOTICE OF SUBSTITUTION OF COUNSEL

Now comes Appellant, Michael Turner, by and through counsel, and hereby notifies the Court that Attorneys Carol A. Wright and William Lazarow are hereby substituted for the Ohio Pubic Defenders, David Bodicker and Richard Vickers as counsel for Appellant Turner.

Approved:

David H. Bodicker (0016590)
Ohio Public Defender
8 East Long-11th FLr.
Columbus, Ohio 43215
(614) 466-0703

and

Richard Vickers (per phone auth 8/15/06)
Richard Vickers (0032997)
(Counsel of Record)
Assistant State Public Defender

Respectfully submitted,

Carol A Wright
Carol A. Wright (0029782)
(Counsel of Record)
318 Berger Alley
Columbus, Ohio 43206
(614) 224-2999

and

E-2

William Lazarow (0014625)
Attorney at Law
400 S. Fifth Street, Suite 202
Columbus, Ohio 43215
(614) 228-9058

Counsel for Appellant
Michael Turner

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Opposition to Motion to Set Execution Date was forwarded by regular U.S. Mail to Steven L. Taylor, Assistant Franklin County Prosecutor, 373 South High Street, 14th Floor, Columbus, Ohio 43215 on this 15th day of August, 2006.

Carol Wright
Carol Wright
Counsel for Michael Turner

EXCERPTS OF POST-CONVICTION PETITION

43947A01

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

STATE OF OHIO, Plaintiff-Respondent,	:	Case No. 01CR-06-3615
	:	Judge Patrick M. McGrath
-vs-	:	
	:	POST-CONVICTION PETITION
MICHAEL R. TURNER,	:	O.R.C. § 2953.21
Defendant-Petitioner.	:	**THIS IS A CAPITAL CASE**

I. CASE HISTORY

TRIAL:

Charge (include specifications)	**Disposition**
Count 1 – Aggravated murder 2903.01.	Guilty
Specification –	
(1) Purposeful killing of or the attempt to kill two or more persons 2929.04(A)(5)	Guilty
(2) Prior attempt of purposeful killing of or the attempt to kill two or more persons 2929.04(A)(5)	Guilty
(3) The victim was a witness to an offense who was purposely killed to prevent the victim's testimony 2929.04(A)(8)	Guilty
Sentence	Death
Count 2 – Aggravated murder 2903.01.	Guilty
Specification –.	
1) Purposeful killing of or the attempt to kill two or more persons 2929.04(A)(5)	Guilty
(2) Prior attempt of purposeful killing of or the attempt to kill two or more persons 2929.04(A)(5)	Guilty
Sentence	Death

43947A02

Date Sentenced:

Name of Attorneys: Tullis J. Rogers, Blaise Baker

Was this conviction the result of a (circle one): **Guilty Plea** No Contest Trial

If the conviction resulted in a trial, what was the length of the trial? **N/A**

Appeal to Court of Appeals

Number or citation: N/A

Appeal to Supreme Court of Ohio

Number or citation: Case No. 03-346

Disposition: Appellant's merit brief filed August 11, 2003.
Appellee's brief filed October 10, 2003

Name of Attorney(s): William Joseph Edwards and Todd Barstow

HAS A POST-CONVICTION PETITION BEEN FILED BEFORE IN THIS CASE?

[ ] YES [X] NO

OTHER RELEVANT CASE HISTORY: None.

43947A08

PETITIONER MICHAEL TURNER'S GROUNDS FOR RELIEF

First Ground for Relief

15. Petitioner hereby incorporates by reference all previous paragraphs as if fully rewritten herein.

16. Petitioner's inculpatory statements to police were not based on a knowing, voluntary, and intelligent waiver of his right against self-incrimination. State v. Otte, No. 76726, 2002 WL 69139 (Cuyahoga Ct. App. Jan. 25, 2001). Ex. 12, 29. As a result, Petitioner was deprived of his rights as guaranteed U.S. Const. amends V and XIV and Ohio Const. art. I §§ 1, 10 and 14; and was thereby prejudiced. Mincey v. Arizona, 437 U. S. 385 (1978); Arizona v. Fulminante, 499 U. S. 279 (1991).

17. Following his arrest by the Reynoldsburg Police Department, Mr. Turner was taken to police headquarters where booking procedures occurred at 11:15 p.m. on June 12, 2001. The transcript of Mr. Turner's audio taped statement to the police at page 30 indicates that he was too intoxicated to be immediately interviewed, however. He was allowed to "sleep it off" for two hours before detectives began an interrogation at 1:15 a.m. In the initial audio taped questioning on June 12, 2001, Mr. Turner consistently denies committing the offense and repeatedly indicates that he believes he was arrested on an alcohol related offense. As police questioning became more focused on the issue of Mr. Turner harming Ms. Turner and Mr. Seggarman, Michael related that he was confused, not feeling well and did not want to talk to the police without legal representation. The police persisted in asking about the offense and no attorney was provided for Mr. Turner. Ex. 13, 29

18. On June 13, 2001, a second interview was conducted and the audio tape begins "If you'll give me some (inaudible) I'll tell you everything that I can remember (inaudible) but you have to promise to get me some (inaudible) medication. (inaudible) Are you going to get me some more of this medication tonight? (inaudible)" During this questioning, Mr. Turner states repeatedly: "I have no idea" or "I don't know" when asked about specifics of the offenses. When asked about this questioning by this interviewer, Mr. Turner explained that he was extremely ill from the withdrawal from alcohol and cocaine. He realized he needed medication and had asked the police for medical care. He indicated that he was struggling to focus and maintain his attention. He felt anxious, depressed, agitated, irritable, confused and was having difficulty understanding the questions and deciding how to answer. He simply wanted the questioning to end and to receive medication to ease his symptoms of withdrawal. Although he could not remember the events related to the offense, he agreed with the statements made by the police in order to receive this medication.. Ex. 13, 29. On June 21, 2001 Petitioner was still suffering from severe alcohol withdrawal. Ex. 28

19. Mr. Turner was clearly requesting medication for his withdrawal symptoms at the time of the second questioning by the Reynoldsburg Police. His description of his physical and emotional state at the time of the questioning is consistent with the symptoms of alcohol withdrawal. Consequently, Mr. Turner's alcohol withdrawal prevented him from being able to knowingly and intelligently waive his Miranda rights. Furthermore, given that Mr. Turner was

undergoing alcohol withdrawal, his statements to the Reynoldsburg Police regarding the instant offense were extremely susceptible to suggestions and interpretations made by the police. Ex. 12, 29. The prosecutor utilized Petitioner's statements to establish his guilt. Tr.33-35. As a result, Petitioner's rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution were violated and he was prejudiced.

20. The prejudice flowing to Petitioner from his counsel's failure to move to suppress his statements is also illustrated by the following colloquy that occurred at the penalty phase hearing when the prosecutor cross-examined Dr. Haskins regarding Petitioner's truthfulness:

Q. Okay. Could you give us an opinion why he would lie when he chooses to lie?
A. Usually it makes him look a little better.
Q. You're certainly aware in reviewing that 60-plus transcript to the Reynoldsburg police he lied in the course of that transcript to the police officers numerous times, didn't he?
A. Yes, he did. Tr. 183.

21. Petitioner gave a lengthy unsworn statement not long before this testimony by Dr. Haskins. In his statement he expressed his remorse and sorrow for the deaths of Ms. Turner and Mr. Seggarman. He also stated that he accepted responsibility for his actions. Tr. 105. At the time of Petitioner's penalty phase hearing, remorse had been repeatedly recognized as a mitigating factor entitled to weight and effect. State v. Rojas, 64 Ohio St. 3d 131 (1992); State v. Green, 66 Ohio St. 3d 141 (1993); State v. Clifford Williams, 73 Ohio St. 3d 153 (1995); State v. Awkal, 76 Ohio St. 3d 324 (1996); State v. Dennis, 79 Ohio St. 3d 421 (1997); State v. Mitts, 81 Ohio St. 3d 223 (1998); State v. Clifton White, 85 Ohio St. 3d 433 (1999); State v. Stallings, 89 Ohio St. 3d 280 (2000). In its sentencing opinion, however, the three judge panel makes no reference to Petitioner's expressions of remorse and responsibility and consequently accorded them no weight and effect.

22. An evidentiary hearing should now be ordered in Petitioner's post-conviction proceeding to determine whether the effects of the drugs and alcohol Petitioner had ingested and the effects of his withdrawal from the drugs and alcohol rendered Petitioner's waiver of his constitutional right against self-incrimination was knowing, voluntary and intelligent. Mincey v. Arizona, 437 U. S. 385 (1978) State v. Otte, No. 76726, 2002 WL 69139 (Cuyahoga Ct. App. Jan. 25, 2001) Ex. 12, 13, 14, 29.

23. Petitioner supports this ground with evidence dehors the record that contains sufficient operative facts to demonstrate that his inculpatory statements to police were not based on a knowing, voluntary, and intelligent waiver of his right against self-incrimination. State v. Jackson, 64 Ohio St. 2d 107, 111 (1980). Petitioner must be granted a new trial or, at a minimum, discovery and an evidentiary hearing on this ground for relief.

Supporting Exhibits: 12, 13, 14, 28, 29.

Legal Authority in Support of Ground for Relief: Mincey v. Arizona, 437 U. S. 385 (1978)State v. Otte, No. 76726, 2002 WL 69139 (Cuyahoga Ct. App. Jan. 25, 2001); Arizona v.

Fulminante, 499 U.S. 279 (1991); State v. Rojas, 64 Ohio St. 3d 131 (1992); State v. Green, 66 Ohio St. 3d 141 (1993); State v. Clifford Williams, 73 Ohio St. 3d 153 (1995); State v. Awkal, 76 Ohio St. 3d 324 (1996); State v. Dennis, 79 Ohio St. 3d 421 (1997); State v. Mitts, 81 Ohio St. 3d 223 (1998); State v. Clifton White, 85 Ohio St. 3d 433 (1999); State v. Stallings, 89 Ohio St. 3d 280 (2000); State v. Jackson, 64 Ohio St. 2d 107, 111 (1980); U.S. Const., amends. V, VI, VIII, IX, XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

Second Ground for Relief:

24. Petitioner Turner incorporates all previous paragraphs as if fully rewritten herein.

25. Petitioner Turner's convictions and sentences are void and/or voidable because the police who interrogated Petitioner failed to honor Petitioner's clear and repeated requests for counsel and continued to interrogate Petitioner after his invocation of his right to counsel. Petitioner ultimately made inculpatory statements to the police. As a result, Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution, and §§ 2, 5, 9, 10, and 16, of Article I of the Ohio Constitution were violated and Petitioner was prejudiced

26. Following his arrest by the Reynoldsburg Police Department, Petitioner was taken to police headquarters where booking procedures occurred at 11:15 p.m. on June 12, 2001. Petitioner was too intoxicated to be immediately interrogated, however. He was allowed to "sleep it off" for two hours before detectives began an interrogation at 1:15 a.m. Tr. 184; Ex. 13. During this interrogation Petitioner Turner repeatedly denied stabbing Ms. Lyles and Mr. Steggerman. Ex. 13. The police utilized a variety of tactics to coerce inculpatory statements from Petitioner. Ex. 13. Finally, Petitioner made several unequivocal requests for counsel. Ex. 13. These requests were effectively ignored by the police interrogators. Ex. 13. Ultimately, the interrogation ended at 5:30 a.m. with Petitioner's request for counsel unfulfilled.

27. The interrogation was resumed later that morning. There the Petitioner was not given his Miranda warnings. Petitioner was obviously ill and was literally begging for "medication". Ex. 13, 29. His distress was such that he offered to tell the police "everything that I can remember.*** but you have to promise to get me some*** medication." Ex. 13. Petitioner's inculpatory statements to police occurred after Petitioner clearly invoked his right to counsel. The prosecutor utilized Petitioner's statements to establish his guilt. Tr.33-35. As a result, Petitioner's rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution were violated and he was prejudiced.

28. The United States Supreme Court in Edwards v. Arizona, 451 U.S. 477, 478 (1981), held that,

> When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to police-initiated interrogation after being again advised of his rights. An accused, such as petitioner, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation until counsel has been made available to him, unless the accused has himself initiated further communication, exchanges, or conversations with the police."

29. Here, Petitioner clearly invoked his right to counsel during a custodial interrogation by explicitly and repeatedly indicating that he wanted to talk to an attorney. A transcription of his interrogation by police is attached as Exhibit 13, at page 37 of his transcribed interrogation, Petitioner told the police "Anything I say I am going to get me a lawyer. That is the way it is going to be." At page 62 he stated, "Can I call my lawyer?". At page 63 the police

then inquired if Petitioner knew the name and telephone number of his attorney. When Petitioner recalled the telephone number, he asked police for the time of day. At page 63 Petitioner then attempted call his attorney.(page 65). The police continued the interrogation and Petitioner again asked for counsel by stating, at page 64, "I would like to have a lawyer help me with this." The police stated at page 64 that they "would give it a shot." Petitioner then identified his attorney as a public defender and asked the police to call for him (page 65). The police then dissuade Petitioner from contacting counsel by stating, "I can tell you straight up that to get you a public defender ... probably impossible. The court has to appoint them and they have to see if you got the money and so forth. **Like I said you have already made a couple of phone calls there**" (page 65). The police continued to interrogate Petitioner and he again stated his desire to speak with counsel (page 66). Petitioner explained that his desire for counsel was based on the comments of the police. ("You've got me to the point where I am scared to say anything (page 66). Nonetheless, the police continued the interrogation. Petitioner stated " you know I've done this a bunch of time (sic) and found it's best to say nothing. And I think this is one of them times.*** "If I had an attorney here that I could talk to and see what he said" (page 68).

30. In Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 2355 (1994), the Supreme Court held that, ... "a suspect need not speak with the discrimination of an Oxford don." However, a suspect, "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstance would understand to be a request for an attorney." Davis, at 2355. Petitioner was absolutely clear in his invocation of his right to counsel. Again in Minnick v. Mississippi, 489 U.S. 146, 111 S. Ct. 486 (1990), the Supreme Court held that, "a suspect who has invoked the right to counsel cannot be questioned regarding any offense unless an attorney is actually present."

31. By failing to honor Petitioner's clear and repeated requests for counsel and by continuing to interrogate Petitioner after his invocation of his right to counsel, the police deprived Petitioner of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution, and §§ 2, 5, 9, 10, and 16, of Article I of the Ohio Constitution. As a result, Petitioner was prejudiced.

32. Petitioner supports this ground with evidence dehors the record that contains sufficient operative facts to demonstrate lack a violation of Petitioner's constitutional rights the prejudice resulting therefrom at Petitioner's capital trial. State v. Jackson, 64 Ohio St. 2d 107, 111 (1980). Petitioner must be granted a new trial or, at a minimum, discovery and an evidentiary hearing on this ground for relief.

Supporting Exhibit: 13, 29.

Legal authority in support of this ground for relief: Strickland v. Washington, 466 U.S. 668 (1984); Wiggins v. Smith, ___ U.S. ___, 123 S. Ct. 2527, 2536 (2003); Edwards v. Arizona, 451 U.S. 477, 478 (1981); Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 2355 (1994); Minnick v. Mississippi, 489 U.S. 146, 111 S. Ct. 486 (1990); U.S. Const., amends. V, VI, VIII, and XIV; Ohio Const., art. I, §§ 2, 5, 9, 10 and 16.

F-7

Third Ground for Relief

439474.13

33. Petitioner Turner hereby incorporates by reference all preceding paragraphs as if fully rewritten herein.

34. Petitioner Turner was denied the effective assistance of counsel in the guilt-innocence determination phase as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. Petitioner's trial counsel unreasonably and prejudicially failed to ensure that he could withdraw his waiver of his constitutional right to trial by jury once the three judge panel rendered a verdict imposing the death penalty upon Petitioner. Strickland v. Washington, 466 U.S. 668 (1984); Williams v. Taylor, 120 S. Ct. 1495, 1513 (2000); Wiggins v. Smith, ___U.S. ___, 123 S. Ct. 2527, 2536 (2003).

35. Trial by jury in criminal cases is fundamental to the American scheme of justice: Duncan v. Louisiana, 391 U.S. 145, 149 (1968). "[W]e hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which -- were they to be tried in a federal court -- would come within the Sixth Amendment's guarantee." The right was also held to be so guaranteed to defendants in criminal cases tried in state courts by the Fourteenth Amendment [Id. at,162]. Most importantly, it is a right that is granted to the criminal defendant personally. State v. Kehoe, 59 Ohio App. 2d 315, 315-316 (1978).

36. In Ohio cases, "[e]very reasonable presumption should be made against the waiver, especially when it relates to a right or privilege so valuable as to be secured by the Constitution." Simmons v. State, 75 Ohio St. 364 (1905); see also the Ohio Const., art. I, § 5 ("the right to trial by jury shall be inviolate").

37. The right to waive jury trial should not be casually usurped by counsel merely because counsel believes the evidence against a capital defendant is "overwhelming" (Ex. 2) or because counsel publicly announces that counsel finds the facts of the case "grotesque" Tr. 49 and make counsel "sick to my stomach." Ex. 1.

38. It is an understatement to say that the decision to waive a jury and try a capital case to a three judge panel is a crucial decision. A capital defendant who chooses to waive his right to a jury trial increases his possibility of receiving the death penalty and loses many of his appellate issues should the penalty of death be deemed appropriate. All twelve jurors must unanimously agree that the penalty of death be appropriate for capital punishment to be instituted. Only one juror need find the penalty to be inappropriate and a life sentence must them be instituted. R.C.§2929.03(D)(2) The consequence of a single juror dissenting from a death verdict ensures that "the trial court is required to sentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment:" Ohio v. Springer 63 Ohio St. 167 (1992); Ohio v. Brooks, 75 Ohio St.3d 148 (1996).

39. Petitioner Tuner's trial counsel caused the waiver of Petitioner's right to a trial by jury on October 24, 2002 and a three judge panel was selected. Tr. 5-13;59-66. Further, the record discloses that the Court failed to engage in an in-depth colloquy with Petitioner as to the

ramifications of waiving a jury. The colloquy was limited solely to the following. The Court inquired if Petitioner understood that he was waiving his right to "have a jury trial in this case?"; the Court informed Petitioner "you're waiving your right to have a jury of 12 persons hear and decide the case, the evidence, and render a unanimous verdict in the case as to the issues"; the Court informed Petitioner, "the alternative to a jury waived trial, the alternative is to have a panel of three judges hear and decide the case and decide the case on all the issues"; the Court inquired if by signing the jury waive it was Petitioner's desire to waive jury and that the decision was made after consulting with counsel. Tr. 64 The trial court then asked defense counsel if counsel wished to make any comment and counsel refused to do so. Tr. 65 The record is thus devoid of any facts as to what, if anything, defense counsel advised Petitioner regarding his constitutional waiver of his right to a jury. Further there is clearly no attempt by Petitioner's counsel to ensure that if the panel returned a death verdict against Petitioner that he could withdraw his waiver of his constitutional right to trial by jury. Tr. 65

40. The unreasonable nature of trial counsel's effectuation of Petitioner's waiver of his right to have his sentence decided by a Franklin County jury is further underscored by the frank admission of the Franklin County Prosecutor's office and a judge of the Franklin County Common Pleas Court that the death penalty is imposed less frequently by jurors in Franklin County as opposed to jurors in other Ohio counties. Ex. 15, 16.

41. Moreover, Ohio's three judge panel provision in capital cases has no counterpart in other state statutes, and therefore the standards of practice relating to this technique are uniquely Ohio standards. Ex.. 17, 18. As a result, a very specific standard of practice has developed in Ohio with respect to jury waivers in capital cases. This is so because of the extraordinary and unusual risks associated with waiving a jury trial in favor of a three judge panel. These risks are heightened particularly in a case where guilt is not an issue and the primary dispute will be whether the aggravating circumstances outweigh the mitigating factors in determining the appropriate punishment. Therefore, the jury trial right should never be waived without reservation of the option to withdraw the waiver in the event that the three judge panel returns a death sentence. Moreover, the reservation of this right should be made in open court and on the record. Ex. 17, 18, 19, 20.

42. This practice of reserving the right to withdraw the waiver of jury was in effect in Franklin County, the venue of Petitioner's trial, at least thirteen (13) years prior to Petitioner's capital trial. Ex. 17, 18. A similar process was utilized in a capital case in Sandusky County as recently as August 28, 2003. Ex. 19, 20. Therefore, the failure of Petitioner's trial counsel to be aware of, and to utilize such a procedure in Petitioner's case constitutes unreasonable and deficient performance that fully prejudiced.

43. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." United States v. Cronic, 466 U.S. 648, 654 (1984). Unless a criminal defendant receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." Cuyler v. Sullivan, 446 U.S. 335, 343 (1980). The right is fundamental and its importance and centrality increase with the gravity of the offense. In capital cases, in which the imposition of the ultimate penalty is sought, the highest standard for effective assistance of counsel applies. A specific act

or omission of defense counsel can be so deficient as to constitute, without more, the deprivation of effective assistance of counsel. See, e.g., Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995). The actions of Petitioner Turner's trial counsel in causing the waiver of his right to trial by jury in favor of a three judge panel, without reserving his right to withdraw that waiver upon a verdict of death by the panel, constituted an omission of that was both deficient and prejudicial.

44. Petitioner Turner supports this ground with evidence dehors the record that contains sufficient operative facts to demonstrate lack of competent counsel and the prejudice resulting from counsel's ineffectiveness. State v. Jackson, 64 Ohio St. 2d 107, 111 (1980). Petitioner must be granted a new penalty phase hearing or, at a minimum, discovery and an evidentiary hearing on this ground for relief.

Supporting Exhibits: 2, 15, 16, 17, 18, 19, 20.

Legal Authority in Support of Ground for Relief: Strickland v. Washington, 466 U.S. 668 (1984); Williams v. Taylor, 120 S. Ct. 1495, 1513 (2000); Wiggins v. Smith, ___ U.S. ___, 123 S. Ct. 2527, 2536 (2003); Duncan v. Louisiana, 391 U.S. 145, 149 (1968); State v. Kehoe, 59 Ohio App. 2d 315, 315-316 (1978); Simmons v. State, 75 Ohio St. 364 (1905); Ohio Const., art. I, § 5; Ohio v. Springer, 63 Ohio St. 167 (1992); Ohio v. Brooks, 75 Ohio St.3d 148 (1996); United States v. Cronic, 466 U.S. 648, 654 (1984); Cuyler v. Sullivan, 446 U.S. 335, 343 (1980); Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995); State v. Jackson, 64 Ohio St. 2d 107, 111 (1980); U.S. Const. amends. V, VI, VIII, and XIV; O.R.C. § 2929.03.

Fourth Ground for Relief

45. Petitioner Turner hereby incorporates by reference all preceding paragraphs as if fully rewritten herein.

46. Petitioner Turner was denied the effective assistance of counsel in the guilt-innocence determination phase as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. Petitioner's trial counsel unreasonably and prejudicially failed to ensure that he could withdraw his waiver of his plea to all counts and specifications charged against him once the three judge panel rendered a verdict imposing the death penalty upon Petitioner. Strickland v. Washington, 466 U.S. 668 (1984); Williams v. Taylor, 120 S. Ct. 1495, 1513 (2000); Wiggins v. Smith, ___U.S. ___, 123 S. Ct. 2527, 2536 (2003). The Sixth Amendment requires that trial counsel undertake a reasonable investigation and preparation for the guilt phase. The duty of defense counsel is heightened in capital cases. Combs v. Coyle, 205 F.3d 269, 289-90 (6th Cir. 2000).

47. Defense counsel caused Petitioner to plead guilty to all counts and death specifications charged against Petitioner because counsel believed the evidence against a Petitioner was "overwhelming" (Ex. 2) and because, as counsel announced publicly, that counsel found the facts of the case "grotesque" Tr. 49 and that the 911 tape obtained by the police made counsel "sick to my stomach." Ex. 1.

48. The facts of virtually all capital murder cases can be deemed "grotesque" and may offend the sensibilities of the attorneys who represent the perpetrators of the capital crimes. That being said, defense counsel in a capital case is ethically required to advocate in a zealous, skillful manner regardless of the horrific facts of the crimes charged against the defendant. That is why the Ohio Supreme Court has mandated that capital defense counsel must be certified, through training and experience, prior to being appointed to provide representation in a capital case. Sup R 20.

49. Petitioner Tuner's trial counsel caused Petitioner's plea on December 16, 2002. Tr. 11-20. The record clearly reveals that there was no attempt by Petitioner's counsel to ensure that if the panel returned a death verdict against Petitioner that he could withdraw his waiver of his constitutional right to trial by jury. Tr. 11-20;42-43.

50. Having entered a guilty plea to all counts and specifications, the risk that Petitioner would be sentenced to death was heightened. This is particularly so in a case where guilt is not an issue and the primary dispute will be whether the aggravating circumstances outweigh the mitigating factors in determining the appropriate punishment. Defense counsel were fully aware that their preparations for the penalty phase of Petitioner's capital trial were woefully incomplete. Ex. 2. The testifying psychologist did not provide her report to defense counsel until December 16, 2002, the very day of the penalty phase hearing. Tr. 6. Although Petitioner's "alcoholism" was presented as the critical mitigating factor to be presented at the penalty phase (Tr. 49). Defense counsel failed to investigate, prepare and present the testimony of lay persons who had direct, firsthand knowledge of Petitioner's dependence on alcohol and the terrible effects of his drug and alcohol dependence on his life functioning. Instead, defense

counsel put on lay witnesses who had no personal knowledge of Petitioner's alcohol dependence. When defense counsel asked witness Reva Turner on direct examination about Petitioner's alcohol consumption, Ms. Turner replied that she did not know because Petitioner did not drink around her. Tr. 65-66 [2] Further, defense counsel presented Brandie Fox as a penalty phase witness. Although Ms. Fox testified that she believed Petitioner drank "a lot", she also testified that "he did not drink around me." Tr. 110. When counsel inquired, "Did you see him—did alcohol—did he ever have a drink around you at the house?", Brandie replied "Not that I can remember." Tr. 110.

51. Therefore, the plea should not have been entered without reservation of the option to withdraw the waiver in the event that the three judge panel returned a death sentence. Moreover, the reservation of this right should be made in open court and on the record. Ex. 19, 20.

52. This practice of reserving the right to withdraw a plea in a capital case is the appropriate and reasonable practice and should have been utilized in Petitioner's case. To do otherwise subjects a capital defendant, such as Petitioner, to entirely too much jeopardy. Therefore, the failure of Petitioner's trial counsel to be aware of, and to utilize such a procedure in Petitioner's case constitutes unreasonable and deficient performance that fully prejudiced. Ex. 17, 18.

53. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." United States v. Cronic, 466 U.S. 648, 654 (1984). Unless a criminal defendant receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." Cuyler v. Sullivan, 446 U.S. 335, 343 (1980). The right is fundamental and its importance and centrality increase with the gravity of the offense. In capital cases, in which the imposition of the ultimate penalty is sought, the highest standard for effective assistance of counsel applies. A specific act or omission of defense counsel can be so deficient as to constitute, without more, the deprivation of effective assistance of counsel. See, e.g., Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995). The actions of Petitioner Turner's trial counsel in causing him to enter a plea to all counts and death specifications, without reserving his right to withdraw that plea upon a verdict of death by the panel, constituted an omission of that was both deficient and prejudicial.

54. Petitioner Turner supports this ground with evidence dehors the record that contains sufficient operative facts to demonstrate lack of competent counsel and the prejudice resulting from counsel's ineffectiveness. State v. Jackson, 64 Ohio St. 2d 107, 111 (1980). Petitioner must be granted a new penalty phase hearing or, at a minimum, discovery and an evidentiary hearing on this ground for relief.

Supporting Exhibits: 1, 2, 17, 18, 19, 20, 21.

Legal Authority in Support this Ground for Relief: Strickland v. Washington, 466 U.S. 668 (1984); Williams v. Taylor, 120 S. Ct. 1495, 1513 (2000); Wiggins v. Smith, ___U.S. ___; 123

[2] The fact that defense counsel would ask Ms. Turner about an area of which she had no personal knowledge illustrates counsel's fundamental lack of preparation for the penalty phase of Petitioner's trial.

S. Ct. 2527, 2536 (2003); Combs v. Coyle, 205 F.3d 269, 289-90 (6th Cir. 2000); United States v. Cronic, 466 U.S. 648, 654 (1984); Cuyler v. Sullivan, 446 U.S. 335, 343 (1980); Glenn v Tate, 71 F.3d 1204 (6th Cir. 1995); State v. Jackson, 64 Ohio St. 2d 107, 111 (1980); U.S. Const. amends. VI, XIV.

Eleventh Ground for Relief

439478 16

136. Petitioner hereby incorporates by reference all previous paragraphs as if fully rewritten herein.

137. Petitioner Turner's convictions and sentences are voidable because he was denied the effective assistance of counsel at the penalty phase of his capital trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Sections 1, 2, 5, 9, 10, 16, and 20 of Article I of the Ohio Constitution and he was thereby prejudiced.

138. The Eighth Amendment requires the sentencer, in this case a three judge panel, to consider the circumstances of the crime and the defendant's background or character during the penalty phase of a capital trial. Boyd v. California, 494 U.S. 370, 377-78 (1990); Lockett v. Ohio, 438 U.S. 586, 604 (1978). Defense counsel's duty to investigate the client's background for mitigating factors is "an indispensable component of the constitutional requirement of...effective representation and assistance from his lawyer." State v. Johnson, 24 Ohio St. 3d 87, 90 (1986), See Williams v. Taylor, 529 U.S. 362 (2000).[11] Recently, the United States Supreme Court relied on the American Bar Association Criminal Justice standards when it stated that trial counsel in death penalty cases "have a duty to make reasonable investigations." Wiggins v. Smith, ___U.S. ___, 123 S. Ct. 2527, 2536 (2003)

139. Defense counsel failed to reasonably and competently investigate, prepare and present available mitigating evidence at the penalty phase of Petitioners' capital trial. This evidence would have established Petitioner's substance dependence and correlative intoxication at the time of his arrest for the charged capital offenses. Counsel's deficient performance precluded the sentencing panel from considering and giving weight and effect to this available, compelling mitigation evidence in the determination of Petitioner's sentence. Counsel's failure to reasonably investigate, prepare and present this mitigating evidence cannot be viewed as a reasonable strategic decision, but rather must be viewed as a dereliction of duty that prejudiced Petitioner.

140. During opening statement by Petitioner's trial counsel, counsel stated, "We expect to show that the Defendant has from a very young age been afflicted with what I am going to call, and you may not agree, the disease of alcoholism. The American Medical Association has termed this as a disease. They did that because alcoholism is chronic, progressive and fatal. It is after a certain point not a moral decision to put down the bottle, that it needs extensive treatment, and even at that, very few people who seek treatment are successful." Tr. 49 Consequently, counsel made it clear to the panel that counsel intended Petitioner's alcoholism to be considered as a primary mitigating factor. However, defense counsel failed to investigate, prepare and present the testimony of lay persons who had direct, firsthand knowledge of Petitioner's dependence on alcohol and the terrible effects of his drug and alcohol dependence on his life functioning. Instead, defense counsel put on lay witnesses who had no personal knowledge of Petitioner's alcohol dependence. When defense counsel asked witness Reva Turner on direct examination about Petitioner's alcohol consumption, Ms. Turner replied that she did not know

[11] Failure to investigate or present mitigating evidence at sentencing constitutes ineffective assistance of counsel. See Id; Glenn v. Tate, 71 F.2d 1204 (6th Cir. 1995); Austin v. Bell, 126 F.3d 843 (6th Cir. 1997).

F-14

because Petitioner did not drink around her. Tr. 65-66 [12] Further, defense counsel presented Brandie Fox as a penalty phase witness. Although Ms. Fox testified that she believed Petitioner drank "a lot", she also testified that "he did not drink around me." Tr. 110 When counsel inquired, "Did you see him—did alcohol—did he ever have a drink around you at the house?", Brandie replied "Not that I can remember." Tr. 110.

141. However, defense counsel had an available source of documentary evidence to utilize in investigating, preparing and presenting the mitigating factor of Petitioner's extreme intoxication at the time the charged capital crimes occurred. The circumstances surrounding Petitioner's arrest were compiled by investigating police and described by the prosecutor as follows. At 11: 11 p.m. on June 12, 2001, police observed a "pair of shoes in a wooded area" near the crime scene. Tr. 30 Petitioner was "pulled from the underbrush" and transported to the Reynoldsburg police station where "he was slated, and arrest photographs were taken at 11:30 p.m.". Tr. 30 At approximately 1:05 a.m. on June 13, 2001, the police began a five hour interrogation. Tr.33 However, factual information, compiled in documents and provided to defense counsel illustrate the level of Petitioner's intoxication at the time of his arrest. Specifically, the transcribed statement of the police interrogation of Petitioner as well as documents compiled by investigating police pertaining to the crime scene should have utilized by defense counsel. Ex.. 13; PO docs. For example, Petitioner was able to stumble only three hundred sixty nine feet from the crime scene before he passed out in the wooded area where he was apprehended. Ex. 25; Turner 13. A half empty bottle of high alcohol whiskey was recovered from the spot where Petitioner passed out. Ex. 25. Although the police were desperate to confront Petitioner, they were forced to let him "sleep it off" before they began their interrogation. Ex. 13. When the interrogation began, police noted that Petitioner had "made a mess"—indicating Petitioner's sickness from the vast amount of substances he had ingested—while "sleeping it off" and police informed him "we gotta clean it up.". Ex. 13.

142. This information, which was contained in police documents was provided to defense counsel through discovery. Counsel could have and should have subpoenaed the police officers involved in the arrest, interrogation and investigation of Petitioner. Had counsel done so, counsel would have presented credible mitigating evidence of Petitioner's substance dependence and correlative intoxication at the time of his arrest, shortly after the murders occurred. At the time of Petitioner's capital trial, this type of mitigating factor had been repeatedly recognized as entitled to weight and effect by the Ohio Supreme Court. State v. Rojas, 64 Ohio St.3d 131 (1992); State v. Otte, 74 Ohio St.3d 555 (1996); State v. Smith, 80 Ohio St. 3d 89 (1997); State v. White, 82 Ohio St. 3d 16 (1998); State v. Lindsey, 87 Ohio St.3d 479 (2000); State v. Smith, 87 Ohio St. 424 (2000); State v. Johnson, 88 Ohio St. 3d 95 (2000).

143. Instead, defense counsel relied on Dr. Haskins's testimony regarding Petitioner Turner's substance dependence. Her testimony in *turn* relied primarily on Petitioner Turner's own reports. Unfortunately, defense counsel elicited from Dr. Haskins that Mr. Turner had a "history of lying" and "exaggerating." Tr. 151 After defense counsel, "opened the door" as to Petitioner's alleged lack of veracity, the prosecutor engaged in cross-examination that exacerbated the damage done on direct examination as the following colloquy illustrates:

[12] The fact that defense counsel would ask Ms. Turner about an area of which she had no personal knowledge illustrates counsel's fundamental lack of preparation for the penalty phase of Petitioner's trial.

Q. Okay.
A. Do we have somebody who lies a lot? Yeah.
Q. Okay. Could you give us an opinion why he would lie when he chooses to lie?
A. Usually it makes himself look a little better. Tr. 183

144. Such commentary fully undermined the credibility of her testimony regarding Petitioner's substance dependence. In its O.R.C. 2929.03(f) sentencing opinion, the three judge panel specifically assessed Dr. Haskins's testimony regarding Michael Turner's drug and alcohol dependence, and found it to be "of little weight." Ex.. 11. The panel also found that the "evidence did not support the conclusion that the defendant was in some drug and alcohol induced stupor ." Ex. 11. The panel's opinion is directly tied to the failure of counsel to locate a qualified expert. Ex. 29, 30.

145. Because defense counsel failed to reasonably and competently investigate, prepare and present available mitigating evidence of Petitioner's substance dependence and correlative intoxication at the time of his arrest, shortly after the murders occurred, the sentencing panel was not provided with mitigating evidence of recognized weight for a sentence less than death. The absence of this evidence at Petitioner's mitigation hearing clearly undermines the adversarial process and renders the outcome of his capital trial unreliable. Petitioner was prejudiced. This witness would have enabled the panel to give weight and effect to this relevant mitigating evidence as required by O.R.C. § 2929.04. Ex. 29, 30

146. Petitioner supports this ground with evidence dehors the record that contains sufficient operative facts to demonstrate lack of competent counsel and the prejudice resulting from counsel's ineffectiveness. State v. Jackson, 64 Ohio St. 2d 107, 111 (1980). Petitioner must be granted a new sentencing hearing or, at a minimum, discovery and an evidentiary hearing on this ground for relief.

Supporting Exhibits: 11, 13, 25, 29, 30.

Legal Authority in Support of Ground for Relief: Boyd v. California, 494 U.S. 370 (1990); Lockett v. Ohio, 438 U.S. 586 (1978); State v. Johnson, 24 Ohio St. 3d 87 (1986); Williams v. Taylor, 529 U.S. 362 (2000); Wiggins v. Smith, ___U.S. ___, 123 S. Ct. 2527 (2003); Glenn v. Tate, 71 F.2d 1204 (6th Cir. 1995); Austin v. Bell, 126 F.3d 843 (6th Cir. 1997); State v. Rojas, 64 Ohio St. 3d 131 (1992); State v. Otte, 74 Ohio St. 3 d 555 (1996); State v. Smith, 80 Ohio St. 3d 89 (1997); State v. White, 82 Ohio St. 3d 16 (1998); State v. Lindsey, 87 Ohio St. 3d 479 (2000); State v. Smith, 87 Ohio St. 424 (2000); State v. Johnson, 88 Ohio St. 3d 95 (2000); State v. Jackson, 64 Ohio St. 2d 107, 111 (1980); U.S. Const. amends. V, VI, VIII, XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20; O.R.C. §§ 2929.03 and 2929.04.

Fifteenth Ground for Relief

187. Petitioner hereby incorporates by reference all previous paragraphs as if fully rewritten herein.

188. Petitioner's convictions and sentences are void and/or voidable because he was denied the effective assistance of counsel at his capital trial. Petitioner's counsel unreasonably failed to move to suppress his inculpatory statements to investigating police. Petitioner's statements were not based on a knowing, voluntary, and intelligent waiver of his right against self-incrimination. State v. Otte, No. 76726, 2002 WL 69139 (Cuyahoga Ct. App. Jan. 25, 2001). Ex. 12. Mincey v. Arizona, 437 U.S. 385 (1978); Arizona v. Fulminante, 499 U.S. 279 (1991). As a result, Petitioner was deprived of the effective assistance of counsel and was thereby prejudiced by his counsel's errors. U.S. Const. amends V, VI, VIII, IX, and XIV; Ohio Const. art. I §§ 1, 2, 5, 9, 10, 16, and 20; Strickland v. Washington, 486 U.S. 668 (1984).

189. Following his arrest by the Reynoldsburg Police Department, Mr. Turner was taken to police headquarters where booking procedures occurred at 11:15 p.m. on June 12, 2001. The transcript of Mr. Turner's audio taped statement to the police at page 30 indicates that he was too intoxicated to be immediately interviewed, however. He was allowed to "sleep it off" for two hours before detectives began an interrogation at 1:15 a.m. In the initial audio taped questioning on June 12, 2001, Mr. Turner consistently denies committing the offense and repeatedly indicates that he believes he was arrested on an alcohol related offense. As police questioning became more focused on the issue of Mr. Turner harming Ms. Turner and Mr. Seggarman, Michael related that he was confused, not feeling well and did not want to talk to the police without legal representation. The police persisted in asking about the offense and no attorney was provided for Mr. Turner. Ex. 13, 29

190. On June 13, 2001, a second interview was conducted and the audio tape begins "If you'll give me some (inaudible) I'll tell you everything that I can remember (inaudible) but you have to promise to get me some (inaudible) medication. (inaudible) Are you going to get me some more of this medication tonight? (inaudible)" During this questioning, Mr. Turner states repeatedly: "I have no idea" or "I don't know" when asked about specifics of the offenses. When asked about this questioning by this interviewer, Mr. Turner explained that he was extremely ill from the withdrawal from alcohol and cocaine. He realized he needed medication and had asked the police for medical care. He indicated that he was struggling to focus and maintain his attention. He felt anxious, depressed, agitated, irritable, confused and was having difficulty understanding the questions and deciding how to answer. He simply wanted the questioning to end and to receive medication to ease his symptoms of withdrawal. Although he could not remember the events related to the offense, he agreed with the statements made by the police in order to receive this medication.. Ex. 13, 29. On June 21, 2001 Petitioner was still suffering from severe alcohol withdrawal. Ex. 28

191. Mr. Turner was clearly requesting medication for his withdrawal symptoms at the time of the second questioning by the Reynoldsburg Police. His description of his physical and emotional state at the time of the questioning is consistent with the symptoms of alcohol withdrawal. Consequently, Mr. Turner's alcohol withdrawal prevented him from being able to

knowingly and intelligently waive his Miranda rights. Furthermore, given that Mr. Turner was undergoing alcohol withdrawal, his statements to the Reynoldsburg Police regarding the instant offense were extremely susceptible to suggestions and interpretations made by the police. Ex. 13, 29. The prosecutor utilized Petitioner's statements to establish his guilt. Tr.33-35. Petitioner was prejudiced by his counsel's failures.

192. The prejudice flowing to Petitioner from his counsel's failure to move to suppress his statements is also illustrated by the following colloquy that occurred at the penalty phase hearing when the prosecutor cross-examined Dr. Haskins regarding Petitioner's truthfulness:

Q. Okay. Could you give us an opinion why he would lie when he chooses to lie?
A. Usually it makes him look a little better.
Q. You're certainly aware in reviewing that 60-plus transcript to the Reynoldsburg police he lied in the course of that transcript to the police officers numerous times, didn't he?
A. Yes, he did. Tr. 183.

193. Petitioner gave a lengthy unsworn statement not long before this testimony by Dr. Haskins. In his statement he expressed his remorse and sorrow for the deaths of Ms. Turner and Mr. Seggarman. He also stated that he accepted responsibility for his actions. Tr. 105. At the time of Petitioner's penalty phase hearing, remorse had been repeatedly recognized as a mitigating factor entitled to weight and effect. State v. Rojas, 64 Ohio St. 3d 131 (1992); State v. Green, 66 Ohio St. 3d 141 (1993); State v. Clifford Williams, 73 Ohio St. 3d 153 (1995); State v. Awkal, 76 Ohio St. 3d 324 (1996); State v. Dennis, 79 Ohio St. 3d 421 (1997); State v. Mitts, 81 Ohio St. 3d 223 (1998); State v. Clifton White, 85 Ohio St. 3d 433 (1999); State v. Stallings, 89 Ohio St. 3d 280 (2000). In its sentencing opinion, however, the three judge panel makes no reference to Petitioner's expressions of remorse and responsibility and consequently accorded them no weight and effect.

194. An evidentiary hearing should now be ordered in Petitioner's post-conviction proceeding to determine whether the effects of the drugs and alcohol Petitioner had ingested rendered Petitioner's waiver of his constitutional right against self-incrimination was knowing, voluntary and intelligent. State v. Otte, No. 76726, 2002 WL 69139 (Cuyahoga Ct. App. Jan. 25, 2001) and to determine if his counsel's failure to move to suppress his statements prejudiced him. Mincey v. Arizona, 437 U.S. 385 (1978); Arizona v. Fulminante, 499 U.S. 279 (1991). Ex. 12, 13, 14, 29.

195. Petitioner supports this ground with evidence dehors the record that contains sufficient operative facts to demonstrate lack of competent counsel and the prejudice resulting therefrom at Petitioner's capital trial. State v. Jackson, 64 Ohio St. 2d 107, 111 (1980). Petitioner must be granted a new trial or, at a minimum, discovery and an evidentiary hearing on this ground for relief.

Supporting Exhibits: 12, 13, 14, 28, 29.

Legal Authority in Support of Ground for Relief: State v. Otte, No. 76726, 2002 WL 99139 (Cuyahoga Ct. App. Jan. 25, 2001); Mincey v. Arizona, 437 U.S. 385 (1978); Arizona v. Fulminante, 499 U.S. 279 (1991); Strickland v. Washington, 486 U.S. 668 (1984); State v. Rojas, 64 Ohio St. 3d 131 (1992); State v. Green, 66 Ohio St. 3d 141 (1993); State v. Clifford Williams, 73 Ohio St. 3d 153 (1995); State v. Awkal, 76 Ohio St. 3d 324 (1996); State v. Dennis, 79 Ohio St. 3d 421 (1997); State v. Mitts, 81 Ohio St. 3d 223 (1998); State v. Clifton White, 85 Ohio St. 3d 433 (1999); State v. Stallings, 89 Ohio St. 3d 280 (2000); State v. Jackson, 64 Ohio St. 2d 107, 111 (1980); U.S. Const., amends. V, VI, VIII, IX, XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

F-19

Sixteenth Ground for Relief:

196. Petitioner Turner incorporates all previous paragraphs as if fully rewritten herein.

197. Petitioner Turner's convictions and sentences are void and/or voidable because he was denied effective assistance of counsel during his capital trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution; Strickland v. Washington, 466 U.S. 668 (1984); Wiggins v. Smith, ___U.S. ___, 123 S. Ct. 2527, 2536 (2003). As a result of his counsel's ineffectiveness, he was prejudiced.

198. Following his arrest by the Reynoldsburg Police Department, Petitioner was taken to police headquarters where booking procedures occurred at 11:15 p.m. on June 12, 2001. Petitioner was too intoxicated to be immediately interrogated, however. He was allowed to "sleep it off" for two hours before detectives began an interrogation at 1:15 a.m. Tr. 184; Ex. 13, police interview During this interrogation Petitioner Turner repeatedly denied stabbing Ms. Lyles and Mr. Steggerman. Ex. 13. The police utilized a variety of tactics to coerce inculpatory statements from Petitioner. Ex. 13. Finally, Petitioner made several unequivocal requests for counsel. Ex. 13. These requests were effectively ignored by the police interrogators. Ex. 13. Ultimately, the interrogation ended at 5:30 a.m. with Petitioner's request for counsel unfulfilled.

199. The interrogation was resumed later that morning. However, the Petitioner was not given his Miranda warnings. Petitioner was obviously ill and was literally begging for "medication". Ex. 13, 29. His distress was such that he offered to tell the police "everything that I can remember.*** but you have to promise to get me some*** medication." Ex. 13. Petitioner's trial counsel failed to move to suppress the inculpatory statements based on the fact that Petitioner clearly invoked his right to counsel. The prosecutor utilized Petitioner's statements to establish his guilt. Tr.33-35. As a result his counsel's failures, Petitioner's rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated and he was prejudiced.

200. The United States Supreme Court in Edwards v. Arizona, 451 U.S. 477, 478 (1981), held that,

> When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to police-initiated interrogation after being again advised of his rights. An accused, such as petitioner, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation until counsel has been made available to him, unless the accused has himself initiated further communication, exchanges, or conversations with the police."

201. Here, Petitioner clearly invoked his right to counsel during a custodial interrogation by explicitly and repeatedly indicating that he wanted to talk to an attorney. A transcription of his interrogation by police is attached as Exhibit 13, at page 37 of his transcribed interrogation, Petitioner told the police "Anything I say I am going to get me a lawyer. That is the way it is going to be." At page 62 he stated, "Can I call my lawyer?". At page 63 the police then inquired if Petitioner knew the name and telephone number of his attorney. When

Petitioner recalled the telephone number, he asked police for the time of day. 4 at page 63 Petitioner then attempted call his attorney.(page 65). The police continued the interrogation and Petitioner again asked for counsel by stating, at page 64, "I would like to have a lawyer help me with this." The police stated at page 64 that they "would give it a shot." Petitioner then identified his attorney as a public defender and asked the police to call for him (page 65). The police then dissuade Petitioner from contacting counsel by stating, "I can tell you straight up that to get you a public defender ... probably impossible. The court has to appoint them and they have to see if you got the money and so forth. **Like I said you have already made a couple of phone calls there**" (page 65). The police continued to interrogate Petitioner and he again stated his desire to speak with counsel (page 66). Petitioner explained that his desire for counsel was based on the comments of the police. ("You've got me to the point where I am scared to say anything (page 66). Nonetheless, the police continued the interrogation. Petitioner stated " you know I've done this a bunch of time (sic) and found it's best to say nothing. And I think this is one of them times.*** "If I had an attorney here that I could talk to and see what he said" (page 68).

202. In Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 2355 (1994), the Supreme Court held that, ... "a suspect need not speak with the discrimination of an Oxford don." However, a suspect, "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstance would understand to be a request for an attorney." Davis, at 2355. Petitioner was absolutely clear in his invocation of his right to counsel. Again in Minnick v. Mississippi, 489 U.S. 146, 111 S. Ct. 486 (1990), the Supreme Court held that, "a suspect who has invoked the right to counsel cannot be questioned regarding any offense unless an attorney is actually present."

203. By failing to honor Petitioner's clear and repeated requests for counsel and by continuing to interrogate Petitioner after his invocation of his right to counsel, the state deprived Petitioner of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution, and §§ 2, 5, 9, 10, and 16, of Article I of the Ohio Constitution.The prosecutor utilized Petitioner's statements to establish his guilt. Tr.33-35. As a result, Petitioner's trial counsel should have moved to suppress his inculpatory statements to police had counsel acted reasonably. But Petitioner's counsel did not act reasonably and Petitioner was prejudiced.

204. Petitioner supports this ground with evidence dehors the record that contains sufficient operative facts to demonstrate lack of competent counsel and the prejudice resulting therefrom at Petitioner's capital trial. State v. Jackson, 64 Ohio St. 2d 107, 111 (1980). Petitioner must be granted a new trial or, at a minimum, discovery and an evidentiary hearing on this ground for relief.

Supporting Exhibit: 13, 29.

Legal authority in support of this ground for relief: Strickland v. Washington, 466 U.S. 668 (1984); Wiggins v. Smith, ___U.S. ___, 123 S. Ct. 2527, 2536 (2003); Edwards v. Arizona, 451 U.S. 477, 478 (1981); Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 2355 (1994);

F-21

Minnick v. Mississippi, 489 U.S. 146, 111 S. Ct. 486 (1990); U.S. Const., amends. V, VI, VIII, IX and XIV; Ohio Const., art. I, §§ 2, 5, 9, 10 and 16.

IV. CONCLUSION

439470 14

WHEREFORE, Petitioner Michael Turner requests the following relief:

A. That this Court declare Michael Turner's judgment to be void or voidable and grant him a new trial;

B. In the alternative, that this Court declare Michael Turner's death sentence to be void or voidable and grant him a new sentencing hearing before a jury;

C. If this Court is not inclined to grant Michael Turner relief based on the matters raised in this petition and supported by the attached exhibits, then he requests that this Court grant him leave to pursue discovery to more fully develop the factual basis demonstrating the constitutional violations that render his conviction and death sentence void or voidable;

D. If this Court is not inclined to grant Michael Turner relief based on the matters raised in this post-conviction petition and supported by the attached exhibits, then he requests that, after permitting him to pursue discovery, that this Court conduct an evidentiary hearing pursuant to Ohio Revised Code Ann. § 2953.21;

E. That this Court grant any further relief to which Michael Turner might be entitled.

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender

RICHARD J. VICKERS - 0032997
Assistant State Public Defender
Post-Conviction Supervisor

DAVID HANSON - 0059580
Assistant State Public Defender

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394
Fax: (614) 644-0703

COUNSEL FOR PETITIONER

F-23

EXCERPTS OF AMENDED POST-CONVICTION PETITION

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

STATE OF OHIO,	:	Case No. 01CR-06-3615
Plaintiff-Respondent,	:	Judge Patrick M. McGrath
-vs-	:	POST-CONVICTION PETITION
MICHAEL R. TURNER,	:	O.R.C. § 2953.21
Defendant-Petitioner.	:	**THIS IS A CAPITAL CASE**

PETITIONER'S FIRST AMENDMENT TO PETITION TO VACATE OR SET ASIDE JUDGMENT AND/OR SENTENCE PURSUANT TO OHIO REVISED CODE ANN. SECTION 2953.21

Now comes the Petitioner Michael Turner, through counsel, and files an amendment to his Petition for Post-Conviction Relief pursuant to Ohio Rev. Code Ann. Section 2953.21(F). The Petition is amended as follows:

1. Add the Seventeenth, Eighteenth and Nineteenth Grounds for Relief to the Petition for Post-Conviction Relief. Withdraw the current Fifteenth Ground for Relief.
2. Add the following attached Exhibits to support the designated Grounds for Relief: Exhibit 31 to support the Seventeenth Ground for Relief; Exhibit 32 to support the Eighteenth Ground for Relief; Exhibits 31 and 32 the Nineteenth Ground for Relief.
3. Attached to this amendment, and made a part of Petitioner's Petition for Post-Conviction Relief, are the Seventeenth, Eighteenth and Nineteenth Grounds for Relief and Exhibits 31 and 32.

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender

RICHARD J. VICKERS - 0032997
Assistant State Public Defender
Post-Conviction Supervisor

DAVID HANSON - 0059580
Assistant State Public Defender

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was hand-delivered to the office of Ronald O'Brien, Prosecuting Attorney, and Steven L. Taylor and Heather R. Saling, Assistant Prosecuting Attorneys, Franklin County Prosecutor's Office, 373 S. High Street, 13th Floor, Columbus, Ohio 43215 on this 4th day of December, 2003.

RICHARD J. VICKERS
COUNSEL FOR APPELLANT

Seventeenth Ground for Relief

209. Petitioner hereby incorporates by reference all previous paragraphs as if fully rewritten herein.

210. Petitioner Turner was denied the effective assistance of counsel at his capital trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Petitioner's trial counsel unreasonably and prejudicially failed to ensure that he was fully informed of the consequences attendant to his waiver of his constitutional right to trial by jury. Petitioner was thereby prejudiced. Strickland v. Washington, 466 U.S. 668 (1984); Williams v. Taylor, 120 S.Ct. 1495, 1513 (2000); Wiggins v. Smith, ___U.S. ___, 123 S.Ct. 2527, 2536 (2003); State v. Haight, 98 Ohio App.3d 639, 694 N.E.2d 294 (1994).

211. Trial by jury in criminal cases is fundamental to the American scheme of justice. "[W]e hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which, were they to be tried in a federal court, would come within the Sixth Amendment's guarantee." Duncan v. Louisiana, 391 U.S. 145, 149 (1968). The right has also held to be so guaranteed by the Fourteenth Amendment to defendants in criminal cases tried in state courts Id. at,162. Most importantly, **it is a right that is granted to the criminal defendant personally.** State v. Kehoe, 59 Ohio App. 2d 315, 315-316 (1978).

212. In Ohio cases, "[e]very reasonable presumption should be made against the waiver, especially when it relates to a right or privilege so valuable as to be secured by the Constitution." Simmons v. State, 75 Ohio St. 364 (1905); see also Ohio Constitution, art. I, § 5 ("the right to trial by jury shall be inviolate").

213. The right to a jury trial should not be usurped by counsel merely because counsel believes the evidence against a capital defendant is "overwhelming" (Ex.2) or because counsel publicly announces that counsel finds the facts of the case "grotesque" (Tr. 49) and make counsel "sick to my stomach." Ex.1

214. Consequently, it is an understatement to say that the decision to waive a jury and try a capital case to a three judge panel is a crucial decision. A capital defendant who chooses to waive his right to a jury trial increases his possibility of receiving the death penalty and loses many of his appellate issues should the penalty of death be imposed. In a death penalty case, all twelve jurors must unanimously agree that the penalty of death be appropriate for capital punishment to be instituted. Only one juror need find the penalty to be inappropriate and a life sentence must them be instituted. R.C.§2929.03(D)(2) The consequence of a single juror dissenting from a death verdict ensures that "the trial court is required to sentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment." State v. Springer 63 Ohio St. 167 (1992); State v. Brooks, 75 Ohio St.3d 148 (1996). However, Petitioner's trial counsel failed to inform him of that fact. Ex.31

215. Petitioner Turner's trial counsel caused the waiver of Petitioner's right to a trial by jury on October 24, 2002, and a three judge panel was selected. (Tr. 5-13; 59-66) Further, the

record discloses that the Court failed to engage in an in-depth colloquy with Petitioner as to the ramifications of waiving a jury. The colloquy was limited solely to the following: the Court inquired if Petitioner understood that he was waiving his right to "have a jury trial in this case?"; the Court informed Petitioner "you're waiving your right to have a jury of 12 persons hear and decide the case, the evidence, and render a unanimous verdict in the case as to the issues"; the Court informed Petitioner, "the alternative to a jury waived trial, the alternative is to have a panel of three judges hear and decide the case and decide the case on all the issues"; the Court inquired if by signing the jury waiver it was Petitioner's desire to waive jury and that the decision was made after consulting with counsel. Tr. 64 The trial court then asked defense counsel if counsel wished to make any comment and counsel refused to do so. Tr. 65 The record is thus devoid of any facts as to what, if anything, defense counsel advised Petitioner regarding his constitutional waiver of his right to a jury.

216. According to Petitioner, his counsel spent very little time discussing the jury waiver with him; encouraged him to waive his right to a jury determination by advising Petitioner "do what I say and everything's gonna be alright"; failed to inform him that a jury would have to be unanimous in its verdict at the mitigation hearing in order to recommend a death sentence; did not advise him that he had an absolute right to withdraw his jury waiver pursuant to O.R.C. § 2945.05; advised him that he could not withdraw his jury waiver when he expressed a desire to do so; did not inform him that it was his personal right to waive a jury and that his right could not be exercised by his counsel; did not explain to him that his chances for reversal on appeal would be reduced by waiving a jury and trying his case to a three judge panel. Ex. 31 Petitioner states that had his counsel informed him of the full panoply of his rights and the consequences of a jury waiver, he would have exercised his right to a jury trial. Ex. 31 Petitioner summarizes his contact with his counsel regarding the waiver of his constitutional right to trial by jury as follow: "My feeling was that whether I wanted to do it or not, they were going to do the jury waiver anyway. Ex.31

217. The unreasonable nature of trial counsel's errors and omissions regarding the waiver of Petitioner's constitutional right to have his sentence decided by a jury prejudiced Petitioner. Ex.17.

218. Petitioner Turner supports this ground with evidence dehors the record that contains sufficient operative facts to demonstrate lack of competent counsel and the prejudice resulting from counsel's ineffectiveness. State v. Jackson, 64 Ohio St. 2d 107, 111 (1980). Petitioner must be granted a new trial and penalty phase hearing or, at a minimum, discovery and an evidentiary hearing on this ground for relief.

Supporting Exhibits: 1,2,17, 31

Legal Authority in Support of Ground for Relief: Sixth and Fourteenth Amendments to the United States Constitution; Strickland v. Washington, 466 U.S. 668 (1984); Williams v. Taylor, 120 S.Ct. 1495, 1513 (2000); Wiggins v. Smith, ___U.S. ___, 123 S.Ct. 2527, 2536 (2003). Duncan v. Louisiana, 391 U.S. 145, 149 (1968); State v. Kehoe, 59 Ohio App. 2d 315, 315-316 (1978); Simmons v. State, 75 Ohio St. 364 (1905); Ohio Constitution, art. I, § 5; State v. Springer 63 Ohio St. 167 (1992); State v. Brooks, 75 Ohio St.3d 148 (1996); United States v.

Cronic, 466 U.S. 648, 654 (1984); Cuyler v. Sullivan, 446 U.S. 335, 343 (1980); Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995); State v. Jackson, 64 Ohio St. 2d 107, 111 (1980) State v. Haight, 98 Ohio App.3d 639, 694 N.E.2d 294 (1994).

EXCERPTS OF AMENDED HABEAS PETITION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

MICHAEL R. TURNER,	)	
	)	
Petitioner,	)	Case No. 2:07-cv-00595
	)	
vs.	)	District Judge Barrett
	)	Chief Magistrate Judge Merz
STUART HUDSON, Warden,	)	
	)	TURNER IS UNDER A
Respondent.	)	SENTENCE OF DEATH

AMENDED PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY
28 U.S.C. § 2254

David C. Stebbins (0005839)
Attorney at Law
400 South Fifth Street, Suite 202
Columbus, OH 43215
614.228.9058
614.221.8601 FAX
david@dstebbins.com

and

William S. Lazarow (0014625)
Attorney at Law
400 South Fifth Street, Suite 202
Columbus, OH 43215
614.228.9058
614.221.8601 FAX
BillLazarow@aol.com

H-1

TURNER'S FEDERAL CONSTITUTIONAL CLAIMS

GROUNDS FOR RELIEF

59) **I. TURNER'S STATEMENTS TO LAW ENFORCEMENT OFFICIALS WERE NOT BASED ON A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF HIS RIGHT AGAINST SELF-INCRIMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

60) Following his arrest by the Reynoldsburg Police Department, Turner was taken to police headquarters where booking procedures occurred at 11:15 p.m. on June 12, 2001. The transcript of Turner's audio taped statement to the police at page 30 indicates that he was too intoxicated to be immediately interviewed. He was, however, allowed to "sleep it off" for two hours before detectives began an interrogation at 1:15 a.m. In the initial audio taped questioning on June 12, 2001, Turner consistently denies committing the offense and repeatedly indicates that he believes he was arrested on an alcohol related offense. As police questioning became more focused on the issue of Mr. Turner harming Ms. Turner and Mr. Seggerman, Michael related that he was confused, not feeling well and did not want to talk to the police without legal representation. The police persisted in asking

about the offense. No attorney was provided. (Post-Conviction Ex. 13, Taped Interview with Suspect).[7]

61) On June 13, 2001, a second interview was conducted. The audio tape begins:

> If you'll give me some (inaudible) I'll tell you everything that I can remember (inaudible) but you have to promise to get me some (inaudible) medication. (inaudible) Are you going to get me some more of this medication tonight? (inaudible).

During this questioning Turner states repeatedly: "I have no idea" or "I don't know" when asked about specifics of the offenses. When asked about this questioning by the interviewer, Turner explained that he was extremely ill from the withdrawal from alcohol and cocaine. He realized he needed medication and had asked the police for medical care. He indicated that he was struggling to focus and maintain his attention. He felt anxious, depressed, agitated, irritable, confused and was having difficulty understanding the questions and deciding how to answer. He simply wanted the questioning to end and to receive medication to ease his symptoms of withdrawal. Although he could not remember the events related to the offense, he agreed with the statements made by the police in order to receive this medication. (Post-Conviction Ex. 13, Taped Interview with Suspect;

---

[7] Since the state court record has not yet been filed, Turner is unable to provide a record cite for these documents. Turner will provide record cites for all documents filed after Respondent submits the state court record.

Ex. 29, Affidavit of Robert L. Smith). On June 21, 2001, Turner was still suffering from severe alcohol withdrawal. (Post-Conviction Ex. 28, Psychiatric Evaluation of Franklin County Sheriff's Office).

62) Turner was clearly requesting medication for his withdrawal symptoms at the time of the second questioning by the Reynoldsburg Police. His description of his physical and emotional state at the time of the questioning is consistent with the symptoms of alcohol withdrawal. Consequently, Turner's alcohol withdrawal prevented him from being able to knowingly and intelligently waive his *Miranda* rights. Furthermore, given that Turner was undergoing alcohol withdrawal, his statements to the Reynoldsburg Police regarding the instant offense were extremely susceptible to suggestions and interpretations made by the police. (Post-Conviction Ex. 13, Taped Interview with Suspect; Ex. 29, Affidavit of Robert L. Smith). The prosecutor utilized Turner's statements to establish his guilt, (Tr. Vol. II, pp. 33-35), in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

63) The prejudice flowing from counsel's failure to move to suppress his statements is also demonstrated by the colloquy at the penalty phase hearing when the prosecutor cross-examined Dr. Haskins regarding Turner's truthfulness:

Q. Okay. Could you give us an opinion why he would lie when he chooses to lie?

A. Usually it makes him look a little better.

Q. You're certainly aware in reviewing that 60-plus transcript to the Reynoldsburg police he lied in the course of that transcript to the police officers numerous times, didn't he?

A. Yes, he did.

(Tr. Vol. II, p. 183).

64) Turner gave a lengthy unsworn statement not long before this testimony by Dr. Haskins. In his statement he expressed his remorse and sorrow for the deaths of Ms. Turner and Mr. Seggerman. He also stated that he accepted responsibility for his actions. (Tr. Vol. II, p. 105). At the time of Turner's penalty phase hearing, remorse had been repeatedly recognized as a mitigating factor entitled to weight and effect. *State v. Rojas*, 64 Ohio St. 3d 131 (1992); *State v. Green*, 66 Ohio St. 3d 141 (1993); State v. Clifford Williams, 73 Ohio St. 3d 153 (1995); *State v. Awkal*, 76 Ohio St. 3d 324 (1996); State v. Dennis, 79 Ohio St. 3d 421 (1997); *State v. Mitts*, 81 Ohio St. 3d 223 (1998); *State v. Clifton White*, 85 Ohio St. 3d 433 (1999); *State v. Stallings*, 89 Ohio St. 3d 280 (2000). However in its sentencing opinion, the three judge panel makes no reference to Turner's expressions of remorse and responsibility and consequently accorded them no weight and effect.

65) Due to the effects of the drugs and alcohol Turner had ingested and the effects of his withdrawal from the drugs and alcohol, Turner's statements to law enforcement officials were not the result of a knowing, voluntary or intelligent waiver of his rights. As such, a writ of habeas corpus should be granted.

66) The merits decision of the Ohio courts on Turner's claims was contrary to or an unreasonable application of clearly established federal law as stated by the Supreme Court of the United States or resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in state courts. 28 U.S.C. § 2254(D).

67) **II. THE LAW ENFORCEMENT OFFICIALS WHO INTERROGATED TURNER FAILED TO HONOR HIS CLEAR AND REPEATED REQUESTS FOR COUNSEL AND CONTINUED TO INTERROGATE HIM AFTER HE INVOKED HIS RIGHT TO COUNSEL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

68) Following his arrest by the Reynoldsburg Police Department, Turner was taken to police headquarters where booking procedures occurred at 11:15 p.m. on June 12, 2001. Turner was too intoxicated to be immediately interrogated. He was, however, allowed to "sleep it off" for two hours before detectives began an interrogation at 1:15 a.m. (Tr. Vol. II, p. 184) (Post-Conviction Ex. 13, Taped Interview with Suspect).[8] During this interrogation, Turner repeatedly denied stabbing Jennifer Lyles and Ronald Seggerman. *Id.* The police utilized a variety of tactics to coerce inculpatory statements from Turner. *Id.* Finally, Turner made several unequivocal requests for counsel. *Id.* These requests were effectively ignored by the police interrogators. *Id.* Ultimately, the interrogation ended at 5:30 a.m. with Turner's request for counsel going unfulfilled.

---

[8] Since the state court record has not yet been filed, Turner is unable to provide a record cite for this document. Turner will provide record cites for all documents filed after Respondent submits the state court record.

69) The interrogation was resumed later that morning without any *Miranda* warnings. Turner was obviously ill and was literally begging for "medication." (Post-Conviction Ex. 13, Taped Interview with Suspect; Ex. 29, Affidavit of Robert L. Smith). His distress was such that he offered to tell the police "everything that I can remember *** but you have to promise to get me some *** medication." (Post-Conviction Ex. 13, Taped Interview with Suspect). Turner's inculpatory statements to police occurred after he clearly invoked his right to counsel. The prosecutor subsequently utilized Turner's statements to establish his guilt, (Tr. Vol. II, pp. 33-35), in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

70) The United States Supreme Court in *Edwards v. Arizona*, 451 U.S. 477, 478 (1981), held:

> When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to police-initiated interrogation after being again advised of his rights. An accused, such as Turner, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation until counsel has been made available to him, unless the accused has himself initiated further communication, exchanges, or conversations with the police.

71) Here, Turner clearly invoked his right to counsel during a custodial interrogation by explicitly and repeatedly indicating that he wanted to talk to an attorney. At page 37 of his transcribed interrogation, Turner told the

police, "Anything I say I am going to get me a lawyer. That is the way it is going to be." (Post-Conviction Ex. 13, Taped Interview with Suspect). At page 62 he stated, "Can I call my lawyer?" At page 63 the police then inquired if Turner knew the name and telephone number of his attorney. When Turner recalled the telephone number, he asked police for the time of day. At page 63 Turner then attempted to call his attorney. The police continued the interrogation and Turner again asked for counsel by stating, at page 64, "I would like to have a lawyer help me with this." The police stated at page 64 that they "would give it a shot." Turner then identified his attorney as a public defender and asked the police to call for him. Page 65. The police dissuaded Turner from contacting counsel by stating, "I can tell you straight up that to get you a public defender ... probably impossible. The court has to appoint them and they have to see if you got the money and so forth. Like I said you have already made a couple of phone calls there." Page 65. The police continued to interrogate Turner and he again stated his desire to speak with counsel. Page 66. Turner explained that his desire for counsel was based on the comments of the police. ("You've got me to the point where I am scared to say anything," page 66). Nonetheless, the police continued the interrogation. Turner finally stated "[Y]ou know I've done this a bunch of time (sic) and found it's best to say nothing. And I think this

is one of them times." "If I had an attorney here that I could talk to and see what he said." Page 68.

72) "[A] suspect need not speak with the discrimination of an Oxford don." However, a suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstance would understand to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459 (1994). Turner was absolutely clear in his invocation of his right to counsel. "[W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990).

73) By failing to honor Turner's clear and repeated requests for counsel and by continuing to interrogate Turner after his invocation of his right to counsel, the police deprived him of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments. As such, a writ of habeas corpus should be granted.

74) The merits decision of the Ohio courts on Turner's claims was contrary to or an unreasonable application of clearly established federal law as stated by the Supreme Court of the United States or resulted in a decision that was

based on an unreasonable determination of facts in light of the evidence presented in state courts. 28 U.S.C. § 2254(D).

103) **VI. MICHAEL TURNER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE INNOCENCE-GUILT DETERMINATION PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

104) Michael Turner was denied the effective assistance of counsel at the innocence-guilt determination phase of his capital trial, and was prejudiced by his counsel's deficient performance. *Strickland v. Washington*, 486 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003).

A. Failure to move to suppress involuntary statements.

105) Counsel unreasonably failed to move to suppress statements made to investigating police. Turner's statements were not based on a knowing, voluntary, and intelligent waiver of the right against self-incrimination. *Mincey v. Arizona*, 437 U.S. 385 (1978); *Arizona v. Fulminante*, 499 U.S. 279 (1991).

106) Following his arrest by the Reynoldsburg Police Department, Turner was taken to police headquarters where he was booked at 11:15 p.m. on June 12, 2001. The transcript of Turner's audio taped statement to the police at page 30 indicates that he was too intoxicated to be immediately interviewed. He was, however, allowed to "sleep it off" for two hours before detectives began an interrogation at 1:15 a.m. In the initial audio taped questioning on

June 12, 2001, Turner consistently denied committing the offense and repeatedly indicated that he believed he was arrested on an alcohol related offense. As police questioning became more focused on the issue of Turner harming Ms. Turner and Mr. Seggerman, he related that he was confused, not feeling well and did not want to talk to the police without legal representation. The police persisted in asking about the offense. No attorney was provided for Turner. (Post-Conviction Ex. 13, Taped Interview with suspect).[11]

107) On June 13, 2001, a second interview was conducted. The audio tape begins:

> If you'll give me some (inaudible) I'll tell you everything that I can remember (inaudible) but you have to promise to get me some (inaudible) medication. (inaudible) Are you going to get me some more of this medication tonight? (inaudible).

During this questioning Turner stated repeatedly: "I have no idea" or "I don't know" when asked about specifics of the offenses. When asked about this questioning by the interviewer, Turner explained that he was extremely ill from the withdrawal from alcohol and cocaine. He realized he needed medication and had asked the police for medical care. He indicated that he

[11] Since the state court record has not yet been filed, Turner is unable to provide a record cite for these documents. Turner will provide record cites for all documents filed after Respondent submits the state court record.

was struggling to focus and maintain his attention. He felt anxious, depressed, agitated, irritable, confused and was having difficulty understanding the questions and deciding how to answer. He simply wanted the questioning to end and to receive medication to ease his symptoms of withdrawal. Although he could not remember the events related to the offense, he agreed with the statements made by the police in order to receive this medication. (Post-Conviction Ex. 13, Taped Interview with suspect; Ex. 29, Affidavit of Robert L. Smith). On June 21, 2001, Turner was still suffering from severe alcohol withdrawal. (Post-Conviction Ex. 28, Psychiatric Evaluation of Franklin County Sheriff's Office).

108) Turner was clearly requesting medication for his withdrawal symptoms at the time of the second questioning by the Reynoldsburg Police. His description of his physical and emotional state at the time of the questioning is consistent with the symptoms of alcohol withdrawal. Consequently, Turner's alcohol withdrawal prevented him from being able to knowingly and intelligently waive his *Miranda* rights. Furthermore, given that Turner was undergoing alcohol withdrawal, his statements were extremely susceptible to suggestions and interpretations made by the police. (Post-Conviction Ex. 13, Taped Interview with suspect; Ex. 29, Affidavit of Robert L. Smith). The prosecutor utilized Turner's statements to establish

his guilt, (Tr. Vol. II, pp. 33-35), in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

109) The prejudice arising from counsel's failure to move to suppress his statements is demonstrated by the colloquy at the penalty phase during the cross-examination of Dr. Haskins:

> Q. Okay. Could you give us an opinion why he would lie when he chooses to lie?
>
> A. Usually it makes him look a little better.
>
> Q. You're certainly aware in reviewing that 60-plus transcript to the Reynoldsburg police he lied in the course of that transcript to the police officers numerous times, didn't he?
>
> A. Yes, he did.

(Tr. Vol. II, p. 183).

110) Turner gave a lengthy unsworn statement not long before this testimony by Dr. Haskins. In his statement he expressed his remorse and sorrow for the deaths of Ms. Turner and Mr. Seggerman. He also stated that he accepted responsibility for his actions. (Tr. Vol. II, p. 105). At the time of the penalty phase hearing, remorse had been repeatedly recognized as a mitigating factor entitled to weight and effect. *State v. Rojas*, 64 Ohio St. 3d 131 (1992); *State v. Green*, 66 Ohio St. 3d 141 (1993); State v. Clifford Williams, 73 Ohio St. 3d 153 (1995); *State v. Awkal*, 76 Ohio St. 3d 324 (1996); State v. Dennis, 79 Ohio St. 3d 421 (1997); *State v. Mitts*, 81 Ohio St.

3d 223 (1998); *State v. Clifton White*, 85 Ohio St. 3d 433 (1999); *State v. Stallings*, 89 Ohio St. 3d 280 (2000). However in its sentencing opinion, the three judge panel makes no reference to Turner's expressions of remorse and responsibility and consequently accorded them no weight and effect.

111) Due to the effects of the drugs and alcohol he had ingested and the effects of his withdrawal from the drugs and alcohol, Turner's statements to law enforcement officials were not knowing, voluntary or intelligent. Counsel's failure to move to suppress these statements was unreasonable as it fell far below the prevailing professional norms, to Turner's prejudice in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments as well as Guideline 10.8 of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003).

B. Failure to move to suppress statements made after invocation of right to counsel.

112) Following his arrest, Turner was taken to police headquarters where he was booked procedures occurred at 11:15 p.m. on June 12, 2001. Turner was too intoxicated to be immediately interrogated. He was, however, allowed to "sleep it off" for two hours before detectives began an interrogation at 1:15 a.m. (Tr. Vol. II, p. 184). (Post-Conviction Ex. 13, Taped Interview with Suspect). During this interrogation, Turner repeatedly denied stabbing Jennifer Turner and Ronald Seggerman. *Id.* The police

utilized a variety of tactics to coerce inculpatory statements from him. *Id.* Finally, Turner made several unequivocal requests for counsel. *Id.* These requests were ignored by the police interrogators. *Id.* Ultimately, the interrogation ended at 5:30 a.m. with Turner's request for counsel going unfulfilled.

113) The interrogation was resumed later that morning without any additional *Miranda* warnings. Turner was obviously ill and was literally begging for "medication." (Post-Conviction Ex. 13, Taped Interview with Suspect; Ex. 29, Affidavit of Robert L. Smith). His distress was such that he offered to tell the police "everything that I can remember *** but you have to promise to get me some *** medication." (Post-Conviction Ex. 13, Taped Interview with Suspect). Turner's inculpatory statements to police occurred after he clearly invoked his right to counsel. The prosecutor subsequently utilized Turner's statements to establish his guilt, (Tr. Vol. II, pp. 33-35), in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

114) When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to police-initiated interrogation after being again advised of his rights. An accused, such as petitioner, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation until counsel has been made

> available to him, unless the accused has himself initiated further communication, exchanges, or conversations with the police.

Edwards v. Arizona, 451 U.S. 477, 478 (1981).

115) Here, Turner clearly invoked his right to counsel during a custodial interrogation by explicitly and repeatedly indicating that he wanted to talk to an attorney: "Anything I say I am going to get me a lawyer. That is the way it is going to be." (Post-Conviction Ex. 13, Taped Interview with Suspect, at 37); "Can I call my lawyer?" *Id.* at 62. The police then asked if he knew the name and telephone number of his attorney. When he recalled the telephone number, he asked the police for the time of day, and attempted to call his attorney. *Id.* at 63. The police continued the interrogation and Turner again asked for counsel, "I would like to have a lawyer help me with this." *Id.* at 64. The police responded that they "would give it a shot." *Id.* When Turner identified his attorney as a public defender and asked the police to call for him, they dissuaded him from contacting counsel by stating, "I can tell you straight up that to get you a public defender ... probably impossible. The court has to appoint them and they have to see if you got the money and so forth. Like I said you have already made a couple of phone calls there." *Id.* at 65. The police continued to interrogate Turner and he again stated his desire to speak with counsel, explaining that his desire for counsel was based on the comments of the police: "You've got me to the point where I am

scared to say anything." *Id.* at 66. Nonetheless, the police continued the interrogation. Turner again repeated his need for counsel: "[Y]ou know I've done this a bunch of time (sic) and found it's best to say nothing. And I think this is one of them times;" "If I had an attorney here that I could talk to and see what he said." *Id.* at 68.

116) "[A] suspect need not speak with the discrimination of an Oxford don." However, a suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstance would understand to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459 (1994). Turner was absolutely clear in his invocation of his right to counsel. "[W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990).

117) By failing to honor Turner's clear and repeated requests for counsel and by continuing to interrogate him after his invocation of his right to counsel, the police deprived Turner of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments. The prosecutor utilized Turner's statements to establish his guilt. (Tr. Vol. II, pp. 33-35). Counsel's failure to move to suppress these statements was

unreasonable in that it fell far below the prevailing professional norms. ABA, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Guideline 10.8. Turner was prejudiced by trial counsel's failure to move to suppress his statements.

C. Failure to Ensure that Turner could withdraw his jury waiver if the three-judge panel returned a death verdict.

118) Counsel unreasonably and prejudicially failed to ensure that he could withdraw his waiver of his constitutional right to trial by jury if the three judge panel rendered a verdict imposing the death penalty, as was the standard practice in Franklin County, Ohio in 2002. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003).

119) Trial by jury in criminal cases is fundamental to the American scheme of justice: "[W]e hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which -- were they to be tried in a federal court -- would come within the Sixth Amendment's guarantee." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). The right was also held to be so guaranteed to defendants in criminal cases tried in state courts by the Fourteenth Amendment. *Id.* at 162. Most importantly, it is a right that is granted to the criminal defendant personally.

120) In Ohio criminal cases, "[e]very reasonable presumption should be made against the waiver, especially when it relates to a right or privilege so valuable as to be secured by the Constitution." *Simmons v. State*, 75 Ohio St. 364 (1905); *see also*, Ohio Const., art. I, § 5 ("the right to trial by jury shall be inviolate").

121) The right to waive jury trial should not be casually usurped by counsel merely because counsel believes the evidence against a capital defendant is "overwhelming" (Post-Conviction Ex. 2, Affidavit of Brandie Fox) or because counsel publicly announces that counsel finds the facts of the case "grotesque" (Tr. Vol. II, p. 49), and make counsel "sick to my stomach." (Post-Conviction Ex. 1, *Columbus Dispatch* newspaper article).

122) It is an understatement to say that the decision to waive a jury and try a capital case to a three judge panel is a crucial decision. A capital defendant who chooses to waive his right to a jury trial increases his possibility of receiving the death penalty and loses many of his appellate issues should the penalty of death be deemed appropriate. All twelve jurors must unanimously agree that the penalty of death is appropriate for capital punishment to be instituted. Only one juror need find the penalty to be inappropriate and a life sentence must then be instituted. Ohio Rev. Code § 2929.03(D)(2). The consequence of a single juror dissenting from a death

verdict ensures that "the trial court is required to sentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment." *State v. Springer*, 63 Ohio St. 167 (1992); *State v. Brooks*, 75 Ohio St.3d 148 (1996).

123) At the direction of his counsel, Turner entered into a waiver of his right to a trial by jury on October 24, 2002 and a three judge panel was selected. (Tr. Vol. I, pp. 59-66). The record discloses that the Court failed to engage in an in-depth colloquy with Turner as to the ramifications of waiving a jury. The colloquy was limited solely to the following: whether Turner understood that he was waiving his right to "have a jury trial in this case?;" that "you're waiving your right to have a jury of 12 persons hear and decide the case, the evidence, and render a unanimous verdict in the case as to the issues;" that "the alternative to a jury waived trial, the alternative is to have a panel of three judges hear and decide the case and decide the case on all the issues;" whether it was Turner's desire to waive jury and that the decision was made after consulting with counsel. (Tr. Vol. I, p. 64). The trial court then asked defense counsel if counsel wished to make any comment and counsel declined to do so. (Tr. Vol. I, p. 65). The record is thus devoid of any facts as to what, if anything, defense counsel advised

Turner regarding his constitutional waiver of his right to a jury. Further there is clearly no attempt by Turner's counsel to ensure that if the panel returned a death verdict, that he could withdraw his waiver of his constitutional right to trial by jury as was the standard practice in Franklin County, Ohio in 2002. (Tr. Vol. I, p. 65).

124) Counsel's unreasonable failure to protect Turner's right to have his sentence decided by a Franklin County jury is further underscored by the frank admission of the Franklin County Prosecutor's office and a judge of the Franklin County Common Pleas Court that the death penalty is imposed less frequently by jurors in Franklin County as opposed to jurors in other Ohio counties. (Post-Conviction Ex. 15, *State v. Campbell*, Brief of Plaintiff-Appellee; Ex. 16, *State v. Campbell*, Decision and Entry).

125) Moreover, Ohio's three-judge panel provision in capital cases has no counterpart in other state statutes, and therefore the standards of practice relating to this technique are uniquely Ohio standards. (Post-Conviction Ex. 17, Affidavit of Harry Reinhart). As a result, a very specific standard of practice has developed in Ohio with respect to jury waivers in capital cases. This is so because of the extraordinary and unusual risks associated with waiving a jury trial in favor of a three-judge panel. These risks are heightened particularly in a case where guilt is not hotly contested and the

primary dispute is whether the aggravating circumstances outweigh the mitigating factors in determining the appropriate punishment. Therefore, the jury trial right should never be waived without reservation of the option to withdraw the waiver in the event that the three judge panel returns a death sentence. Moreover, the reservation of this right should be made in open court and on the record. (Post-Conviction Ex. 17, Affidavit of Harry Reinhart; Ex. 19, *State v. Woodhouse*, Plea of Guilty; Ex. 20, *State v. Woodhouse*, Transcript of Change of Plea).

126) The practice of reserving the right to withdraw the waiver of jury was in effect in Franklin County at least thirteen years prior to Turner's trial. (Post-Conviction Ex. 17, Affidavit of Harry Reinhart). A similar process was utilized in a capital case in Sandusky County as recently as August 28, 2003. (Post-Conviction Ex. 19, *State v. Woodhouse*, Plea of Guilty; Ex. 20, *State v. Woodhouse*, Transcript of Change of Plea). Therefore, the failure of counsel to utilize such a procedure here was unreasonable in that it fell far below the prevailing professional norms and deprived Turner of a right enjoyed by all other similarly situated capital defendant's in Ohio. ABA, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Guideline 10.8.

127) "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654 (1984). Unless a criminal defendant receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). The right is fundamental and its importance and centrality increase with the gravity of the offense. In capital cases, in which the imposition of the ultimate penalty is sought, the highest standard for effective assistance of counsel applies. A specific act or omission of defense counsel can be so deficient as to constitute, without more, the deprivation of effective assistance of counsel. *See, e.g., Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995). The actions of counsel in causing the waiver of his right to trial by jury in favor of a three-judge panel, without reserving his right to withdraw that waiver upon a verdict of death by the panel, constituted an omission that was both deficient and prejudicial.

D. Failure to Ensure that Turner was fully informed of the consequences of his jury waiver.

128) Counsel unreasonably and prejudicially failed to ensure that Turner was fully informed of the consequences attendant to his waiver of his constitutional right to trial by jury. *Strickland v. Washington*, 466 U.S. 668

(1984); *Williams v. Taylor*, 120 S. Ct. 1495, 1513 (2000); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003).

129) Trial by jury in criminal cases is fundamental to the American scheme of justice: *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). "[W]e hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which -- were they to be tried in a federal court -- would come within the Sixth Amendment's guarantee." The right was also held to be so guaranteed to defendants in criminal cases tried in state courts by the Fourteenth Amendment. *Id.* at 162. Most importantly, it is a right that is granted to the criminal defendant personally.

130) In Ohio criminal cases, "[e]very reasonable presumption should be made against the waiver, especially when it relates to a right or privilege so valuable as to be secured by the Constitution." *Simmons v. State*, 75 Ohio St. 364 (1905); *see also*, Ohio Const., art. I, § 5 ("the right to trial by jury shall be inviolate").

131) The right to waive jury trial should not be usurped by counsel merely because counsel believes the evidence against a capital defendant is "overwhelming" (Post-Conviction Ex. 2, Affidavit of Brandie Fox) or because counsel publicly announces that counsel finds the facts of the case

"grotesque" (Tr. Vol. II, p. 49), and make counsel "sick to my stomach." (Post-Conviction Ex. 1, *Columbus Dispatch* newspaper article).

132) It is an understatement to say that the decision to waive a jury and try a capital case to a three judge panel is a critical decision. A capital defendant who chooses to waive his right to a jury trial increases his possibility of receiving the death penalty and loses many of his appellate issues should the penalty of death be deemed appropriate. All twelve jurors must unanimously agree that the penalty of death be appropriate for capital punishment to be instituted. Only one juror need find the penalty to be inappropriate and a life sentence must then be instituted. Ohio Rev. Code § 2929.03(D)(2). The consequence of a single juror dissenting from a death verdict ensures that "the trial court is required to sentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment." *State v. Springer*, 63 Ohio St. 167 (1992); *State v. Brooks*, 75 Ohio St.3d 148 (1996).

133) At the direction of his counsel, Turner waived his right to a trial by jury on October 24, 2002 and a three judge panel was selected. (Tr. Vol. I, pp. 59-66). The record discloses that the Court failed to engage in an in-depth colloquy about the ramifications of waiving a jury. The colloquy was

limited solely to: whether Turner understood that he was waiving his right to "have a jury trial in this case?;" that "you're waiving your right to have a jury of 12 persons hear and decide the case, the evidence, and render a unanimous verdict in the case as to the issues;" that "the alternative to a jury waived trial, the alternative is to have a panel of three judges hear and decide the case and decide the case on all the issues;" whether it was Turner's desire to waive jury and that the decision was made after consulting with counsel. (Tr. Vol. I, p. 64). The trial court then asked defense counsel if counsel wished to make any comment. Counsel declined to do so. (Tr. Vol. I, p. 65). The record is thus devoid of any facts as to what, if anything, defense counsel advised Turner regarding his constitutional waiver of his right to a jury.

134) Counsel spent little time discussing the jury wavier with Turner; encouraged him to waive his right to a jury determination by advising him to "do what I say and everything's going to be alright;" failed to inform him that a jury would have to be unanimous in its verdict at the penalty phase hearing in order to impose a sentence of death; did not advise him that he had the absolute right to withdraw his jury waiver pursuant to Ohio Rev. Code § 2945.05; advised him that he could not withdraw his jury waiver when he expressed a desire to do so; did not inform him that it was his

personal right to waive a jury and that this right could not be exercised by his counsel; and did not explain to him that his chances for reversal on appeal would be reduced by waiving a jury and trying the case to a three-judge panel. (Post-Conviction Ex. 31, Affidavit of Michael Turner).

135) Turner further explained that had his counsel informed him of the full panoply of his rights and the consequences of a jury waiver, he would have exercised his right to a jury trial. (Post-Conviction Ex. 31, Affidavit of Michael Turner). Turner summarized his contact with trial counsel regarding the waiver of his constitutional right to trial by a jury: "My feeling was that whether I wanted to do it or not, they were going to do the jury waiver anyway." *Id.*

136) Counsel's failure to fully explain the consequences of the jury waiver was unreasonable in that it fell far below the prevailing professional norms and thereby deprived Turner of his right to have his sentence decided by a jury in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments as well as Guideline 10.8 of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003).

E. Failure to ensure that Turner could withdraw his guilty plea if the three-judge panel returned a death verdict.

137) Counsel unreasonably and prejudicially failed to ensure that Turner could withdraw his plea to all counts and specifications if the three judge

panel rendered a verdict imposing the death penalty contrary to the prevailing professional norms in Ohio in 2002. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003). The Sixth Amendment requires that trial counsel undertake a reasonable investigation and preparation for the guilt phase. The duty of defense counsel is heightened in capital cases. *Combs v. Coyle*, 205 F.3d 269, 289-90 (6th Cir. 2000).

138) Counsel directed Turner to plead guilty to all counts and death specifications charged against him because counsel believed the evidence against him was "overwhelming" (Post-Conviction Ex. 2, Affidavit of Brandie Fox) and because, as counsel announced publicly, counsel found the facts of the case "grotesque" (Tr. Vol. II, p. 49), and the 9-1-1 tape obtained by the police made counsel "sick to [his] stomach." (Post-Conviction Ex. 1, *Columbus Dispatch* newspaper article).

139) The facts of virtually all capital murder cases can be deemed "grotesque" and may offend the sensibilities of the attorneys who represent the perpetrators of the capital crimes. That being said, defense counsel in a capital case is ethically required to advocate in a zealous, skillful manner regardless of the horrific facts of the crimes charged against the defendant. That is why the Ohio Supreme Court has mandated that capital defense

counsel must be certified, through training and experience, prior to being appointed to provide representation in a capital case. Rule 20 of the Rules of Superintendence for the Courts of Ohio. *See*, *also*, ABA, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Guideline 10.8.

140) Turner's trial counsel directed him to enter a guilty plea on December 16, 2002. (Tr. Vol. II, pp. 11-20). The record reveals that there was no attempt by counsel to ensure that if the panel returned a death verdict, that he could withdraw his guilty plea to all counts and specifications as was the prevailing practice in Franklin County, Ohio in 2002.

141) Having entered a guilty plea to all counts and specifications, the risk that Turner would be sentenced to death was heightened. This is particularly so in a case in which guilt was not a hotly contested issue and the primary dispute was whether the aggravating circumstances outweigh the mitigating factors in determining the appropriate punishment. Counsel were fully aware that their preparations for the penalty phase were woefully incomplete. (Post-Conviction Ex. 2, Affidavit of Brandie Fox). Nevertheless, counsel never requested a continuance or any additional time to prepare the mitigation case which would determine whether Turner would live or die.

142) The testifying psychologist did not provide her report to counsel until December 16, 2002, the day of the trial and penalty phase hearing. (Tr. Vol. II, p. 6). Although Turner's "alcoholism" was identified as the critical mitigating factor to be presented at the penalty phase (Tr. Vol. II, p. 49), counsel failed to investigate, prepare and present the testimony of lay persons who had direct, firsthand knowledge of Turner's dependence on alcohol and the terrible effects his drug and alcohol dependence had on his life functioning. Instead, counsel put on lay witnesses who had no personal knowledge of Turner's alcohol dependence. When defense counsel asked witness Reva Turner (Turner's mother) on direct examination about Turner's alcohol consumption, Ms. Turner replied that she did not know because he did not drink around her. (Tr. Vol. II, pp. 65-66).[12] Counsel also presented Brandie Fox as a penalty phase witness. Although Ms. Fox testified that she believed Turner drank "a lot," she also testified that "he did not drink around me." (Tr. Vol. II, p. 110). When counsel inquired, "Did you see him—did alcohol—did he ever have a drink around you at the house?," Brandie replied, "Not that I can remember." *Id.*

[12] The fact that defense counsel would ask Ms. Turner about an area of which she had no personal knowledge illustrates counsel's fundamental lack of preparation for the penalty phase of Turner's trial.

143) The guilty plea should not have been entered without reservation of the option to withdraw the waiver in the event that the three judge panel returned a death sentence. Moreover, the reservation of this right should have been made in open court and on the record. (Post-Conviction Ex. 19, *State v. Woodhouse*, Plea of Guilty; Ex. 20, *State v. Woodhouse*, Transcript of Change of Plea).

144) The practice of reserving the right to withdraw a plea in a capital case was the reasonable and standard practice in Ohio. There was no reason not to have employed it here. Without this safeguard, Turner was unnecessarily subjected to a sentence of death. Counsel's failure to utilize this standard procedure was unreasonable in that it fell far below the prevailing professional norms and prejudiced Turner. (Post-Conviction Ex. 17, Affidavit of Harry Reinhart). "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654 (1984). Unless a criminal defendant receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). The right is fundamental and its importance and centrality increase with the gravity of the offense. In capital cases, in which the imposition of the ultimate penalty

is sought, the highest standard for effective assistance of counsel applies. A specific act or omission of defense counsel can be so deficient as to constitute, without more, the deprivation of effective assistance of counsel. *See, e.g., Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995). The actions of Turner's counsel in directing him to enter a plea to all counts and death specifications, without reserving his right to withdraw that plea upon a verdict of death by the panel, constituted an omission of that was both deficient and prejudicial. As such, a writ of habeas corpus should be granted.

145) In sum, counsel abdicated their duty to competently represent Turner in the innocence-guilt phase of his capital trial. Although trial counsel filed some 34 pre-trial motions seeking discovery and addressing the application of the death penalty, they failed to file any motion to suppress Turner's statements to the Reynoldsburg Police based either upon Turner's physical and mental state that prevented the voluntary waiver of his rights, or upon Turner's invocation of his right to counsel. Significantly, counsel's efforts to avoid the imposition of the death penalty through a plea agreement were rejected by the Reynoldsburg Police Department. If trial counsel had been successful in suppressing even some of Turner's statements, the police may well have been more willing to accept a plea agreement which would have precluded a death sentence. Counsel also failed to ensure that Turner could

withdraw both his jury waiver and his guilty pleas if the three-judge panel returned a death verdict. These were standard practices at the time of Turner's trial, but were never sought by Turner's counsel. Likewise, counsel did not insure that Turner was fully informed and understood the consequences of his jury waiver, including giving up the right to have twelve people rather than three determine whether he should live or die. Equally deficient was counsel's decision to plead guilty to a death specification when factual disputes existed as to whether the state could prove the specification, solely so that they could proceed directly to mitigation:

> There was a substantial disagreement with regard to Specification Three, that being the killing of a witness, but we decided to go ahead and enter a plea to all three specifications so that we can proceed directly to mitigation.

(Tr. Vol. II, p. 40). Despite the existence of this factual dispute and knowing that the three-judge panel would almost certainly find Turner guilty of all charges and specifications without the presentation of any evidence, they still directed him to waive his right to a jury trial, and then later directed him to plead guilty to the indictment and all capital specifications. In sum, counsel gave up, or directed Turner to give up, almost every constitutional right he had, receiving nothing in return. Counsel's performance was a failure of advocacy – let alone zealous advocacy – and fell far below the prevailing professional norms to the prejudice of Michael Turner, thus denying Turner

the effective assistance of counsel under the Fifth, Sixth, Eighth and Fourteenth Amendments.

146) The merits decision of the Ohio courts on Turner's claims was contrary to or an unreasonable application of clearly established federal law as stated by the Supreme Court of the United States or resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in state courts. 28 U.S.C. § 2254(D).

161) **IX. MICHAEL TURNER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

162) Turner was denied the effective assistance of counsel in the penalty phase of his capital trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984).

163) It is undisputed that capitally charged individuals have a constitutionally protected right to the presentation of mitigating evidence. *Williams v. Taylor*, 529 U.S. 362 (2000). More recently the Supreme Court relied upon the American Bar Association Criminal Justice Standards when it stated that trial counsel in death penalty cases have "a duty to make reasonable investigations." *Wiggins v. Smith*, 539 U.S. 510, 522 (2003).

164) In order to establish a claim of ineffective assistance of counsel, Turner must satisfy a two-pronged test. *Strickland v. Washington*, 466 U.S. 668 (1984). First, he must show that his counsel was "objectively deficient" or acted unreasonably. Second, he must show that but for trial counsel's errors, a reasonable probability exists that the result of the trial would have been different.

evidence of the type often relied on for imposing a sentence less than death. The failure to develop and present this compelling evidence at Turner's penalty phase hearing clearly undermined the adversarial process rendering the resulting sentence of death unreliable. These lay witnesses, in conjunction with qualified expert testimony, would have enabled the sentencer to give weight and effect to this compelling mitigating evidence as required by Ohio Rev. Code § 2929.04, as well as the Fifth, Sixth, Eighth and Fourteenth Amendments.

G. Failure to utilize readily available documentary evidence to demonstrate Turner's extreme intoxication at the time of the offense.

207) Counsel had an available source of vast quantities of documentary evidence to utilize in investigating, preparing and presenting, as a mitigating factor, Turner's extreme intoxication at the time of the commission of the charged crimes. The circumstances surrounding Turner's arrest were well documented by the police and described by the prosecutor:

A) At 11: 11 p.m. on June 12, 2001, police observed a "pair of shoes in a wooded area" near the crime scene. (Tr. Vol. II, p. 30).

B) Turner was "pulled from the underbrush" and transported to the Reynoldsburg police station where "he was slated, and arrest photographs were taken at 11:30 p.m." (Tr. Vol. II, p. 30).

C) At approximately 1:05 a.m. on June 13, 2001, the police began a five hour interrogation. (Tr. Vol. II, p. 33).

208) Documents provided to defense counsel more fully demonstrate the level of Turner's inebriation at the time of his arrest.

209) Specifically, the transcribed statement of the police interrogation of Turner as well as documents compiled by investigating police pertaining to the crime scene, demonstrate an extremely intoxicated and incoherent Michael Turner. (Post-Conviction Ex. 13, Taped Interview with Suspect).

A) Turner was able to stumble only three hundred sixty nine feet from the crime scene before he passed out in the wooded area where he was apprehended. (Post-Conviction Ex. 25, Investigative Follow-Up).

B) A half empty bottle of high alcohol whiskey was recovered from the spot where Turner passed out. *Id.*

C) Although the police were desperate to confront Turner, they were forced to let him "sleep it off" before they began their interrogation. (Post-Conviction Ex. 13, Taped Interview with Suspect).

D) When the interrogation began, police noted that Turner had "made a mess"—indicating Turner's sickness from the vast amount of substances he had ingested—while "sleeping it off" and police informed him "we gotta clean it up." *Id.*

210) This information was contained in police documents and provided to defense counsel through discovery. Counsel could have and should have subpoenaed the police officers involved in the arrest, interrogation and

investigation of Turner to demonstrate the extreme state of his intoxication. Had counsel done so, counsel could have presented credible evidence of Turner's substance dependence and related extreme intoxication at the time of his arrest, shortly after these crimes were committed.

211) At the time of Turner's trial, this type of mitigating evidence had been repeatedly recognized by the Ohio Supreme Court as entitled to weight and effect. *See, e.g., State v. Rojas*, 64 Ohio St.3d 131 (1992); *State v. Otte*, 74 Ohio St.3d 555 (1996); *State v. Smith*, 80 Ohio St. 3d 89 (1997); *State v. White*, 82 Ohio St. 3d 16 (1998); *State v. Lindsey*, 87 Ohio St.3d 479 (2000); *State v. Smith*, 87 Ohio St. 424 (2000); *State v. Johnson*, 88 Ohio St. 3d 95 (2000).

212) Instead, counsel merely relied on Dr. Haskins's largely unsupported testimony regarding Turner's substance dependence. Her testimony in turn relied primarily on Turner's self reporting, weakened by counsel's elicitation from Dr. Haskins that Turner had a "history of lying" and "exaggerating." (Tr. Vol. II, p. 151). The prosecutor subsequently exacerbated the damage done on direct examination with cross-examination about Turner's history of lying. (Tr. Vol. II, pp. 183).

213) Because it was based almost exclusively on Turner's self-reporting, Dr. Haskins' testimony regarding Turner's substance dependence was

rejected by the sentencer. In its sentencing opinion, the three-judge panel specifically assessed Dr. Haskins's testimony regarding Michael Turner's drug and alcohol dependence, and found it to be "of little weight." (Post-Conviction Ex. 11, Trial Court Opinion). The panel also found that the "evidence did not support the conclusion that the defendant was in some drug and alcohol induced stupor." *Id.* This conclusion could not have been reached had counsel presented the readily available documentary and testimonial evidence as well as the testimony of a qualified substance abuse expert. (Post-Convictions Exs. 29 and 30, Affidavits of Robert L. Smith).

214) Because counsel failed to reasonably and competently investigate, prepare and present readily available mitigating evidence of Turner's substance dependence and related intoxication at the time of his arrest, shortly after the murders occurred, the sentencer did not hear and therefore could not consider compelling mitigating evidence of recognized weight for a sentence less than death. The failure to develop and present this evidence clearly undermined the adversarial process and rendered the outcome of Turner's penalty phase hearing unreliable. A qualified expert would have enabled the panel to give weight and effect to this relevant mitigating evidence as required by Ohio Rev. Code § 2929.04, and the Fifth, Sixth, Eighth and Fourteenth Amendments.

240) **XI. TURNER'S SENTENCE OF DEATH WAS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AS WELL AS THE VARIOUS TREATY AND COMPACT OBLIGATIONS OF THE UNITED STATES UNDER INTERNATIONAL LAW.**

241) Ohio has systemic constitutional problems in the administration of capital punishment. The American Bar Association has recently called for a moratorium on capital punishment unless and until each jurisdiction attempting to impose such punishment "implements policies and procedures that are consistent with . . . longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed . . ."

242) As the ABA has observed, in a report accompanying its resolution, "administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency." The ABA concludes that this morass has resulted from the lack of competent counsel in capital cases, the lack of a fair and adequate review process, and the pervasive effects of race.

243) The United Nations High Commission for Human Rights has studied the American capital punishment process, and has concluded that

"guarantees and safeguards, as well as specific restrictions on Capital Punishment, are not being respected. Lack of adequate counsel and legal representation for many capital defendants is disturbing."

244) The High Commissioner further concluded that "race, ethnic origin and economic status appear to be key determinates of who will, and who will not, receive a sentence of death." The report also described in detail the special problems created by the politicization of the death penalty, the lack of an independent and impartial state judiciary, and the racially-biased system of selecting juries:

> The high level of support for the death penalty cannot justify the lack of respect for the restrictions and safeguards surrounding its use. In many countries, mob killings and lynchings enjoy public support as a way to deal with violent crime and are often portrayed as "popular justice." Yet they are not acceptable in civilized society.

245) The Ohio capital punishment system suffers from all of the problems identified in the ABA and United Nations reports: the under-funding of counsel, the lack of fair and adequate appellate review processes and the pervasive effects of race in determining who is sentenced to death.

246) The Ohio capital sentencing statues also require submission of statutory presentence and mental health evaluations to the jury or judge once requested by a capital defendant regardless of the content of those reports and without any further input or comment from counsel or the defendant.

Ohio Rev. Code §§ 2929.03(D)(1). This mandatory submission prevents a capital defendant from controlling the presentation of mitigating evidence in his case to the jury at the penalty phase because all information in these reports, no matter how irrelevant or how prejudicial, must go to the jury in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

247) Ohio's capital statutory scheme permits the arbitrary and discriminatory imposition of the death penalty. Ohio's death penalty sentencing scheme violates the rights of Michael Turner under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

248) The Eighth Amendment prohibits the infliction of cruel and unusual punishment. The Eighth Amendment's protections are applicable to the states through the Fourteenth Amendment. Punishment that is "excessive" constitutes cruel and unusual punishment. The underlying principle of governmental respect for human dignity is the guideline to determine whether this statute is constitutional. The Ohio death sentencing scheme violates this bedrock principle.

249) Turner was convicted and sentenced to death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendment as well as principles of international law contained in the various charters and treaties endorsed by the government of the United States and applied to the states under Article

VI of the United States Constitution. As such his conviction and sentence must be vacated.

250) To the extent that counsel did not fully litigate these issues concerning whether Ohio's death sentencing statutes on their face and as applied to Turner violate the United States Constitution as well as the various treaty and charter obligations of the United States, counsel's performance fell far below the prevailing professional norms and deprived Turner of the effective assistance of counsel.

251) The merits decision of the Ohio courts on Turner's claims was contrary to or an unreasonable application of clearly established federal law as stated by the Supreme Court of the United States or resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the state courts. 28 U.S.C. § 2254(D).

252) **XII. OHIO HAS FAILED TO PROVIDE AN ADEQUATE SYSTEM OF APPELLATE AND PROPORTIONALITY REVIEW IN DEATH PENALTY CASES.**

253) Appellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia,* 428 U.S. 153 (1976). A state may not leave the decision of whether a defendant lives or dies to the unfettered discretion of the jury because such a scheme inevitably results in death sentences that are wantonly and ... freakishly imposed" and "are cruel and unusual in the same way that being struck by lightening is cruel and unusual." *Furman.* at 309-310. (Stewart, J., concurring) This is true regardless of what other limitations and safeguards are enacted. Appellate review is necessary to correct the arbitrary imposition of a sentence of death - despite the safeguards. The Eighth Amendment requires some form of meaningful appellate review is required to assess the sentencer's imposition of the death penalty.

254) While the federal constitution does mandate proportionality review in all death cases, the Eighth Amendment mandates appellate review that eliminates disproportionate sentences because they are arbitrary.

255) The Ohio Legislature mandated proportionality review in capital cases. Ohio Rev. Code Section 2929.05(A) provides that the Supreme Court

of Ohio shall make an independent, *de novo*, review of all the evidence and facts in the case to determine if the "sentence of death is appropriate;" "the Supreme Court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in *similar* cases." (Emphasis supplied)

256) Thus, the statute mandates that the Supreme Court of Ohio perform proportionality review to determine if the sentence is appropriate and excessive under the Eighth Amendment. Proportionality review, therefore, is an integral part of Ohio's review of a capital sentence.

257) The Supreme Court of Ohio has not performed any meaningful proportionality review, and has ignored the spirit and intent of the statutes requiring proportionality review as part of the appellate process.

258) The Supreme Court of Ohio limits its "proportionality review" to a comparison to other cases where death has been imposed.

259) The Court does not consider in this calculus the many cases in which death was not imposed --- even in similar cases.

260) The Court simply lists other cases in which similar aggravating circumstances exist where death was imposed as a sentence.

261) The Court does not make any comparison to those cases with similar aggravating circumstances where death was not imposed.

262) The Supreme Court of Ohio has performed this inadequate "proportionality review" in capital cases for over twenty years. Each time, it has limited the pool of cases compared to other cases where death has been imposed and where it has affirmed the sentence of death.

263) The Supreme Court of Ohio has yet to find a death sentence to be disproportionate.

264) The review by the Supreme Court of Ohio is clearly contrary to the legislative intent behind the mandated proportionality review and contrary to Eighth Amendment requirements.

265) In order for the Supreme Court of Ohio to conduct a review in a constitutionally acceptable manner, it is required to compare any given case where death is imposed case to other similar homicide cases where the death penalty was not imposed. Only then can there be a determination whether the sentence of death in a particular case is so far outside the ordinary sentence for that type of case as to be so disproportionate as to be arbitrary and therefore in violation of the Eighth Amendment.

266) The Supreme Court of Ohio has not only failed to follow the dictates of Ohio Rev. Code, § 2929.05, it has also failed to engage in any meaningful comparison of those cases or to follow its own precedent, where it recognized Ohio Rev. Code § 2929.05(A) as a meaningful requirement that

reduces the arbitrary and capricious imposition of death sentences. The fundamental purpose behind this mandated proportionality review, was to prevent a return to the pre-*Furman* era when death sentences were imposed arbitrarily, capriciously and indiscriminately.

267) Nevertheless, the Ohio Supreme Court's proportionality review simply consists of citation one or more cases presenting similar aggravating circumstances where the sentence of death has been affirmed.

268) The cases cited by the Court are often not at all similar to the case being reviewed.

269) In more than twenty-five years of capital litigation under the present death penalty statute, the Supreme Court of Ohio has not followed statutorily-mandated proportionality review.

270) The Supreme Court of Ohio in its review here again merely compared the sentence in this case to other purportedly similar cases in which death had also been imposed, without any reference to any similar cases where death had not been imposed:

271) The merits decision of the Ohio courts on Turner's claims was contrary to or an unreasonable application of clearly established federal law as stated by the Supreme Court of the United States or resulted in a decision

that was based on an unreasonable determination of facts in light of the evidence presented in the state courts. 28 U.S.C. § 2254(D).

272) **XIII. MICHAEL TURNER WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ON HIS SOLE APPEAL OF RIGHT TO THE SUPREME COURT OF OHIO IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.**

273) Where a state offers an appeal of right to a criminal defendant convicted of any crime, that defendant is entitled to the effective assistance of counsel to pursue that appeal of right provided by the state under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

274) Ohio affords one appeal of right to the Supreme Court of Ohio for a defendant sentenced to death. Ohio Rev. Code § 2929.05.

275) Michael Turner was represented by appointed counsel W. Joseph Edwards and Todd Barstow on his one appeal of right to the Supreme Court of Ohio.

276) Appellate counsel's performance fell far below the prevailing professional norms for appellate counsel in capital cases. *See* ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003). Appellate counsel failed in their obligations to "safeguard the interests of the client and [to] cooperate fully with successor counsel." ABA *Guidelines* 10.13.

277) Likewise appellate counsel failed "to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards of

applicable high quality capital defense representation . . . [and] to present issues in a manner that will preserve them for subsequent review." ABA *Guideline* 10.15.C.

278) Counsel failed to file "a petition for *certiorari* in the Supreme Court of the United States" and failed to notify successor counsel who were known to Edwards and Barstow that they did not intend to file such a petition. ABA *Guideline* 10.15.D. ("[i]f appellate counsel does not intend to file such a petition, he or she should immediately notify successor counsel if known and the responsible agency.")

279) Appellate counsel's performance fell far below the prevailing professional norms for appellate counsel in a capital case in 2002-2003 because counsel failed to raise or properly litigate critical federal constitutional issues that were apparent from the record, that should have been evident to a competent appellate attorney, and that there existed no reasonable strategic reason for not raising these issues.

280) **PROPOSITION OF LAW I**

MICHAEL TURNER'S STATEMENTS TO LAW ENFORCEMENT OFFICIALS WERE NOT BASED ON A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF HIS RIGHT AGAINST SELF-INCRIMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

281) Following his arrest by the Reynoldsburg Police Department, Turner was taken to police headquarters and booked 11:15 p.m. on June 12, 2001. Turner's audio taped statement to the police at page 30 demonstrates that he was too intoxicated to be interviewed. He was allowed to "sleep it off" for two hours before detectives began to interrogate him at 1:15 a.m. During the initial audio taped questioning on June 12, 2001, Turner consistently denied committing the offense and repeatedly indicated that he believed he was arrested for an alcohol related offense. As the questioning focused on Ms. Turner and Mr. Seggerman, Turner insisted that he was confused, not feeling well and that he did not want to talk to the police without legal representation. The police persisted in asking about the offense without providing an attorney. (Post-Conviction Ex. 13, Taped Interview with Suspect).[18]

282) On June 13, 2001, a second interview was conducted:

> If you'll give me some (inaudible) I'll tell you everything that I can remember (inaudible) but you have to promise to get me some (inaudible) medication. (inaudible) Are you going to get me some more of this medication tonight? (inaudible).

During this questioning Turner states repeatedly: "I have no idea" or "I don't know" when asked about specifics of the offenses. When asked about this

[18] Since the state court record has not yet been filed, Turner is unable to provide a record cite for these documents. Turner will provide record cites for all documents filed after Respondent submits the state court record.

questioning by the interviewer, Turner explained that he was extremely ill from the withdrawal from alcohol and cocaine. He realized he needed medication and had asked the police for medical care. He indicated that he was struggling to focus and maintain his attention. He felt anxious, depressed, agitated, irritable, confused and was having difficulty understanding the questions and deciding how to answer. He simply wanted the questioning to end and to receive medication to ease his symptoms of withdrawal. Although he could not remember the events related to the offense, he agreed with the statements made by the police in order to receive this medication. (Taped Interview with Suspect). On June 21, 2001, Turner was still suffering from severe alcohol withdrawal. (Psychiatric Evaluation of Franklin County Sheriff's Office).

283) Turner was clearly requesting medication for his withdrawal symptoms at the time of the second questioning. His description of his physical and emotional state at the time of the questioning is consistent with the symptoms of alcohol withdrawal. Turner's alcohol withdrawal prevented him from being able to knowingly and intelligently waive his *Miranda* rights. Furthermore, given that Turner was undergoing alcohol withdrawal, his statements were susceptible to suggestion by the police. (Taped Interview with Suspect). The prosecutor utilized Turner's statements to

establish his guilt, (Tr. Vol. II, pp. 33-35) in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

284) The prejudice flowing from counsel's failure to move to suppress his statements was demonstrated in the cross-examination of Dr. Haskins regarding Turner's truthfulness:

> Q. Okay. Could you give us an opinion why he would lie when he chooses to lie?
>
> A. Usually it makes him look a little better.
>
> Q. You're certainly aware in reviewing that 60-plus transcript to the Reynoldsburg police he lied in the course of that transcript to the police officers numerous times, didn't he?
>
> A. Yes, he did.

(Tr. Vol. II, p. 183).

285) Shortly before this testimony Turner gave a lengthy unsworn statement where he expressed his remorse and sorrow for these deaths, and expressed his acceptance of responsibility. (Tr. Vol. II, p. 105). Remorse is a mitigating factor entitled to weight and effect. *State v. Rojas*, 64 Ohio St. 3d 131 (1992); *State v. Green*, 66 Ohio St. 3d 141 (1993); *State v. Clifford Williams*, 73 Ohio St. 3d 153 (1995); *State v. Awkal*, 76 Ohio St. 3d 324 (1996); *State v. Dennis*, 79 Ohio St. 3d 421 (1997); *State v. Mitts*, 81 Ohio St. 3d 223 (1998); *State v. Clifton White*, 85 Ohio St. 3d 433 (1999); *State v. Stallings*, 89 Ohio St. 3d 280 (2000). However in its sentencing opinion, the

three judge panel does not mention or give any weight to Turner's remorse or acceptance of responsibility.

286) Due to the effects of the drugs and alcohol Turner had ingested and the effects of his withdrawal from the drugs and alcohol, Turner's statements to law enforcement officials were not knowing, voluntary or intelligent, and should have been suppressed under the Fifth, Sixth, Eighth and Fourteenth Amendments.

287) **PROPOSITION OF LAW II**

> **THE LAW ENFORCEMENT OFFICIALS WHO INTERROGATED TURNER FAILED TO HONOR HIS CLEAR AND REPEATED REQUESTS FOR COUNSEL AND CONTINUED TO INTERROGATE HIM AFTER HE INVOKED HIS RIGHT TO COUNSEL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

288) Following his arrest, Turner was taken to police headquarters and booked at 11:15 p.m. on June 12, 2001. He was too intoxicated to be interrogated and was permitted to "sleep it off" for two hours before detectives began an interrogation at 1:15 a.m. (Tr. Vol. II, p. 184) (Taped Interview with Suspect).[19] During this interrogation, Turner repeatedly denied stabbing Jennifer Turner and Ronald Seggerman. *Id.* The police

[19] Since the state court record has not yet been filed, Turner is unable to provide a record cite for this document. Turner will provide record cites for all documents filed after Respondent submits the state court record.

utilized a variety of coercive tactics to elicit statements. *Id.* Finally, Turner made several unequivocal requests for counsel. *Id.* These requests were ignored by the interrogators. *Id.* Ultimately, the interrogation ended at 5:30 a.m. Turner was not provided counsel.

289) The interrogation was resumed later that morning without any additional *Miranda* warnings. Turner was obviously ill and was begging for "medication." (Taped Interview with Suspect). His distress was so great that he offered to tell the police "everything that I can remember *** but you have to promise to get me some *** medication." (Taped Interview with Suspect). Turner's statements were given after Turner clearly invoked his right to counsel. The prosecutor subsequently utilized these statements to establish his guilt, (Tr. Vol. II, pp. 33-35), in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

290) When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to police-initiated interrogation after being again advised of his rights. An accused, such as petitioner, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation until counsel has been made available to him, unless the accused has himself initiated further communication, exchanges, or conversations with the police.

Edwards v. Arizona, 451 U.S. 477, 478 (1981)

291) Turner clearly invoked his right to counsel during a custodial interrogation by explicitly and repeatedly indicating that he wanted to talk to an attorney. At page 37 of his transcribed interrogation, Turner told the police, "Anything I say I am going to get me a lawyer. That is the way it is going to be." (Taped Interview with Suspect). At page 62 he stated, "Can I call my lawyer?" At page 63 the police then inquired if Turner knew the name and telephone number of his attorney. When Turner recalled the telephone number, he asked police for the time of day. At page 63, Turner then attempted call his attorney. The police continued the interrogation and Turner again asked for counsel by stating, at page 64, "I would like to have a lawyer help me with this." The police stated at page 64 that they "would give it a shot." Turner then identified his attorney as a public defender and asked the police to call for him. Page 65. The police dissuaded Turner from contacting counsel by stating, "I can tell you straight up that to get you a public defender ... probably impossible. The court has to appoint them and they have to see if you got the money and so forth. Like I said you have already made a couple of phone calls there." Page 65. The police continued to interrogate Turner and he again stated his desire to speak with counsel. Page 66. Turner explained that his desire for counsel was based on the comments of the police. ("You've got me to the point where I am scared to

say anything," page 66). Nonetheless, the police continued the interrogation. Turner stated "[Y]ou know I've done this a bunch of time (sic) and found it's best to say nothing. And I think this is one of them times." "If I had an attorney here that I could talk to and see what he said." Page 68.

292) "[A] suspect need not speak with the discrimination of an Oxford don." However, a suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstance would understand to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459 (1994). Turner was absolutely clear in his invocation of his right to counsel. "[W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990).

293) By failing to honor Turner's clear and repeated requests for counsel and by continuing to interrogate Turner after his invocation of his right to counsel, the police deprived Turner of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

294) **PROPOSITION OF LAW III**

MICHAEL TURNER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE INNOCENCE-GUILT DETERMINATION PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH,

EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

295) **A. Failure to ensure that Turner could withdraw his jury waiver if the three-judge panel returned a death verdict.**

296) Turner's counsel unreasonably failed to ensure that he could withdraw his waiver of trial by jury once the three judge panel rendered a verdict imposing the death penalty as was standard practice in Ohio at that time. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003).

297) Trial by jury in criminal cases is fundamental to the American scheme of justice: *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). "[W]e hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which -- were they to be tried in a federal court -- would come within the Sixth Amendment's guarantee." The right was also held to be so guaranteed to defendants in criminal cases tried in state courts by the Fourteenth Amendment. *Id.* at 162. Most importantly, it is a right that is granted to the criminal defendant personally.

298) In Ohio criminal cases, "[e]very reasonable presumption should be made against the waiver, especially when it relates to a right or privilege so valuable as to be secured by the Constitution." *Simmons v. State*, 75 Ohio

St. 364 (1905); *see also*, Ohio Const., art. I, § 5 ("the right to trial by jury shall be inviolate").

299) The right to waive jury trial should not be casually usurped by counsel merely because counsel believes the evidence against a capital defendant is "overwhelming" (Post-Conviction Ex. 2, Affidavit of Brandie Fox) or because counsel publicly announces that counsel finds the facts of the case "grotesque" (Tr. Vol. II, p. 49).

300) It is an understatement to say that the decision to waive a jury and try a capital case to a three judge panel is a crucial decision. A capital defendant who chooses to waive his right to a jury trial increases his possibility of receiving the death penalty and loses many of his appellate issues should the penalty of death be deemed appropriate. All twelve jurors must unanimously agree that the penalty of death be appropriate for capital punishment to be instituted. Only one juror need find the penalty to be inappropriate and a life sentence must then be instituted. Ohio Rev. Code § 2929.03(D)(2). The consequence of a single juror dissenting from a death verdict ensures that "the trial court is required to sentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving

thirty full years of imprisonment." *State v. Springer*, 63 Ohio St. 167 (1992); *State v. Brooks*, 75 Ohio St.3d 148 (1996).

301) At the direction of his counsel, Turner entered into a waiver of his right to a trial by jury on October 24, 2002. A three judge panel was selected. (Tr. Vol. I, pp. 59-66). The Court failed to engage in an in-depth colloquy as to the ramifications of waiving a jury. The colloquy was limited solely to the following: whether Turner understood that he was waiving his right to "have a jury trial in this case?;" that "you're waiving your right to have a jury of 12 persons hear and decide the case, the evidence, and render a unanimous verdict in the case as to the issues;" that "the alternative to a jury waived trial, the alternative is to have a panel of three judges hear and decide the case and decide the case on all the issues;" whether it was Turner's desire to waive jury and that the decision was made after consulting with counsel. (Tr. Vol. I, p. 64). The trial court then asked defense counsel if counsel wished to make any comment and counsel declined to do so. (Tr. Vol. I, p. 65). The record is thus devoid of any facts as to what, if anything, defense counsel advised Turner regarding his constitutional waiver of his right to a jury. Further there is clearly no attempt by Turner's counsel to ensure that if the panel returned a death

verdict against Turner, that he could withdraw his waiver of his constitutional right to trial by jury. (Tr. Vol. I, p. 65).

302) Moreover, Ohio's three-judge panel provision in capital cases has no counterpart in other state statutes, and therefore the standards of practice relating to this technique are uniquely Ohio standards. As a result, a very specific standard of practice has developed in Ohio with respect to jury waivers in capital cases, because of the unusual risks associated with waiving a jury trial in favor of a three-judge panel. These risks are heightened particularly in a case where guilt is not an issue and the primary dispute will be whether the aggravating circumstances outweigh the mitigating factors in determining the appropriate punishment. Therefore, standard practice in jury trials in Ohio is that a waiver of jury in favor of a three-judge panel is always accompanied by reservation of the option to withdraw the waiver in the event that the three judge panel returns a death sentence. Moreover, the reservation of this right should be made in open court and on the record.

303) The practice of reserving the right to withdraw the waiver of jury was the standard practice in Franklin County, Ohio, the venue of Turner's trial, for at least thirteen years. The failure of counsel to be aware of, and to

utilize this standard practice was unreasonable in that it fell far below the prevailing professional norms.

304) Unless a criminal defendant receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). The right is fundamental and its importance and centrality increase with the gravity of the offense. In capital cases, in which the imposition of the ultimate penalty is sought, the highest standard for effective assistance of counsel applies. A specific act or omission of defense counsel can be so deficient as to constitute, without more, the deprivation of effective assistance of counsel. *See, e.g., Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995). The actions of counsel in permitting the waiver of the right to trial by jury in favor of a three-judge panel, without reserving his right to withdraw that waiver upon a verdict of death, constituted an omission that was both deficient and prejudicial.

305) **B. Failure to ensure that Turner was fully informed of the consequences of his jury waiver.**

306) Turner was denied the effective assistance of counsel in the trial phase when counsel unreasonably and prejudicially failed to ensure that he was fully informed of the consequences of this waiver. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 120 S. Ct. 1495, 1513

(2000); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003).

307) Trial by jury in criminal cases is fundamental to the American scheme of justice: *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). "[W]e hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which -- were they to be tried in a federal court -- would come within the Sixth Amendment's guarantee." The right was also held to be so guaranteed to defendants in criminal cases tried in state courts by the Fourteenth Amendment. *Id.* at 162. Most importantly, it is a right that is granted to the criminal defendant personally.

308) In Ohio criminal cases, "[e]very reasonable presumption should be made against the waiver, especially when it relates to a right or privilege so valuable as to be secured by the Constitution." *Simmons v. State*, 75 Ohio St. 364 (1905); *see also*, Ohio Const., art. I, § 5 ("the right to trial by jury shall be inviolate").

309) The right to trial by jury may not be waived merely because counsel believes the evidence against a capital defendant is "overwhelming."

310) The decision to waive a jury in favor of a three-judge panel is a crucial decision. A capital defendant who chooses to waive his right to a jury trial increases his possibility of receiving the death penalty and loses many

of his appellate issues should the penalty of death be imposed. All twelve jurors must unanimously agree on the penalty of death. If one juror finds the penalty to be inappropriate, a life sentence is imposed. Ohio Rev. Code § 2929.03(D)(2). *State v. Springer*, 63 Ohio St. 167 (1992); *State v. Brooks*, 75 Ohio St.3d 148 (1996).

311) At the direction of counsel, Turner signed a waiver of his right to a trial by jury. A three-judge panel was selected. (Tr. Vol. I, pp. 59-66). The Court failed to engage in an in-depth colloquy with Turner as to the ramifications of waiving a jury. The colloquy was limited solely to the following: whether Turner understood that he was waiving his right to "have a jury trial in this case?;" that "you're waiving your right to have a jury of 12 persons hear and decide the case, the evidence, and render a unanimous verdict in the case as to the issues;" that "the alternative to a jury waived trial, the alternative is to have a panel of three judges hear and decide the case and decide the case on all the issues;" whether it was Turner's desire to waive jury and that the decision was made after consulting with counsel. (Tr. Vol. I, p. 64). The trial court then asked defense counsel if counsel wished to make any comment and counsel declined to do so. (Tr. Vol. I, p. 65). The record is thus devoid of any facts as to what, if anything, counsel advised Turner regarding his constitutional waiver of his right to a jury.

312) Counsel spent little time discussing the jury wavier; encouraged him to waive his right to a jury determination by advising him to "do what I say and everything's going to be alright;" failed to inform him that a jury would have to be unanimous in its verdict at the penalty phase in order to recommend a sentence of death; did not advise him that he had the absolute right to withdraw his jury waiver pursuant to Ohio Rev. Code § 2945.05; advised him that he could not withdraw his jury waiver when he expressed a desire to do so; did not inform him that it was his personal right to waive a jury and that this right could not be exercised by his counsel; and did not explain to him that his chances for reversal on appeal would be reduced by waiving a jury and trying the case to a three-judge panel.

313) The unreasonable nature of trial counsel's errors and omissions regarding the waiver of Turner's constitutional right to have his sentence decided by a jury prejudiced Turner.

314) **C. Failure to ensure that Turner could withdraw his guilty plea if the three-judge panel returned a death verdict.**

315) Turner was denied the effective assistance of counsel at the trial phase when counsel unreasonably and prejudicially failed to ensure that he could withdraw his plea to all counts and specifications if the three-judge panel rendered a verdict imposing the death penalty. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v.*

Smith, 539 U.S. 510 (2003). The Sixth Amendment requires that trial counsel undertake a reasonable investigation and preparation for the trial phase. The duty of defense counsel is heightened in capital cases. *Combs v. Coyle*, 205 F.3d 269, 289-90 (6th Cir. 2000).

316) Counsel directed Turner to plead guilty to all counts and death specifications charged against him because counsel believed the evidence was "overwhelming."

317) The facts of virtually all capital murder cases can be deemed "grotesque" and may offend the sensibilities of the attorneys who represent the perpetrators of the capital crimes. That being said, defense counsel in a capital case is nevertheless ethically required to advocate in a zealous, skillful manner regardless of the facts. That is why the Ohio Supreme Court has mandated that capital defense counsel must be certified, through training and experience, prior to being appointed to provide representation in a capital case. Rule 20 of the Rules of Superintendence for the Courts of Ohio.

318) Counsel directed Turner to enter a guilty plea on December 16, 2002. (Tr. Vol. II, pp. 11-20). Counsel made no attempt to insure that if the panel returned a death verdict against Turner, that he could withdraw his guilty plea.

319) Entering a guilty plea increased the risk that Turner would be sentenced to death was heightened, where guilt was not an issue and the primary dispute was whether the aggravating circumstances outweighed the mitigating factors in determining the appropriate punishment. Counsel were aware that their preparations for the penalty phase of Turner's capital trial were woefully incomplete. Nevertheless, counsel never requested a continuance or any additional time to prepare for the penalty phase.

320) The testifying psychologist did not provide her report to defense counsel until the day of the penalty phase hearing. (Tr. Vol. II, p. 6). Although Turner's "alcoholism" was identified as the critical mitigating factor to be presented at the penalty phase (Tr. Vol. II, p. 49), defense counsel failed to investigate, prepare and present the testimony of lay persons who had direct, firsthand knowledge of Turner's dependence on alcohol and the terrible effects his drug and alcohol dependence had on his life functioning. Instead, defense counsel put on lay witnesses who had no personal knowledge of Turner's alcohol dependence. When defense counsel asked witness Reva Turner on direct examination about Petitioner's alcohol consumption, Ms. Turner replied that she did not know because Petitioner

did not drink around her. (Tr. Vol. II, pp. 65-66).[20] Defense counsel also presented Brandie Fox as a penalty phase witness. Although Ms. Fox testified that she believed Petitioner drank "a lot," she also testified that "he did not drink around me." (Tr. Vol. II, p. 110). When counsel inquired, "Did you see him—did alcohol—did he ever have a drink around you at the house?," Brandie replied, "Not that I can remember." *Id.*

321) The guilty plea should not have been entered without reservation of the option to withdraw the waiver in the event that the three-judge panel returned a death sentence. Moreover, the reservation of this right should have been made in open court and on the record.

322) The practice of reserving the right to withdraw a plea in a capital case was the standard practice and should have been utilized in Turner's case. The failure of Turner's counsel to be aware of, and to utilize this standard procedure constitutes unreasonable and deficient performance.

323) In conclusion, counsel abdicated their duty to competently represent Turner at the trial phase. Although counsel filed some 34 pre-trial motions seeking discovery and addressing the application of the death penalty, they failed to file a Motion to Suppress Turner's statements based either upon their

[20] The fact that defense counsel would ask Ms. Turner about an area of which she had no personal knowledge illustrates counsel's fundamental lack of preparation for the penalty phase of Petitioner's trial.

involuntariness or upon Turner's invocation of his right to counsel. Significantly counsel's efforts to avoid the imposition of the death penalty through a plea agreement were rejected by the Reynoldsburg Police Department. If counsel had been successful in suppressing even some of Turner's statements, the status of the case would have changed dramatically. Trial counsel also failed to ensure that Turner could withdraw both his jury waiver and his guilty pleas if the three-judge panel returned a death verdict. These were standard practices at the time of trial. Counsel also did not ensure that Turner was fully informed of the consequences of his jury waiver. In sum, trial counsel gave up, or directed Turner to give up, almost every constitutional right he had, and received nothing in return. Trial counsel were ineffective and Turner was prejudiced by both their acts and omissions under the Fifth, Sixth, Eighth and Fourteenth Amendments.

324) **PROPOSITION OF LAW IV**

MICHAEL TURNER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

325) Turner was denied the effective assistance of counsel at the penalty phase of his capital trial under the Fifth, Sixth, Eighth and Fourteenth Amendments. *Strickland v. Washington*, 466 U.S. 668 (1984).

326) Capitally charged individuals have a constitutionally protected right to the presentation of mitigating evidence. *Williams v. Taylor*, 529 U.S. 362 (2000). Trial counsel in death penalty cases have "a duty to make reasonable investigations" of their client's background and mental health history for potential mitigation. *Wiggins v. Smith*, 539 U.S. 510 (2003).

327) *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-prong test for claims of ineffective assistance of counsel. Counsel were "objectively deficient" or acted unreasonably. But for trial counsel's errors, a reasonable probability exists that the result of the trial would have been different.

328) Counsel here acted unreasonably in failing to challenge the capital specifications as well as in failing to prepare and present available mitigating evidence. But for counsel's errors, there is a reasonable probability that the outcome of Turner's trial would have been different.

329) **A. Failure to utilize readily available documentary evidence to demonstrate Turner's extreme intoxication at the time of the offense.**

330) Counsel had a readily available source of documentary evidence to utilize in investigating, preparing and presenting the mitigating factor of Turner's extreme intoxication at the time the charged capital crimes occurred. The circumstances surrounding Turner's arrest were documented

by investigating police and described by the prosecutor: At 11: 11 p.m. on June 12, 2001, police observed a "pair of shoes in a wooded area" near the crime scene. (Tr. Vol. II, p. 30). Turner was "pulled from the underbrush" and transported to the Reynoldsburg police station where "he was slated, and arrest photographs were taken at 11:30 p.m." (Tr. Vol. II, p. 30). At approximately 1:05 a.m. on June 13, 2001, the police began a five hour interrogation. (Tr. Vol. II, p. 33).

331) Additional factual information, compiled in documents and provided to defense counsel, illustrate the level of Turner's intoxication at the time of his arrest. Specifically, the transcribed statement of the police interrogation of Turner as well as documents compiled by investigating police pertaining to the crime scene, should have been utilized by defense counsel. (Taped Interview with Suspect). For example, Turner was able to stumble only three hundred sixty nine feet from the crime scene before he passed out in the wooded area where he was apprehended. (Investigative Follow-Up). A half empty bottle of high alcohol whiskey was recovered at the spot where Turner passed out. *Id.* Although the police were anxious to interrogate Turner, they were forced to let him "sleep it off" before they began their interrogation. (Taped Interview with Suspect). When the interrogation began, police noted that Turner had "made a mess"—indicating Turner's

sickness from the vast amount of substances he had ingested—while "sleeping it off" and police informed him "we gotta clean it up." *Id.*

332) This information was contained in police documents and provided to defense counsel through discovery. Counsel could have and should have subpoenaed the police officers involved in the arrest, interrogation and investigation of Turner. Had counsel done so, counsel could have presented credible mitigating evidence of Turner's substance dependence and correlative intoxication at the time of his arrest, shortly after the murders occurred. At the time of Turner's trial, this type of mitigating evidence had been repeatedly recognized by the Ohio Supreme Court as entitled to weight and effect. *See, e.g., State v. Rojas*, 64 Ohio St.3d 131 (1992); *State v. Otte*, 74 Ohio St.3d 555 (1996); *State v. Smith*, 80 Ohio St. 3d 89 (1997); *State v. White*, 82 Ohio St. 3d 16 (1998); *State v. Lindsey*, 87 Ohio St.3d 479 (2000); *State v. Smith*, 87 Ohio St. 424 (2000); *State v. Johnson*, 88 Ohio St. 3d 95 (2000).

333) Instead, defense counsel relied on testimony regarding Turner's substance dependence from their psychologist. Her testimony in turn relied primarily on Turner's self reporting. Unfortunately, defense counsel also elicited that Turner had a "history of lying" and "exaggerating," (Tr. Vol. II,

p. 151), which permitted the prosecutor to engage in cross-examination that exacerbated the damage done on direct examination. (Tr. Vol. II, pp. 183).

334) Such commentary undermined the credibility of the psychologist's testimony regarding Turner's substance dependence. In its Ohio Rev. Code § 2929.03(f) sentencing opinion, the three-judge panel specifically assessed this testimony and gave it "little weight." (Trial Court Opinion). The panel also found that the "evidence did not support the conclusion that the defendant was in some drug and alcohol induced stupor." *Id.* The panel's opinion is directly linked to counsel's failure to obtain a qualified substance abuse expert.

335) Turner gave a lengthy unsworn statement shortly before this testimony where he expressed remorse and sorrow for the deaths. He accepted responsibility for his actions. (Tr. Vol. II, p. 105). He repeatedly expressed remorse to jail staff while incarcerated in the Franklin County Jail prior to trial. Remorse is recognized by the Ohio state courts as a mitigating factor entitled to weight and effect. *See, e.g., State v. Rojas*, 64 Ohio St. 3d 131 (1992); *State v. Green*, 66 Ohio St. 3d 141 (1993); *State v. Clifford Williams*, 73 Ohio St. 3d 153 (1995); *State v. Awkal*, 76 Ohio St. 3d 324 (1996); *State v. Dennis*, 79 Ohio St. 3d 421 (1997); *State v. Mitts*, 81 Ohio St. 3d 223 (1998); *State v. Stallings*, 89 Ohio St. 3d 280 (2000). In some

instances, remorse has been found to be a mitigating factor entitled to "significant weight." *State v. Clifton White*, 85 Ohio St. 3d 433, 456 (1999). Here the three-judge panel made no reference and gave no weight to Turner's expressions of remorse and acceptance of responsibility. (Trial Court Opinion).

336) **PROPOSITION OF LAW V**

OHIO HAS FAILED TO PROVIDE AN ADEQUATE SYSTEM OF APPELLATE AND PROPORTIONALITY REVIEW IN DEATH PENALTY CASES. MICHAEL TURNER'S SENTENCE OF DEATH IS DISPROPORTIONATE AND INAPPROPRIATE IN THIS CASE.

337) Appellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by *Furman v. Georgia*, 408 U.S. 238 (1972), *Gregg v. Georgia*,428 U.S. 153 (1976)

338) A state may not leave the decision of whether a defendant lives or dies to the unfettered discretion of the jury because such a scheme inevitably results in death sentences that are "wantonly and ... freakishly imposed" and "are cruel and unusual in the same way that being struck by lightening is cruel and unusual." *Furman,* at 309-310. (Stewart, J., concurring) Therefore, meaningful appellate review is required.

339) Ohio's system does not meet these requirements.

340) The trial court's sentencing opinion does not contain a statement of the statutory aggravating circumstances that the jury found; the mitigating factors found to exist; or the reasons why death was the appropriate sentence. Ohio Rev. Code § 2929.03(F).

341) The trial court simply afforded "very little" or "no weight" to each mitigating factor and offered no explanation of why the mitigation as a whole was outweighed by the statutory aggravating circumstances.

342) The Supreme Court of Ohio's "independent review" could not and did not correct this deficiency.

343) **PROPOSITION OF LAW VI**

MICHAEL TURNER'S SENTENCE OF DEATH WAS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AS WELL AS THE VARIOUS TREATY AND COMPACT OBLIGATIONS OF THE UNITED STATES UNDER INTERNATIONAL LAW.

344) Ohio has systemic constitutional problems in the administration of capital punishment. The American Bar Association has recently called for a moratorium on capital punishment unless and until each jurisdiction attempting to impose such punishment "implements policies and procedures that are consistent with . . . longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and

impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed . . ."

345) As the ABA has observed, in a report accompanying its resolution, "administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency." The ABA concludes that this morass has resulted from the lack of competent counsel in capital cases, the lack of a fair and adequate review process, and the pervasive effects of race.

346) The United Nations High Commission for Human Rights has studied the American capital punishment process, and has concluded that "guarantees and safeguards, as well as specific restrictions on Capital Punishment, are not being respected. Lack of adequate counsel and legal representation for many capital defendants is disturbing."

347) The High Commissioner further concluded that "race, ethnic origin and economic status appear to be key determinates of who will, and who will not, receive a sentence of death." The report also described in detail the special problems created by the politicization of the death penalty, the lack of an independent and impartial state judiciary, and the racially-biased system of selecting juries:

> The high level of support for the death penalty cannot justify the lack of respect for the restrictions and safeguards

> surrounding its use. In many countries, mob killings and lynchings enjoy public support as a way to deal with violent crime and are often portrayed as "popular justice." Yet they are not acceptable in civilized society.

348) The Ohio capital punishment system suffers from all of the problems identified in the ABA and United Nations reports: the under-funding of counsel, the lack of fair and adequate appellate review processes and the pervasive effects of race in determining who is sentenced to death.

349) The Ohio capital sentencing statues also require submission of statutory presentence and mental health evaluations to the jury or judge once requested by a capital defendant regardless of the content of those reports and without any further input or comment from counsel or the defendant. Ohio Rev. Code §§ 2929.03(D)(1). This mandatory submission prevents a capital defendant from controlling the presentation of mitigating evidence in his case to the jury at the penalty phase because all information in these reports, no matter how irrelevant or how prejudicial, must go to the jury in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

350) Ohio's capital statutory scheme permits the arbitrary and discriminatory imposition of the death penalty. Ohio's death penalty sentencing scheme violates the rights of Michael Turner under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

351) The Eighth Amendment prohibits the infliction of cruel and unusual punishment. The Eighth Amendment's protections are applicable to the states through the Fourteenth Amendment. Punishment that is "excessive" constitutes cruel and unusual punishment. The underlying principle of governmental respect for human dignity is the guideline to determine whether this statute is constitutional. The Ohio death sentencing scheme violates this bedrock principle.

352) Michael Turner was convicted and sentenced to death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendment as well as principles of international law contained in the various charters and treaties endorsed by the government of the United States and applied to the states under Article VI of the United States Constitution. As such his conviction and sentence must be vacated.

353) To the extent that counsel did not fully litigate these issues concerning whether Ohio's death sentencing statutes on their face and as applied to Michael Turner violate the United States Constitution as well as the various treaty and charter obligations of the United States, counsel's performance fell far below the prevailing professional norms and deprived Turner of the effective assistance of counsel.

7. That this Court permit expansion of the Record with any documents necessary to resolution of the Petition for Habeas Corpus;

8. That this Court order that the Warden file an answer pursuant to Rule 5 of the Rules Governing §2254 Cases.

9. That this Court grant him an evidentiary hearing pursuant to Rule 8 of the Rules Governing § 2254 Cases;

10. That this Court grant any further relief to which Michael Turner may be entitled.

Respectfully submitted,

David C. Stebbins (0005839)
Attorney at Law
400 South Fifth Street, Suite 202
Columbus, OH 43215
614.228.9058
614.221.8601 FAX
david@dstebbins.com

and

William S. Lazarow (0014625)
Attorney at Law
400 South Fifth Street, Suite 202
Columbus, OH 43215
614.228.9058
614.221.8601 FAX
BillLazarow@aol.com

By: /s/ David C. Stebbins
David C. Stebbins
Counsel for Michael Turner

Pursuant to 28 U.S.C. § 2242, acting on behalf of Michael R. Turner, the petitioner herein, I hereby verify that the allegations contained herein are true and accurate to the best of my knowledge.

/s/ David C. Stebbins
David C. Stebbins

July 31, 2007

CERTIFICATE OF SERVICE

The above document was served on all parties of record through the court's electronic filing system, including:

Sarah Hadacek

shadacek@ag.state.oh.us

and

Thomas E. Madden

tmadden@ag.state.oh.us

Pursuant to 28 U.S.C. § 2242, acting on behalf of Michael R. Turner, the petitioner herein, I hereby verify that the allegations contained herein are true and accurate to the best of my knowledge.

/s/ David C. Stebbins
David C. Stebbins

July 31, 2007