IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,	CASE NO. 2000 CR 02945
Plaintiff,	JUDGE MARY KATHERINE HUFFMAN
-vs-	DECISION, ORDER AND ENTRY OVERRULING MOTION FOR LEAVE TO FILE DELAYED MOTION FOR NEW TRIAL
LARRY JAMES GAPEN,	
Defendant.	

This matter is before the court on Defendant's Motion for Leave to File Delayed Motion for New Trial, the same having been filed herein on October 16, 2013. Hearings on Defendant's Motion for Leave to File Delayed Motion for New Trial were held on August 29, 2014, October 10, 2014, January 9, 2015, and August 14, 2015. On August 14, 2015, this court set a lengthy schedule for post-hearing briefing, at the request of counsel, and said Motion for Leave was ripe for decision on August 5, 2016. The court has considered all Motions and Memoranda filed herein, including all exhibits and the testimony elicited at the time of the hearings.

Gapen's proposed Motion for a New Trial seeks relief and retrial on both the trial and penalty phases of the proceedings. Gapen alleges the following five grounds for relief:

> First Ground for Relief: Gapen's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article One, Sections One, Five, Nine and Ten of the Ohio Constitution were violated and his convictions and death sentence are constitutionally invalid because one of the jurors who was seated at his trial was biased and incapable of fairly deciding the case.

Second Ground for Relief: Gapen's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article One, Sections One, Five, Nine and Ten of the Ohio Constitution were violated and his convictions and death sentence are constitutionally invalid because the jury was in possession of prejudicial evidence during deliberations which had never been admitted or was specifically excluded at trial.

Third Ground for Relief: Gapen's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article One, Sections One, Five, Nine and Ten of the Ohio Constitution were violated and his convictions and death sentence are constitutionally invalid because the trial judge failed to disclose evidence of constitutional violations that took place after the jury had retired to deliberate.

Fourth Ground for Relief: Gapen's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article One, Sections One, Five, Nine and Ten of the Ohio Constitution were violated and his convictions and death sentence are constitutionally invalid because one of the jurors who was seated at his trial was biased and incapable of fairly deciding the case because he would automatically vote for death upon a guilty verdict at the trial phase.

Fifth Ground for Relief: Gapen's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article One, Sections One, Five, Nine and Ten of the Ohio Constitution were violated and his convictions and death sentence are constitutionally invalid because Juror Nedostup shared his biased beliefs about the principles of *lex talionis* with other jurors during sentencing phase deliberations of Gapen's trial, and thus injected an extra-judicial source of law and unconfronted, unexamined extrinsic evidence and witness testimony into the jury's deliberations outside the presence of Gapen's counsel.

I. PROCEDURAL HISTORY

The following procedural history is relevant to the pending Motion:

On September 18, 2000, Martha Madewell, Nathan Marshall, and Martha's thirteen year old daughter, Jesica Young, were brutally murdered while they slept at 6266 Pheasant Hill Road, Dayton, Ohio. The confessed perpetrator of the offenses was Madewell's former husband, Larry Gapen. Attorneys David Greer and Bobby Joe Cox were appointed to represent Gapen in the trial of the indicted charges against him, which included, among other offenses, twelve counts of aggravated murder with aggravating circumstances specifications. Following numerous pretrial motions and other proceedings, the matter proceeded to trial in May, 2001. Gapen was found guilty

by a jury of the aggravated murders of Madewell, Marshall, and Jesica, and was sentenced to death for Jesica's murder on Count 13 only.

Following the conclusion of the trial, on August 23, 2001, the trial judge, John Petzold, through an Entry, appointed Jane Perry and Stephen Ferrell from the Ohio Public Defender's Officer to represent Gapen in his direct appeal of the convictions to the Ohio Supreme Court. Gapen filed his post-conviction petition in this court on October 4, 2002. Gapen's 2002 post-conviction petition alleged six grounds for relief, some of which are relevant to his Motion for Leave to File Motion for New Trial now pending before this court.

The first claimed ground for relief in Gapen's 2002 petition for post-conviction relief alleged ineffective assistance of counsel associated with the presentation of mitigation evidence by Dr. Robert Smith. In particular, Gapen claimed that counsel was ineffective for failing to pursue a psychological explanation for the death of Jesica Young.

In his second ground for relief, Gapen alleged a violation of his right to a fair trial and reliable sentence resulting from juror misconduct, claiming that jurors considered inappropriate matters. Specifically, Gapen claimed that Assistant State Public Defender Kathryn Sandford had been present during an interview of juror Raymond Senter, and during an interview with juror Mark Maguire, where the jurors admitted to considering inappropriate evidence. In his Second Ground for Relief contained within his 2002 petition for post-conviction relief, also Gapen alleged the following:

> 15. Juror Senter also said that he had made up his mind to vote for the death penalty for the aggravated murder of thirteen-year-old Jesica Young at the end of the trial phase. (Ex. B). The juror did not keep an open mind during the mitigation phase and failed to engage in a proper weighing process, thus violating the court's instructions.

The third ground for relief in Gapen's petition claimed jurors admitted to Assistant State Public Defender Kathryn Sandford that they did not understand the concept of "aggravating circumstances."

In his fourth ground for relief, Gapen alleged that Dorian Hall, a supervisor for the Mitigation/Criminal Investigation Unit for the Office of the Ohio Public Defender was present during an interview with juror David Nedostup, who admitted that he had a bachelor's degree in theology and completed post-graduate studies in apologetics. Gapen alleged that, as a result of the interview with Nedostup, he learned that Nedostup's "world view" was such that the only appropriate sanction for murder is death. Gapen also alleged that Nedostup had admitted that he made up his mind to vote for the death penalty for the death of Jesica Young at the end of the trial phase, rather than after the mitigation phase had been completed. Some of the specific allegations contained in the motion presently pending before this court, Gapen's Motion for Leave to File Delayed Motion for New Trial, relate to juror David Nedostup. Gapen argued the following related to Nedostup in his 2002 post-conviction petition:

> **Fourth Ground for Relief:**
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> ...
>
> 32. Petitioner's Sixth, Eighth, and Fourteenth Amendment rights to a fair trial and reliable sentence were violated when members of his jury failed to follow the trial court's instructions of law. Under Ohio's death penalty scheme, the jury is instructed to weigh aggravating circumstances against mitigating factors. O.R.C. §2929.04(B). The judge specifically instructed the jurors: "Only the aggravating circumstances may be considered and weighed against the mitigating factors in determining the penalty for that count." The judge then listed the five indicted statutory aggravating circumstances. (T.p. 4248-49) He went on to instruct the jury: "[O]nly evidence admitted in the trial phase that is relevant to the aggravating circumstances and to any of the mitigating factors is to be considered by you." (T.p. 4254) The jury failed to follow these instructions, and Petitioner was thereby prejudiced.
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> 33. In support of this ground for relief, Petitioner appends and hereby incorporates by reference the affidavit of Dorian Hall, supervisor for the Mitigation/Criminal Investigation Unit for the office of the Public Defender. (Ex. D) Ms. Hall was present during an interview with juror David Nedostup.

34. Juror Nedostup said that he has a bachelor's degree in theology and has completed post-graduate studies in apologetics. As a result, he said that he has done a great deal of critical thinking about the place of human beings in the universe. He has determined that there are certain presumptions, objective truths, and moral absolutes that apply to all human behavior. And that all of this has formed the basis of his "world view." Further, facts by themselves are meaningless and take on meaning only after being viewed through the prism of one's "word view." So it is for juror Nedostup. And so it was for Petitioner when his jurors decided his sentence.

35. One of the moral absolutes that instructs juror Nedostup's "world view" is that if a person is guilty of murder, death is the only appropriate sanction. Therefore, the facts of this case when viewed through the prism of juror Nedostup's "world view" mandated death because Petitioner was proved beyond a reasonable doubt to be guilty of the three murders as charged.

36. The seeming inconsistency of the verdicts reflect juror Nedostup's willingness to compromise with the other jurors as long as Petitioner received a death sentence.

37. Juror Nedostup's "world view" does not allow for individualized sentencing as required by Ohio capital jurisprudence, because, according to Nedostup, it is offensive to the moral absolutes that govern human behavior.

38. The critical thinking in which juror Nedostup has engaged for years has led him to believe that in all cases like this, at the end of the trial phase when guilt has been proved, then death must be imposed.

39. Juror Nedostup also said that he had made up his mind to vote for the death penalty for the aggravated murder of thirteen-year-old Jesica Young at the end of the trial phase. (Ex. D) He did not keep an open mind during the mitigation phase and failed to engage in a proper weighing process, thus violating the court's instructions. (T.p. 3965-71) Juror Nedostup violated his oath to follow the law as given to him through instructions by this Court.

…

(Post-Conviction Petition, filed herein on October 4, 2002).

In his fifth ground for relief, Gapen alleged ineffective assistance of counsel relating to trial counsel's theory of the case, particularly, that Gapen had not acted with prior calculation and design.

In his sixth and final ground for relief, Gapen alleged that the cumulative effect of his claims resulted in a denial of his constitutional rights.

Attached to Gapen's 2002 Petition for post-conviction relief were the following affidavits which must be considered in evaluating Gapen's pending Motion for Leave to file a motion for new

trial: affidavit of Kathryn Sandford dated September 13, 2002; affidavit of Kathryn Sandford dated September 16, 2002; and affidavit of Dorian Hall dated October 1, 2002. The aforementioned affidavits will be detailed below.

The affidavit of Dorian Hall, dated October 1, 2002, attached as Exhibit D to Gapen's post-conviction petition, states:

Now comes Dorian Hall, who hereby deposes and states as follows:

1. That I am the supervisor of the mitigation/criminal investigation unit of the Office of the Ohio Public Defender.

2. That I was present during an interview of David Nedostup by William Mooney.

3. During that interview Mr. Nedostup said the following:

   A. He has a Bachelors degree in theology.

   B. He has completed post-graduate studies in apologetics.

   C. As a result of his academic interests, he has done a great deal of critical thinking about the basis of human behavior.

   D. That critical thinking has lead him to several conclusions, including:

      1. There are certain presumptions that effect human behavior;
      2. There are moral absolutes that apply to human behavior.
      3. There are objective truths that apply to human behavior.
      4. These presumptions, moral absolutes, and, objective truths form the basis for ones' "world view".
      5. Facts standing alone are meaningless. Facts only take on meaning when viewed through the filter of ones "world view."
      6. One of moral absolutes that infirm his "world view" is that if one is guilty of murder, then death is the only appropriate sanction.
      7. Mitigating factors would be such factors as did the murder occur during a war, was it the result of self-defense, was there compelling, credible evidence that the person did not commit the murder. But once it is proved that the person committed the murder, death must be the sanction.

8. He never believed that any other penalty was acceptable. When the jury sent the question to the judge regarding the penalty and the apparent impasse, he only went along with it to placate the other jurors.
9. The apparent inconsistent verdict was a compromise. He felt that because Mr. Gapen was guilty of all three murders, death was the appropriate verdict in all three. He singed (sic) the verdict forms only as a compromise.

The same affidavit of Dorian Hall was presented at the hearing on Defendant's Motion for Leave to File Motion for New Trial.

On January 31, 2005, the Second District Court of Appeals affirmed in part and reversed in part, for hearing, this court's Decision, Order and Entry Sustaining the State of Ohio's Motion for Summary Judgment on Gapen's Petition for post-conviction relief. Following the hearings related to the remanded claim for relief on Gapen's claim of ineffective assistance of counsel in the sentencing phase of the trial, this court issued its Decision, Order and Entry Overruling Petition for Post-Conviction Relief on August 28, 2006. On August 24, 2007 the Second District Court of Appeals affirmed the decision overruling Gapen's Petition for Post-Conviction Relief related to the ineffective assistance of counsel claim. Thereafter, Gapen filed a Petition for Writ of Habeas Corpus with the United States District Court in 2008. By their own admission, the Office of the Federal Public Defender was appointed to represent Gapen in August, 2008. Following discovery and a variety of proceedings, the United States District Court issued its Decision and Order on Motions to Hold Petition in Abeyance and Expand Scope of Representation on October 8, 2013. In its Decision, the United States District Court granted Gapen's request to stay the habeas proceedings to permit Gapen to exhaust his state court remedies, including the filing of a delayed motion for new trial. The court also granted Gapen's request that the scope of the representation by his current counsel, both assistant federal public defenders, be expanded to include the filing of a delayed motion for a new trial, as well as any other state court proceedings.

II. FACTS

The following evidence was presented at the time of the oral hearing herein, or contained within the record herein:

Gapen's trial counsel filed his Motion with Respect to Sentencing on June 27, 2001. In that Motion, Gapen's trial counsel raised the issue of juror misconduct and suggested that jurors considered impermissible evidence or failed to follow the jury instructions provided in their deliberations related to sentencing on the indicted counts related to Jesica Young. In his Motion, Gapen's trial counsel also suggested that the jury's verdicts as to the recommended sentence associated with Jesica Young's death was as a result of a compromise between the jurors.

Alan Rossman, an attorney with the Federal Public Defender's Office, testified that federal public defenders may not represent a defendant in state court without the permission of the federal court. Discovery in a federal habeas case is limited to that which may be ordered by the federal district judge. Gapen filed his federal habeas petition on August 8, 2008 and counsel was appointed on his behalf on August 11, 2008. Discovery was not requested by Gapen's federal public defenders for over two years after their appointment, on October, 2010.

Kathryn Sandford testified at the oral hearing on Gapen's Motion for Leave. Sandford began her involvement with Gapen's case as early as 2002. Sandford, an attorney with the Office of the Ohio Public Defender, has worked in the capital unit of the Ohio State Public Defender's Office since 1996. While Sandford did not work on Gapen's post-conviction team, she did assist his team with some juror interviews. Appended to Gapen's 2002 post-conviction petition were two affidavits of Kathryn Sandford. Sandford's first affidavit, dated September 13, 2002, states:

> Now comes Kathryn Sandford, who hereby deposes and states as follows:
>
> 1. I am an attorney licensed to practice law in Ohio and employed by the Office of the Ohio Public Defender.

2. On September 8, 2002, I accompanied Larry Gapen's postconviction counsel to the home of Raymond Senter, Jr. a juror in Mr. Gapen's capital case.
3. I was present while Raymond Senter, Jr. was being interviewed about Mr. Gapen's trial.
4. Juror Senter said that the primary aggravating circumstance for him that weighed in favor of a death sentence for Larry Gapen was the "premeditation" of the crimes. According to juror Senter, the fact that Mr. Gapen had time to think through a plan and had driven to his house to retrieve the murder weapon before going back to the Madewell house to commit the crimes showed that he was "sane" at the time and that he knew what he was doing.
5. Juror Senter also said that the fact that Mr. Gapen showed no remorse or emotion throughout the trial also weighed heavily toward voting for the death sentence.
6. Juror Senter admitted that fellow juror David Nedostup conducted his own outside research on the death penalty and the law, and that juror Nedostup told the other jurors about his research during deliberations.
7. According to juror Senter, Larry Gapen's defense attorneys went to great lengths to explain Mr. Gapen's crime of passion as it related to Martha Madewell and the man she was sleeping with. He further said, however, that the attorneys never addressed any reason for the death of Mr. Gapen's thirteen-year-old stepdaughter. The defense stayed away from the subject.
8. Juror Senter could find no reason for Mr. Gapen to kill the girl. Because Mr. Gapen had to climb the stairs from the basement to the top floor of the house to get to the girl's bedroom, he had time to think about what he was going. This "premeditation" with no explanation convinced juror Senter to vote for death on that count.
9. Juror Senter said that after the evidence was presented during the trial phase about the attack on the thirteen-year-old girl, he made up his mind right then about voting for death.
10. When Raymond Senter, Jr. was asked by postconviction counsel to sign an affidavit to the above information, he declined to do so.

Sandford's second affidavit, dated September 16, 2002, states:

1. I am an attorney licensed to practice law in Ohio and employed by the Office of the Ohio Public Defender.
2. On September 16, 2002, I participated in a telephone interview with Mr. Gapen's postconviction counsel and Mark Maguire, a juror in Mr. Gapen's capital trial.
3. Mr. Maguire said that the most significant "aggravating circumstance" for him was the "cold-bloodedness" of Mr. Gapen's actions. Juror Maguire was struck by Mr. Gapen's actions in killing the two people in the basement, "calmly" talking to his stepdaughter Brooke who was in the basement, then "calmly" walking upstairs and killing thirteen-year-old Jesica and "calmly" talking with his stepson Daniel. The premeditation of Mr. Gapen's actions weighed in favor of death.

4. Juror Maguire also said that he could not get beyond the killing of a thirteen-year-old girl. He wanted Mr. Gapen to take the witness stand to explain the attack on Jesica. He said that Mr. Gapen's unsworn statement provided "no insight into what was in his head."
5. According to Juror Maguire, the only evidence to explain Jesica's death came from the detective's testimony about Mr. Gapen's police statement. In that statement, Mr. Gapen had said that he killed Jesica because she always disrespected him. Juror Maguire wanted to know more than that about Mr. Gapen's motivation to kill Jesica.
6. Juror Maguire stated that the defense's theory of a "crime of passion" seemed to fit the killings of Martha Madewell and Nathan Marshall, but not Jesica Young.
7. Juror Maguire confirmed that while the trial was proceeding, juror David Nedostup conducted independent research into the biblical meaning of the death penalty. Mr. Nedostup shared his views with the other jurors. He also read religious texts during side bars when the jury was waiting in another room for the trial to resume.
8. When postconviction counsel asked juror Maguire if he would sign an affidavit to the foregoing, he declined.

What Sandford learned in the 2002 interviews with Jurors Maguire and Senter, but failed to include in her 2002 affidavits, is critical to the court's decision on the pending motion. At the oral hearing on the pending Motion, Ms. Sandford acknowledged that she and Ruth Tkacz, who was also present during the interviews, obtained information from Mr. Maguire and Mr. Nedostup that was not contained within her two affidavits. Sandford's handwritten notes from the interviews confirmed that Juror Maguire discussed with her and Ruth Tkacz Nedostup's religious beliefs and that Nedostup was not open to other viewpoints. Sandford and Tkacz learned from Juror Maguire in 2002 that the receipt for a gun purchased at Old English Gun Shoppe was among the exhibits in the jury room and discussed with Maguire the gun and purchase of the weapon, although Sandford did not include that information in the affidavits she signed in 2002. Sanford acknowledged at the time of the oral hearing that everything she discussed with Mr. Senter was likely not included in her 2002 affidavit. All notes taken by Ms. Sandford during the interview with Mr. Maguire were retained by Gapen's post-conviction counsel; Sandford acknowledged that she did not retain notes from her interview with Juror Senter. Ms. Sandford testified that her notes from her interview with

Juror Maguire were available to the State Public Defenders and then to the Federal Public Defenders, once the case was in the federal system. Sandford admitted that she and Tkacz did not require a court order to talk with the jurors in the Gapen trial.

David Nedostup was a juror in Gapen's trial. The lengthy juror questionnaire, which is contained within the record herein, completed by Nedostup, provided the following relevant information:

Question 28 – Schools attended

Response: Moody Bible Institute
Trinity Seminary Ill.
Morton Junior College

Question 45 – Please describe your views on the death penalty

Response: "It is just punishment for relative crime depending on its severity."

Question 47 – Which of the following statements best reflects your view of using the death penalty (check one)

Response: "Appropriate in every case where someone has been murdered."

Question 48 – Place a check in one of the spaces next to each statement indicating your agreement and/or disagreement with the statement at the left.

The death penalty should never be used as the punishment for any murder.

Response: Strongly disagree

The death penalty should always be used as the punishment for every murder.

Response: Strongly agree

The death penalty should sometimes be used as the punishment in certain murder cases.

Response: Disagree

It does not make any difference to me whether or not we have a death penalty in Ohio.

Response: Strongly Agree

The testimony of law enforcement officers is not entitled to any greater or lesser impact merely because they are law enforcement officers.

Response: Strongly Agree

The courts have made it too difficult to prosecute and convict criminals.

Response: Strongly Agree

If the prosecution goes to the trouble to bring someone to trial, that person is probably guilty.

Response: Strongly Disagree

People in prison have a better life than most of the taxpayers who pay for the prisons.

Response: Strongly Disagree

Question 61 – Do you identify with any religious or spiritual group, denomination, or set of teachings?

Response: "Yes"

If yes, please provide the following information:

How active are you?

Response: "Very"

Have you ever held a position of responsibility in your religious community?

Response: "Yes"

Question 87 – Have you ever visited or been inside a prison/jail?

Response: "Yes"

If yes, please explain the circumstances and described how it made you feel:

Response: "In Chicago with Bible Institute Training."

Question 89 – Do you currently, or have you during the past five (5) years, done any volunteer work?

Response: "Yes"

If so, for what organization(s).

Response: Ginghamsburg United Methodist Church

Question 91 – What type of books do you prefer? (Example: non-fiction, historical, romance, espionage, mystery)

Response: Apologetics – Christian Defense

Question 93 – Do you read any magazines or periodicals on a regular basis?

Response: Yes

If yes, which ones?

Response: Christian Research Journal

Focus on Family

Following the conclusion of the jury's deliberations in the sentencing phase of the trial, Nedostup sent an e-mail to an address he believed was related to Judge John Petzold; the e-mail was dated Sunday, June 24, 2001, at 9:07AM, and stated:

> Dear John,
>
> I am juror number five, Dave Nedostup, the inconsistency in the sentencing phase of the trial is due to the fact that we were a hung jury. The majority of the jury wanted the death penalty. The hang up was the mitigating circumstances concerning Martha Madewell, with her it was six for life without parole and six for death. For Nathan

> Marshall and Jessica Young it was eleven for the death penalty and one for life without parole.
>
> In order for us to secure a verdict AT ALL we did some compromising. As for me the verdict was death at all costs. As we discussed among ourselves it was my understanding that one count of death agreed upon by all jurors was sufficient to secure the death penalty. As to Jessica Young we all unanimously voted that there were no mitigating circumstances thus the death penalty fit the crime (lex talionis) I bear full responsibility for sending this email. Thanks for reading this to understand what I believe to be the inconsistency.
>
> Sincerely,
>
> David Nedostup

Attached to Gapen's Motion for leave is the affidavit of David Greer, one of Gapen's trial attorneys. Greer's affidavit, dated September 23, 2013, states:

1. I am a partner in the law firm of Bieser, Greer & Landis, LLP in Dayton, Ohio.
2. I was admitted to the Bar in 1962 and have been devoting all of my professional life to trial work since the first case I tried in September of that year.
3. I am a Fellow of the American College of Trial Lawyers, and have been a Fellow in the College since 1979.
4. I was appointed to represent Larry Gapen as lead counsel for his capital trial by Judge John Petzold. Bobby Joe Cox was appointed as co-counsel. We represented Mr. Gapen throughout both phases of the entire trial in 2001.
5. On September 18, 2013, I learned for the first time of an e-mail which a juror sent to the trial judge on June 24, 2001 between the return of the jury's sentencing verdict and the formal imposition of the sentence by the trial judge.
6. The e-mail stated, *inter alia*, that "we were a hung jury" and that even as to Jessica Young there was no unanimous decision on penalties.
7. I can state as a matter of fact, not opinion, that if I had known of that e-mail in late June of 2001, I would have filed a motion on behalf of Mr. Gapen urging the Court to exercise its discretion to impose a life sentence and, in the alternative, to declare a mistrial, set the jury verdicts aside, and grant a new trial.
8. On September 18, 2013, I received for the first time Affidavits and deposition transcripts which substantiate what I regard, and would have regarded in June of 2001, as clear jury misconduct which would have been part of the alternate motion to declare a mistrial, set the jury verdicts aside, and grant a new trial.
9. The information I received on September 18, 2013, demonstrated that at least two jurors, had they been candid on *voir dire*, should have been disqualified from service on the jury.

10. The information I received on September 18, 2013, also demonstrated that improper and prejudicial information, including exhibits that had been specifically ruled inadmissible and excluded from evidence, had been considered by the jury in its deliberations.
11. My co-counsel and I had carefully inspected the exhibits prior to the commencement of jury deliberations, and I am unable to explain or understand how excluded exhibits found their way to the jury room during deliberations.
12. I am also unable to explain or understand why the e-mail sent to the trial judge on June 24, 2001 was not disclosed at the time to defense counsel, especially in view of the author's reference to "lex talionis," the concept that the automatic penalty for murder is death – a concept that is in violation of the Ohio law applicable to Mr. Gapen's case.
13. Mr. Gapen's case did not present any issue as to who caused the deaths which he clearly and admittedly caused. The only issues presented form the outset of the representation undertaken my (sic) Mr. Cox and myself as Mr. Gapen's court-appointed counsel were life or death issues.
14. In that context, the juror misconduct issues of which I first became aware on September 18, 2013, were critical issues that would have triggered investigation and hearings upon the filing of the motions that I can state as fact would have been filed had the relevant facts been known.
15. But for the post-trial efforts of Mr. Gapen's current attorneys from the Federal Public Defender's Office, I would remain uninformed of the June 24, 2001 e-mail and of the other facts relating to jury misconduct that were brought to my attention on September 18, 2013.

Mr. Greer also testified at the oral hearing in this matter. During the trial, Mr. Greer and Mr. Bobby Joe Cox, his co-counsel, reviewed the exhibits prior to the time they were submitted to the jury during deliberations. Mr. Greer testified that trial exhibits 114 (swabs), 176 (five teeth), 179 (two teeth) and 199D (Receipt from Old English Gun Shoppe), were not admitted during the trial and, thus, should not have been submitted to the jury for consideration. Mr. Greer was not aware the four exhibits delineated above had been submitted to the jury until he was contacted by Gapen's habeas counsel in 2013. During the trial Mr. Greer was not aware of the incident that occurred at Juror Maguire's neighbor's home. If he had, Mr. Greer would have asked that Mr. Maguire be excused from the jury. Mr. Greer was also unaware of the e-mail sent from Juror Nedostup to Judge Petzold, the trial judge presiding over the case, until it was brought to his attention by Gapen's habeas counsel. If he had been aware of the e-mail, Mr. Greer would have requested either a new trial, that a mistrial be declared, or that Judge Petzold sentence Gapen to life in prison.

State's Exhibit 4, a partial transcript of the proceedings following the polling of the jury after the jury's sentencing verdicts had been read, reveals that Mr. Greer was alerted to, and concerned with, the inconsistent nature of the death sentence recommended by the jury as to Count 13, and the recommended sentence of life on the other counts:

> Mr. Greer: Your Honor, it is the Defendant's position that you can't discharge the jury at this point because the verdicts are inconsistent. It's the same weight of the mitigating factors and aggravating circumstances in all counts, and Count Thirteen is no different from anything else in that way. It means they had to put it back on the scale on that one, and, therefore, the Court has to either reject their verdict on Count Thirteen or send it back to render consistent verdicts.

(State's Ex. 4; trial transcript pages 4307-4308). Thereafter, as noted above, Gapen's trial counsel filed his Motion with Respect to Sentencing on June 27, 2001. In that Motion, Gapen's trial counsel raised the issue of juror misconduct and suggested that jurors considered impermissible evidence or failed to follow the jury instructions provided in their deliberations related to sentencing on the indicted counts related to Jesica Young. In his Motion, Gapen's trial counsel also suggested that the jury's verdicts as to the recommended sentence associated with Jesica Young's death was as a result of a compromise between the jurors.

Additionally, attached to Gapen's Motion for Leave is the affidavit of Bobby Joe Cox, dated September 25, 2013, which states:

1. I am the principal attorney at Cox Law Offices, in Dayton, Ohio.
2. I was appointed to represent Larry Gapen as co-counsel for his capital trial by Judge John Petzold. David Greer was appointed as lead counsel. We represented Mr. Gapen throughout both phases of the entire trial.
3. I have reviewed Mr. Greer's affidavit in this case. I agree with everything he says in his affidavit. I have also reviewed the exhibits Mr. Greer describes in his affidavit.
4. If Mr. Greer and I had been aware of the e-mail sent by David Nedostup to Judge Petzold, we would have filed a motion on behalf of Mr. Gapen urging the Court to exercise its discretion to impose a life sentence and, in the alternative, to declare a mistrial, set the jury verdicts aside, and grant a new trial.

5. In addition, the new evidence establishes that juror misconduct took place. Mr. Greer and I would have raised this issue in the alternate motion to declare a mistrial, set the jury verdicts aside, and grant a new trial.
6. I also agree with Mr. Greer that the new evidence demonstrates that two of the jurors were not candid during *voir dire*, and that they would have been disqualified form jury service if they had been candid.
7. The new evidence also demonstrates that improper and prejudicial information, including exhibits that had been specifically ruled inadmissible and excluded from evidence, had been considered by the jury in its deliberations.
8. Mr. Greer and I had carefully inspected the exhibits prior to the commencement of jury deliberations, and I am unable to explain or understand how excluded exhibits found their way to the jury room during deliberations.
9. I am also unable to explain or understand why the e-mail sent to the trial judge on June 24, 2001 was not disclosed at the time to defense counsel, especially in view of the author's reference to "lex talionis," the concept that the automatic penalty for murder is death – a concept that is in violation of the Ohio law applicable to Mr. Gapen's case.
10. Mr. Gapen's case did not present any issue as to who caused the deaths which he clearly and admittedly caused. The only issues presented form the outset of the representation undertaken my (sic) Mr. Greer and myself as Mr. Gapen's court-appointed counsel were life or death issues.
11. In that context, the juror misconduct issues which I recently became aware of were critical issues that would have triggered investigation and hearings upon the filing of the motions that I can state as fact would have been filed had the relevant facts been known.
12. I was not aware of the e-mail sent to the trial judge by Juror Nedostup, or any of the other previously referenced juror misconduct issues, until I was provided with the new evidence that was developed during the course of Mr. Gapen's federal habeas corpus proceedings.

Also provided to the court is the affidavit of Jacob A. Cairns. Cairns affidavit was originally filed in the federal habeas proceedings. Cairns' affidavit, dated January 5, 2012, states:

1. I am an attorney admitted to the practice of law in the State of Ohio. I am also admitted to practice in various federal courts, including the United States District Court for the Southern District of Ohio.

2. I am presently employed as a Research and Writing Attorney in the Capital Habeas Unit at the Office of the Federal Public Defender for the Southern District of Ohio.

3. One of my duties at work is to provide legal assistance in Larry Gapen's federal habeas corpus proceedings. I am not an attorney of record in the case, however.

4. One of Mr. Gapen's claims in his habeas petition involves an allegation of juror misconduct. On October 31, 2011, District Judge Rice granted Mr. Gapen's motion for leave to conduct discovery on this claim. Specifically, Judge Rice gave our

office authorization to conduct depositions of the jurors and alternate jurors who served at Mr. Gapen's trial.

5. On December 1, 2011, Assistant Federal Public Defender Allen Bohnert and I attempted to locate some of the jurors from Mr. Gapen's trial so that we could interview them.

6. Mr. Bohnert and I were able to locate juror Mark Maguire. Mr. Bohnert and I explained to Mr. Maguire that we were attorneys with the Office of the Federal Public Defender and that we represented Mr. Gapen in his federal habeas corpus proceedings. Mr. Maguire agreed to discuss the case with us. I estimate that our conversation with Mr. Maguire lasted approximately one hour and fifteen minutes.

7. Mr. Maguire seemed to be pleased to discuss the case. He even apologized to us at one point for taking up our time.

8. During our conversation with Mr. Maguire, he told us about an extremely violent incident that had taken place a few years before Mr. Gapen's trial. At the time, we were discussing Mr. Gapen's relationship with Martha Madewell, who was one of the homicide victims in Mr. Gapen's case. During this portion of the interview, Mr. Maguire told us about another woman he knew who had also been the victim of an extremely violent incident. The following paragraphs describe the incident as Mr. Maguire recounted it to us.

9. Mr. Maguire lives in a duplex house that is divided into two separate residential units. He explained to us that he lives in one of the units (this was where we interviewed him), and he rents out the adjoining unit to tenants. The two units appeared to be separated by a single wall, although I cannot be positive about this because Mr. Maguire's living room was the only interior part of the house I saw. The victim in the violent incident was a young woman who was a tenant in the rental unit of Mr. Maguire's house.

10. The victim had allowed a male acquaintance of hers to spend the night at her residence. They were not romantically involved at the time, although my understanding from Mr. Maguire's description of the incident was that they had a romantic relationship in the past.

11. During the night, the victim woke up to find the male acquaintance standing over her stark naked holding a pair of handcuffs and a handgun. When the victim tried to get away, the acquaintance shot her four times. However, none of the gunshot wounds were fatal and the victim survived.

12. After shooting the victim, her attacker committed suicide by shooting himself twice in the heart. This resulted in an enormous amount of blood spraying out of the attacker's torso and all over the interior of the residence.

13. In addition, when the police arrived, they did not escort the victim out of the residence, but instead made her crawl down the driveway to meet them at their police cruisers. This resulted in a large and clearly visible trail of blood leading out of the front door and down the driveway.

14. Mr. Maguire was at home in the adjoining unit during this incident, along with his daughter who was a young child. Both of them eventually woke up while all of this

was going on. Mr. Maguire's son may also have been in the residence when the incident took place, although this was not entirely clear from our conversation with him. Mr. Maguire stated during the interview that his son was around the same age as Billy Madewell.

15. In addition, the victim in the case had a son who was also a young child. Her son was in the rental unit when the attack took place. Mr. Maguire said he believed that the attacker had drugged the son with cough syrup before the incident so that the child would remain asleep.

16. Mr. Maguire viewed the crime scene at some point after the body had been removed. He explained to us that there was blood everywhere. Blood sprayed out of the deceased's torso and across a large selection of the wall. The pool of blood that had accumulated under the deceased's body was deep enough that the deceased's buttocks had left a visible impression on the floor. The carpet in the rental unit had to be removed due to the large amount of blood covering it.

17. Mr. Maguire explained that he started cleaning up the blood after the deceased's body was removed from the residence, and that one of the first responders at the crime scene provided him with a pair of rubber gloves that rolled up past his elbows. Mr. Maguire's insurance company subsequently paid for a professional service to clean the apartment.

18. Mr. Maguire made statements indicating that he was unimpressed with the police response to the incident. As previously noted, the police had the victim crawl down the driveway to meet them, instead of escorting her out of the residence. Mr. Maguire seemed very displeased about this. In addition, one of the officers at the scene was so nervous that he dropped his sidearm on the ground twice while standing beside his cruiser. The police also left the crime scene completely unattended at one point; this took place before the handgun that had been used in the crime had even been removed from the residence. Mr. Maguire was amazed that the police would leave a handgun that had just been used in a suicide and attempted murder lying around in an unsecured crime scene.

19. Based on Mr. Maguire's demeanor during our conversation with him, it appeared to me that this event left a strong impression on him. I estimate that we spent around twenty minutes of our interview discussing it.

20. After the interview, I was able to locate a newspaper article about the event Mr. Maguire had described. The information in the article is generally consistent with Mr. Maguire's account, although there do appear to be some minor discrepancies.

21. During our conversation, Mr. Maguire also described a piece of evidence that was in the jury room during deliberations which he believed was very significant. Specifically, the jurors found a receipt in Mr. Gapen's wallet showing that Mr. Gapen had either purchased or attempted to purchase a gun by using a false Social Security number, and that this had occurred before the homicides took place. Mr. Maguire stated that this evidence was significant because it showed that Mr. Gapen had been plotting the homicides for some time and that they were premeditated.

22. Mr. Maguire stated that at some point after Mr. Gapen's trial had concluded and the jurors had been excused from service, he and some of the other jurors met with the

trial judge. Mr. Maguire said that he asked about the gun receipt during his conversation with the judge, and the judge basically told him that it was irrelevant.

23. Mr. Bohnert and I conducted a second interview of Mr. Maguire on December 14, 2011. I estimate that this interview lasted somewhere between ten and twenty minutes. He seemed to be happy to discuss the case again.

24. During the second interview, we asked Mr. Maguire to clarify some of the issues surrounding the presence of the gun receipt that was in the jury room during deliberations. Mr. Maguire explained that the receipt had been found in Mr. Gapen's wallet, which was in the jury room along with other exhibits. Mr. Maguire explained that there were exhibits laid out along one side of the table where the jury could examine them.

25. With respect to the wallet, it appeared to Mr. Maguire that some other items had probably been removed from it, but the receipt had been left inside. Mr. Maguire stated that the receipt showed a Social Security number which Mr. Gapen had used when he was purchasing or trying to purchase a handgun.

26. Mr. Maguire appeared to have a great deal of knowledge regarding firearms and the procedures for purchasing firearms. He recognized the significance of the receipt based on his experience with firearms. He said the receipt was the type of document that one would receive if a gun was actually purchased at that time, or if the buyer was required to go through a waiting period before completing the purchase.

27. Mr. Maguire indicated that he knew that the Social Security number Mr. Gapen had used in purchasing or attempting to purchase the firearm was false, but he did not recall exactly why he knew that. He indicated that there were two possibilities for why he would have concluded it was not Mr. Gapen's real Social Security number. The first was that there may have been another exhibit with Mr. Gapen's real Social Security number on it and the jury had discovered the discrepancy.

28. The second possibility Mr. Maguire discussed was that the number on the receipt may have been one which could not have possibly belonged to Mr. Gapen. Mr. Maguire explained that the first three digits in a Social Security number are based on geographic area, and the middle two numbers are always within ten years of the last two digits of a person's birth year. My own subsequent research indicates that Mr. Maguire may have been mistaken in his belief regarding the middle two numbers, but in any event he was convinced that the receipt demonstrated that Mr. Gapen had falsified his Social Security number when purchasing or attempting to purchase a handgun.

29. Mr. Maguire stated that he also viewed Mr. Gapen's purchase or attempted purchase of the handgun as being significant because it had taken place while Mr. Gapen was subject to electronic monitoring. He indicated that this was probably why Mr. Gapen had used a false Social Security number because using his own number would have prevented a purchase from taking place.

30. At the conclusion of the second interview, we asked Mr. Maguire if he would be willing to sign an affidavit based on some of the statements he had made. Mr. Maguire advised us that he did not want to sign an affidavit.

31. Mr. Bohnert and I also attempted to locate juror Heidi Reynolds on December 14, 2011. She was not at her residence, but we left our business cards with an individual who answered the door.

32. Ms. Reynolds called Mr. Bohnert as we were returning to Columbus. Mr. Bohnert was able to configure his cell phone so that I was able to hear what Ms. Reynolds was saying.

33. During the conversation, Ms. Reynolds said that one of the jurors appeared to be asleep at some point during the trial. She described the individual as a younger African-American male.

34. On January 4, 2012, Assistant Federal Public Defender Sharon Hicks and I interviewed juror Raymond Senter at his residence. We explained to Mr. Senter that we were attorneys with the Office of the Federal Public Defender and that we represented Mr. Gapen in his federal habeas corpus proceedings. Mr. Senter agreed to discuss the case with is. I estimate that our conversation lasted approximately fifteen minutes.

35. During our conversation, Mr. Senter confirmed that Mr. Gapen's wallet had been in the jury room during deliberations, and he also confirmed that the jury had found some type receipt inside the wallet. He remembered that the jury had discussed the receipt during deliberations, but he did not remember exactly what the receipt was for or why it was significant.

36. To the best of my recollection, the information contained in this affidavit accurately reflects the statements Mr. Maguire made to us during out two interviews with him, the statements made by Ms. Reynolds when she called Mr. Bohnert, and the statements made by Mr. Senter when we interviewed him.

Cairns also testified at the oral hearing on the pending motion. Cairns has worked for the Office of the Federal Public Defender as a research and writing attorney in the Capital Habeus Unit in Columbus, Ohio since August, 2010. Cairns assists with research and writing motions and petitions, but also sometimes assists in investigations. Cairns participated in the interviews of jurors in this matter. In December, 2011 through January, 2012, Cairns spoke with several jurors. Cairns recalled that some of the jurors in this matter were quite willing to talk with investigators, while others were not. Cairns recalled talking with jurors Maguire, Nedostup, R.S. Griffey, and Ballman, as well as several other jurors whose names he could not recall.

Cairns participated in interviews with Maguire twice in December, 2011. Maguire still resided in the same home where he had resided at the time of the trial in this matter. On December 1, 2011, Maguire advised the investigators of the incident involving a tenant in the other half of a

building he owned and in which he resided, where the tenant was killed by a male acquaintance and the male then killed himself. Maguire also told the investigators, reiterating what he had revealed in 2002, that the jurors had found a receipt in Gapen's wallet during deliberations that indicated Gapen had purchased or attempted to purchase a handgun while he was released on bond for the prior case. Maguire advised the investigators that he believed the handgun was relevant to the issue of pre-meditation. During the second interview, which took place on December 14, 2011, wherein the investigators sought clarifying information from Maguire, Maguire acknowledged that after the trial he and some of the other jurors met with Judge Petzold and discussed with Judge Petzold the aforementioned receipt. Mr. Maguire was not willing to sign an affidavit.

Cairns also participated in an interview with Juror Nedostup in January, 2012. Nedostup had a large number of papers with him to which he would at times refer during the interview. Nedostup did not provide the interviewers with any documents, however. Cairns acknowledged that Nedostup had been interviewed by Dorian Hall prior to October 1, 2002.

On cross-examination, Cairns acknowledged that neither he nor the other investigators required a subpoena or court order to talk with any jurors in this matter. Cairns also acknowledged that jurors in this matter talked with him and other investigators without any court order or subpoena. Cairns was aware that the Officer of the Federal Public Defender began representing Gapen in 2008.

Cairns acknowledged that other attorneys representing Gapen interviewed Juror Maguire on September 16, 2002, and that Kathryn Sandford was advised by Juror Maguire, on that date, of the presence of the gun receipt in the jury room. Maguire died on January 19, 2012.

On January 4, 2012, Cairns participated in an interview with Raymond Senter. Cairns acknowledged that Senter had previously been interviewed by Gapen's post-conviction team on September 8, 2002. Senter was not asked to sign an affidavit

Cairns also participated in the telephone interview of Heidi Reynolds, another juror. Reynolds was cooperative and Cairns did not require a court order or subpoena to speak with Ms. Reynolds. Cairns participated in an interview with Juror David Ballman. Likewise, Cairns did not require a court order or subpoena to speak with Mr. Ballman.

William Mooney testified at the oral hearing. He has been employed as an Assistant Public Defender in the Officer of the Ohio State Public Defender for approximately seventeen years and has worked in the trial litigation division for approximately twelve years. He previously worked in the habeas appellate section. Mr. Mooney was part of Mr. Gapen's original state post-conviction team. As part of the state post-conviction investigation in 2002, interviews of jurors were conducted. A letter was sent to jurors seeking contact with the Public Defender's Officer; at times letters were also hand delivered to jurors or left at a juror's home. In preparation for conducting juror interviews Mr. Mooney obtained Mr. Gapen's file from David Greer and also spoke with Mr. Greer about the case. Mr. Mooney and Ruth Tkacz reviewed Mr. Greer's file associated with his representation of Mr. Gapen. Mr. Mooney and Ms. Tkacz divided the list of jurors between themselves to contact for interviews. Juror interviews began in 2002. Some impediments existed to conducting juror interviews, including some of the jurors chose not to talk with counsel and some jurors could not be found. Most of the jurors from the trial refused to speak with representatives of the State Public Defender's Office.

Mr. Mooney and Dorian Hall interviewed Juror Nedostup at a restaurant in the summer or early fall of 2002. Nedostup brought a Bible, a file and another book with him to the interview. During the interview Nedostup admitted that he had attempted to contact Judge Petzold after the trial had been completed. During the conversation Mr. Nedostup took out some papers. Nedostup discussed with the two representatives of the State Public Defender's Officer his academic training in philosophy or religion. Those topics were the subject of the discussion between the three. Mr. Nedostup was asked to provide a sworn affidavit but he refused to do so. Mr. Mooney, and other

counsel from the State Public Defender's Office filed a petition for post-conviction relief on behalf of Mr. Gapen. Claims related to juror conduct were included in that petition for post-conviction relief. Counsel filed a motion for the discover depositions of all jurors and alternates in the trial, but the same was overruled by the court. On cross-examination Mr. Mooney acknowledged that Mr. Nedostup appeared voluntarily at the meeting and no subpoena or court order was necessary to compel his attendance.

As part of the federal proceedings, the deposition of Juror Raymond Senter was taken on May 31, 2012. Senter testified that he recalled some things about his jury service, although he did not possess a clear recollection of the entire proceeding. Senter recalled a receipt for the purchase of a handgun included with the evidence available in the jury room. Senter believed that the receipt was not relevant to the case. Senter did not recall other jurors discussing the gun receipt. When asked about how certain he was that that he observed the receipt for the purchase of the handgun in the jury room, Senter responded, "90%."

Juror Mattie Fournoy submitted to a deposition on May 31, 2012, also in connection with the federal proceedings. Fournoy testified that she was the foreperson of the Gapen jury. Ms. Fournoy recalled that during both the deliberations on the trial and sentencing phases of the proceedings, the jury had exhibits available to them in the jury room. Ms. Fournoy recalled one of the exhibits included an envelope containing human teeth from the female juvenile victim. She did not recall whether there was a second set of teeth also included in the evidence.

Gapen has been represented by no less than ten highly competent attorneys, as well as numerous investigators, from trial through the present motion pending before this court.

III. LAW AND ANALYSIS

An application for a new trial must be made by motion, which must be filed within fourteen days after the verdict was rendered, or within one hundred twenty days of trial if the motion is based

upon newly discovered evidence, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial or from discovering the evidence, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided. Crim. R. 33(B). "The trial court cannot extend the time to file a motion under Crim. R. 33 other than pursuant to the conditions provided in that rule." *State v. McConnell,* 2011-Ohio-5555. Because the defendant did not file his motion within the 120-day time-frame, he is required to seek the trial court's leave to file a motion for new trial. *See State v. Warwick,* 2002-Ohio-3649; *State v. York,* 2001-Ohio-1528. "When a motion pursuant to Crim. R. 33(A)(6) is filed more than 120 days after judgment, the reviewing court first examines the record to determine if the defendant provided clear and convincing proof that the evidence could not have been discovered with due diligence before the time limit imposed by Crim. R. 33(B) expired. *State v. McConnell, supra., citing State v. Simms,* Cuyahoga App. No. 74702, (June 24, 1999).

The standard of "clear and convincing evidence" is defined as "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *State v. Schiebel,* 55 Ohio St. 3d 71, 74 (1990). This standard of proof requires more than a mere allegation that a defendant was unavoidably prevented from discovering the evidence he seeks to introduce as support for a new trial motion. *State v. Kiraly,* 56 Ohio App. 2d 37, 55 (1977).

A defendant must offer a specific and sufficient explanation as to why the evidence could not have been obtained sooner, or his investigative efforts or actions, in order to demonstrate that he was unavoidably prevented from obtaining the evidence within the prescribed time. *See State v. Golden,* 2010-Ohio-4438; *State v. Wilson,* 2012-Ohio-1505. Additionally, a defendant is "unavoidably prevented" from filing a motion for new trial if he did not have knowledge of the

existence of the grounds supporting the motion for a new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence. *State v. Mathis,* 134 Ohio App.3d 77, 79 (1999); *see also State v. Parker,* 178 Ohio App. 3d 574 (2008). A defendant's "incarceration, without more, does not amount to clear and convincing proof that he was unavoidably prevented from discovering the evidence within the time limitations of Crim. R. 33(B)." *State v. Smith,* Miami App. No. 97CA46 (March 27, 1998). Furthermore, there is "a material different between being unaware of information and being unavoidably prevented from discovering that information in the exercise of due diligence." *State v. Thompson,* 2012-Ohio-4862. "[A] defendant fails to demonstrate that he or she was unavoidably prevented from discovering new evidence when he would have discovered that information earlier had he or she exercised due diligence and some effort." *State v. Lenoir,* 2016-Ohio-4981, *citing State v. Metcalf,* 2015-Ohio-3507.

Thus, when considering a motion for leave to file a motion for new trial, "[a] trial court must first determine if a defendant has met his burden of establishing by clear and convincing proof that he was unavoidably prevented from filing his motion for a new trial within the statutory time limits. If that burden has been met but there has been an undue delay in filing the motion after the evidence was discovered, the trial court must determine if that delay was reasonable under the circumstances or that the defendant has adequately explained the reason for the delay." *State v. Stansberry,* Cuyahoga App. No. 71004 (Oct. 9, 1997).

"Crim. R. 33 does not set forth any specific time strictures as to when a motion for new trial may be filed after unavoidable prevention has been found. However, 'case law has adopted a reasonableness standard.'" *State v. Elersic,* 2008-Ohio-2121; *see also State v. York,* 2001-Ohio-1528. A moving defendant is required to file a motion for leave to file a motion for new trial within a reasonable time after discovering the evidence. *See State v. Peals,* 2010-Ohio-5893; *State v. Grinnell,* 201-Ohio-3028. In expounding on the rationale underlying the requirement that a motion

for leave to file a motion for new trial must be filed within a reasonable time, the Second District Court of Appeals has stated:

> The essence of Crim.R. 33 is that collateral attacks on the validity of trial proceedings must be made close in time to the proceeding to ensure that any issue raised may be given full and fair consideration. The rule equally protects both the finality of verdicts and principles of judicial economy. Delays in presenting evidence once discovered undermine the "overall objective of the criminal rules in providing the speedy and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable delay." Allowing a defendant to drag the process out while the evidence and the recollections of witnesses become increasingly stale defies the very purpose of the criminal rules. Similarly, once leave has been given, the promised evidence must be presented or the opportunity lost. Any other result would defeat the purpose of the rule intended to ensure that cases are decided on the best evidence available and that any defect in judgment is swiftly identified and swiftly remedied.

State v. McConnell, 2011-Ohio-5555 (internal citations omitted).

A strategic decision to withhold the filing of a motion for leave to file a motion for new trial does not excuse nor obviate the effect of the delay in filing. In *State v. Lenoir*, 2015-Ohio-1045, a defendant continued to pursue a petition for habeas corpus in federal district court and delayed and failed to file a motion for leave to file a motion for new trial for over a year, despite his knowledge of evidence that could have formed a basis for a new trial. In finding that Lenoir failed to file his motion for leave to file a motion for new trial within a reasonable time after he discovered the new evidence, the Second District Court of Appeals explained:

> In the instance case, Lenoir asserts that he became aware of the telephone conversation between his sister and Peterson on April 12, 2012. Lenoir, however, did not file his motion for leave to file a motion for new trial until over a year later on May 2, 2013. We note that in May of 2012, Lenoir was focused on pursuing a writ of habeas corpus from the federal court based on the recording of the telephone conversation. However, we cannot excuse the lengthy delay in filing the motion for leave with the trial court wherein he utilized the same "newly discovered evidence." Lenoir did not need permission from the federal court to file his motion for leave in the trial court. Moreover, the record clearly indicates that Lenoir was aware that he could simultaneously file motions in both federal and state court.

State v. Lenoir, 2015-Ohio-1045.

In a recent decision, the Second District Court of Appeals discussed the imposition of a reasonable-time requirement:

> …Even if the defendant has demonstrated that he could not have learned of the proposed ground for a new trial within the prescribed period, a court has the discretion to deny leave to move for a new trial when the defendant has delayed moving for leave after discovering the evidence supporting that ground, and that delay was neither adequately explained nor reasonable under the circumstances.

State v. Warren, 2019-Ohio-3522.

A. Law of the Case

Defendant argues that the decision of the United States District Court, finding that Gapen was diligent in developing his new claims represents the law of the case, is binding upon this court, requiring the court to grant him leave to file a motion for new trial. Essentially, Gapen contends that the State is barred from relitigating the issue of whether he was unavoidably prevented from discovering the factual basis for his Motion for New Trial, as he claims the issue has been determined by the federal district court.

> The doctrine of res judicata can be divided into two subparts: claim preclusion and issue preclusion. Under claim preclusion, a party who prevails in one action is precluded from relitigating the same cause of action against the same party. Under issue preclusion, also known as collateral estoppel, the party is precluded from relitigating in a second action an issue that has been actually and necessarily litigated and determined in a prior action.
>
> In regard to the application of res judicata between state and federal court, this court has held as follows:
>
> > It is well settled that when a judgment is rendered by a federal court acting under its federal question jurisdiction, the availability of a res judicata defense depends on the federal-law standards.
>
> In order for a claim to be res judicata under federal law, the new claim must share three elements with the earlier action: (1) identity of the parties or their privies; (2) identity of the causes of action; and (3) a final judgment on the merits.

Johnson v. Cleveland City Sch. Dist., 2011-Ohio-2778 (internal citations omitted).

Gapen cites, in support of his argument, *State v. Jalowiec*, 2015-Ohio-5042. Defendant's reliance herein on *Jalowiec* is misplaced. In *Jalowiec*, the trial court determined that because the issue, materiality, was previously decided by the federal district court, defendant was precluded from relitigating the same issue before the state court, as the federal district court had made a determination contrary to defendant's position. Here, Gapen is not seeking to relitigate the same

issues as were considered in the federal district court, as the legal standards and factual issues are distinct and different.

"The 'law of the case' doctrine provides that 'the decision of a *reviewing court* in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.'" *Walls v. City of Toledo*, 166 Ohio App. 3d 349 (2006), *quoting Nolan v. Nolan*, 11 Ohio St. 3d 1, 3 (1984). The *Nolan* court emphasized that the law of the case doctrine requires that trial courts follow the mandates of reviewing courts only. *Id.* The law of the case doctrine, however, does not apply when two different court systems, such as the state and federal systems, are involved; the federal trial court is not a reviewing court of a state trial court. *State v. Whiteside*, Franklin App. No. 86AP-325 (Feb. 10, 1987). The facts in *Whiteside* are particularly interesting when considering Gapen's argument. In *Whiteside*, the federal district court had suppressed statements made by Whiteside to the police; the statements related to both the federal and state charges against Whiteside. Whiteside argued that the state trial court was bound by the federal district court's decision to suppress the statements made by Whiteside. The *Whiteside* court found that the trial court was not bound by the federal district court's decision to suppress the statements, as the federal trial court is not a reviewing court of the state trial court's decisions.

Further, as the State argues, the March 6, 2012 decision of the federal district is not only much more narrow, but is based upon a different standard than that which is applicable to this court's decision on Defendant's Motion for Leave to file Motion for New Trial. The standard employed by the federal district judge was whether Gapen had exercised due diligence in uncovering the evidence related to Juror Maguire, and when Gapen's federal habeas counsel knew or should have known of the evidence. This court must apply a much different analysis to all of Gapen's claims, not simply his claim associated with Juror Maguire. Additionally, the federal district judge's decision is much more narrow than the matters before this court. The focus of the March 6, 2012

decision of the federal district judge related to the knowledge of Defendant's federal habeas counsel; this court's analysis of Gapen's Motion for Leave is his knowledge, whether obtained by him personally or by his numerous counsel, of the facts or circumstances related to his motion, not that of his later-appointed federal habeas counsel. The court, as well as Gapen, cannot ignore the fact that his counsel and investigators uncovered the evidence upon which he predicates his pending motion at least as early as 2002, and in some instances during trial.

Gapen's claims before the Federal District Court are distinctly different from whether he has met the burden necessary for this court to grant him leave to file a motion for new trial, and the decision of the federal district court is not *res judicata*, nor determinative of any issue before this court. The federal district court's decision, issued on March 6, 2012, in the habeas corpus proceedings has no binding effect on this court in terms of this court's determination of whether Gapen has met his burden in order to be granted leave to file a motion for new trial and does not establish the law of the case.

B. Timeliness

In his Motion for Leave to File Delayed Motion for New Trial, filed on October 16, 2013, Gapen alleges that his "legal team" learned, for the first time, in December, 2011, the factual predicates for the constitutional claims related to jurors.

Gapen argues that "(t)he relevant date in question for assessing Gapen's diligence in filing his motion in this court is from October 1, 2013, when his duty to litigate his new claims in state court arose by virtue of the Warden's refusal to waive exhaustion." Gapen's assessment of his duty to pursue a motion for new trial based upon newly discovered evidence only after his current counsel became aware of the evidence upon which he relies is grossly erroneous. The diligence of Gapen's current counsel in investigating, upon their personal knowledge of the facts, is not the standard by which this court must consider the timeliness of Gapen's Motion.

Contrary to Gapen's argument, the date on which the Warden refused to waive exhaustion does not relate to the requirement that any motion for leave to file a motion for new trial be filed timely. In his memoranda, Gapen's counsel continually focus on *their* personal knowledge and diligence, when Ohio law focuses on *Gapen's* knowledge and conduct after he or any of his numerous counsel learned of evidence relating to any potential motion for a new trial. Despite counsel's protestations to the contrary, Gapen *could* have filed his motion for new trial long before he did. The fact that Gapen's federal public defenders were not authorized by their employment to represent Gapen in state court did not preclude Gapen, or any of his prior counsel, from pursuing a motion for new trial. Gapen has been represented by no less than ten highly competent attorneys and numerous investigators from trial through the motion presently pending before this court. Nothing prevented Gapen from pursuing the claims on his own behalf, particularly when much, if not all, of the information upon which Gapen predicates his Motion for Leave was learned by him or his numerous counsel many years prior to the filling of the Motion for Leave. Nothing prevented Gapen, appointed counsel or an investigator from the office of the state or federal public defender from talking with potential witnesses, trial counsel, or trial court jurors before discovery was actually ordered by the federal judge. The strategic timing of the filing of Gapen's Motion for Leave harkens to the proverbial "arrow in the quiver" – counsel chose to pursue other potential avenues of relief while holding back from filing a motion for new trial based upon the evidence he now claims supports his pending motion.

Still further, while federal habeas counsel may have required authorization to conduct state court litigation, nothing prevented Gapen's other counsel or Gapen himself from pursuing a state court remedy on his behalf. Additionally, counsel has not explained why they delayed seeking authorization from the federal district court to conduct state court litigation for over a year after they personally learned of the evidence upon which the motion is premised. Federal habeas counsel did not seek authorization to conduct state court litigation until September 30, 2013, five years after

they were appointed to represent Gapen, and, as the State points out, almost two years after said counsel personally learned of the evidence supporting Gapen's claims.

C. Arguments Associated with Individual Grounds for Relief

The court will next review the arguments associated with each individual ground for relief, only as those arguments relate to his Motion for Leave.

1. First Ground for Relief

Defendant's first groups for relief states:

> First Ground for Relief: Gapen's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article One, Sections One, Five, Nine and Ten of the Ohio Constitution were violated and his convictions and death sentence are constitutionally invalid because one of the jurors who was seated at his trial was biased and incapable of fairly deciding the case.

Subpart 1 of Defendant's first ground for relief states:

> Juror Maguire failed to provide honest responses during voir dire, and his correct responses would have provided the basis for a challenge for cause.

Subpart 2 of Defendant's first ground for relief states:

> Maguire was impliedly biased and a new trial must be granted.

The court will consider the two aforementioned arguments together. In summary, Defendant argues that Juror Maguire failed to disclose during voir dire that a murder-suicide took place at the property adjoining his home, as well as what Defendant describes as Maguire's negative experience with police during and after the incident. Gapen also argues that as a result of the incident at the property next to Maguire, Maguire harbored some implied bias requiring a new trial. Gapen argues that he was unavoidably prevented from learning the information obtained from Maguire until Maguire was interviewed by Jacob Cairns, an employee of the Federal Public Defender's Office, in December, 2011. Defendant, however, erroneously suggests that Maguire had an obligation to disclose the aforementioned-information without either party asking Maguire

questions that would be probative of the information. Maguire could not possibly be expected to know that every life experience he had could be important to the seating of the jury, particularly since neither the State's counsel nor Gapen's counsel asked any question during voir dire that could have elicited the information upon which Gapen bases his First Claim for Relief. Gapen's counsel argues that Maguire was not truthful during voir dire, but Maguire was never asked any question that could have elicited the information about which Gapen now complains. Furthermore, Gapen's arguments relating to implied bias are speculative at best. Gapen's counsel could have discovered the information during voir dire, but did not ask Maguire any question that resulted in an untruthful response by Mr. Maguire associated with the incident that occurred in the unit next to his home.

Still further, Maguire had been interviewed by Gapen's attorneys on September 16, 2002. During the 2002 interview, Maguire revealed to Gapen's counsel that during deliberations the jury had been in possession of the receipt for the gun found in Gapen's wallet. (The argument relating to the gun receipt will be addressed under the Second Ground for Relief below). Maguire was interviewed twice by Gapen's attorneys, including Jacob Cairns, in December, 2011. At the time of the oral hearing herein, Cairns worked at the Office of the Federal Public Defender in the capital habeus unit in Columbus. Maguire revealed to Gapen's attorneys the incident that had occurred at his neighbor's home. Gapen summarily claims that because of Maguire's proximity to a crime of violence, he was impliedly biased and incapable of fairly deciding the case. Defendant unjustly characterizes the murder-suicide as having occurred at Maguire's home. The incident took place in a home adjoining Maguire's, and not in his home. Maguire's tenant, who rented half of a duplex he owned, was shot four times, but survived, and her attacker, a friend whom she permitted to spend the night in her home, committed suicide. The victim was not related to Maguire, but instead was his tenant. Furthermore, there is nothing to suggest that the experience of Maguire's neighbors caused bias on his part against Gapen, nor rendered him incapable of fairly deciding the case. Gapen's argument amounts to nothing more than pure speculation.

Furthermore, Mr. Maguire completed a juror questionnaire prior to his jury service. None of the questions asked of Maguire, or the other prospective jurors, in the questionnaire specifically relate to Gapen's arguments herein. The following questions and answers supplied by Maguire may have relevance to Gapen's motion:

76. Do you belong to any group or organization which is concerned with crime prevention or victims' rights?

Response: Yes

77. Have you ever been a victim of a crime?

Response: Yes

If yes, how many times?

Response: One

What type of crime(s)? Assault by armed men

81. Do you feel the job the police did on it was

Response: Unsatisfactory

Why?

Response: I felt that they didn't want to hunt down 4 armed men since I wasn't badly injured.

83. How has that experience affected your impressions about the criminal justice system?

Response: It hasn't. Only my opinion of the two (Youngstown P.D.) police officers was affected by the incident.

84. Other than answers you may have already given, have you had a good or positive experience with any police officers?

Response: Yes

Please explain and indicate the police agency involved:

Response: Y.P.D.

85. Other than answers you may have already given, have you had a bad or negative experience with any police officers?

Response: No.

The court has reviewed the transcript herein. A review of the record makes clear that Gapen's counsel had a free and open opportunity to examine Maguire on voir dire. Gapen argues that his counsel had no reason to ask Maguire about the incident, but Maguire had no reason nor duty to disclose the information if he was not asked. Gapen's counsel was not prevented from learning of Maguire's past experiences, nor is there any evidence that Maguire kept the information from counsel or the court. There is no evidence that Maguire, when asked, withheld any of the information Gapen now claims is important. While Maguire did not reveal the information at issue during voir dire, no question was asked of him or the panel that would have prompted disclosure of the information. Quite simply, counsel asked no questions that would have elicited the information; Maguire was not required or expected, during voir dire, to exercise prescience and anticipate issues that may have been relevant to counsel. Instead, it was the duty of Gapen's counsel to asked probing questions to elicit responses from jurors. A review of the voir dire examination conducted does not reveal any inconsistencies by Maguire, nor failure to respond to any question that would have generated the responses associated with the shooting and suicide in the home next to Maguire's.

Gapen was not unavoidably prevented from obtaining knowledge of the information associated with Maguire's past experiences. Instead, Gapen's counsel simply did not ask the appropriate questions to elicit the information from Maguire. Maguire had no duty to provide information that was not asked of him. The court finds that Gapen has failed to demonstrate that he was unavoidably prevented from obtaining the information related to the events that occurred near Maguire's home, or the information related to his feelings associated with law enforcement. It must be remembered that Maguire did not claim to be positively influenced by law enforcement, but

instead he had experienced negative feelings for law enforcement, which would presumably favor Gapen. With due diligence and some effort, Gapen's trial counsel could have obtained the information about which he now complains. Since the court has determined that Gapen has failed in the initial obligation associated with the First Claim for Relief, the court will not analyze any of the additional requirements associated with the aforementioned claim.

2. Second Ground for Relief

Gapen's second ground for relief states:

> Gapen's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article One, Sections One, Five, Nine and Ten of the Ohio Constitution were violated and his convictions and death sentence are constitutionally invalid because the jury was in possession of prejudicial evidence during deliberations which had never been admitted or was specifically excluded at trial.

Gapen's Second Ground for Relief contains ten subparts, which state as follows:

Subpart 1:

> Prejudicial, unadmitted and inadmissible evidence in the form of a gun shop receipt was sent to the jury for deliberations.

Subpart 2:

> Prejudicial, unadmitted and inadmissible evidence win the form of the victim's teeth was sent to the jury for deliberations.

Subpart 3:

> Prejudicial, unadmitted and inadmissible evidence in the form of inflammatory photos of the victim's bedroom, bed and teeth was sent to the jury for deliberations.

Subpart 4:

> Prejudicial, unadmitted and inadmissible evidence in the form of oral swabs from the victim was sent to the jury for deliberations.

Subpart 5:

> Prejudicial, unadmitted and inadmissible evidence in the form of rectal swabs from the victim was sent to the jury for deliberations.

Subpart 6:

> Prejudicial, unadmitted and inadmissible evidence in the form of vaginal swabs from the victim was sent to the jury for deliberations.

Subpart 7:

> Prejudicial, unadmitted and inadmissible evidence in the form of crime scene, victim, and autopsy photographs was sent to the jury for deliberations.

Subpart 8:

> Prejudicial, unadmitted and inadmissible evidence in the form of a storage locker rental agreement and ATM receipts was sent to the jury for deliberations.

Subpart 9:

> Prejudicial, unadmitted and inadmissible evidence in the form of a 911 recording was sent to the jury for deliberations.

Subpart 10:

> Prejudicial, unadmitted and inadmissible evidence in the form of Gapen's electronic monitoring records was sent to the jury for deliberations.

a. Gun Receipt

Juror Nedostup acknowledged in his deposition that he recalled seeing a receipt from The Old English Gun Shop in the jury room during deliberations. (Nedostup deposition, page 128). However, Gapen's legal team first learned that the gun receipt was in the jury room in 2002. It is unmistakable from the affidavits and testimony of Attorney Sandford that she and Attorney Tkacz learned of the gun receipt from an interview with Juror Maguire in 2002. In Sandford's testimony, and in Gapen's memorandum, importance is placed on the fact that Juror Maguire did not "emphasize" the gun receipt in his 2002 conversation with Attorneys Sandford and Tkacz. Maguire's emphasis on the gun receipt is not important to the court's analysis; Gapen's knowledge is the linchpin, and not the knowledge of his individual counsel or whether emphasis was placed on the issue by Mr. Maguire. Gapen and his counsel knew in 2002, as a result of an interview with Juror Maguire, that the gun receipt had been in the jury room, even though the receipt was not admitted into evidence by the trial judge. At the very least, Defendant had knowledge, at least as early as 2002, that the gun receipt was in the jury room during deliberations, and certainly had an

obligation to inquire into and diligently investigate the matter and conduct further inquiry, rather than waiting eleven years to seek a new trial related to said evidence.

Gapen argues that this court found that Sandford's affidavit contained incompetent evidence, as it contained hearsay from Maguire, and thus did not consider the affidavit when analyzing Gapen's post-conviction petition. Whether the evidence was not considered related to the post-conviction petition does not mean the court cannot consider Gapen's knowledge of the evidence. On the contrary, Gapen, once he and his counsel learned of Maguire's statements in 2002 had a duty to diligently act upon that evidence, rather than wait eleven years to raise the evidence in the 2013 motion for leave to file motion for new trial.

b. Teeth

One or two envelopes containing Jesica Young's dislodged teeth were allegedly sent to the jury room with admitted evidence, despite the trial court's ruling that the teeth were to be excluded. Juror Flournoy advised counsel in a sworn deposition in 2012 that the teeth were among the exhibits in the jury room during deliberations. Nedostup did not recall seeing human teeth in the jury room, although he deemed it possible, during his deposition, that there were teeth in the jury room with the other exhibits. (Nedostup deposition, page 130). The transcript of the trial proceedings, however, demonstrates that there was significant testimony from several witnesses regarding Young's dislodged teeth, as well as where the teeth were located by medical and law enforcement personnel. When Gapen learned that the gun receipt was in the jury room, further inquiry was required to act diligently; such an inquiry would have uncovered that Jesica's teeth were also in the jury room. The court's analysis must focus on whether Gapen *could have* learned of the evidence, and not on whether he, in fact, learned of the evidence. Therefore, the court finds that Gapen has failed to establish that he could not have, in the exercise of due diligence, learned that the teeth were also in the jury room.

c. Photographs of bedroom, bed and teeth

Gapen claims that photographs of Jesica Young's bedroom, her bed and teeth were sent to the jury during deliberations, despite the trial court's refusal to admit the photographs. Gapen claims he first learned that the unadmitted photographs of Jesica Young's bedroom, bed and teeth were with the jury during deliberations, as a result of the sworn deposition testimony of Juror Nedostup in May, 2012. As with the teeth themselves, during trial the jury heard testimony from a number of witnesses on the state of Young's bedroom, her bed, as well as observations of her teeth.

Similar the Jesica's teeth, when Gapen learned that the gun receipt was in the jury room, further inquiry was required to act diligently; such an inquiry would have uncovered that unadmitted photographs were also in the jury room. The court's inquiry does not focus on whether Gapen learned of the evidence, but whether he *could have* learned of the evidence. Therefore, the court finds that Gapen has failed to establish that he could not have, in the exercise of due diligence, learned that the teeth were also in the jury room.

d. Other evidence

In his Motion, Gapen alleges that since Jurors Nedostup, Fournoy and Senter confirmed in May, 2012, certain exhibits not admitted were in the jury room, there is an inference that other unadmitted but highly inflammatory trial exhibits were in the jury room. Gapen speculates in his Ground for Relief Two, Subparts 4-10, that the oral swabs of Jesica Young, rectal swabs, vaginal swabs, crime scene, victim and autopsy photographs, storage locker rental agreement and ATM receipts, 911 recording and Gapen's electronic monitoring records may have been sent to the jury room during deliberations, but has not offered or suggested that any juror or witness has indicated, nor that he has discovered any evidence to suggest that the aforementioned evidence was sent to the jury room or considered by the jurors during deliberations. Instead, Gapen engages in mere speculation that jurors may have been exposed to the unadmitted evidence detailed above. Gapen's claim that the evidence mentioned above, by inference, must have been in the jury room during

deliberations, relies on speculation, and not on evidence. While there is evidence, based upon juror statements, that the teeth and unadmitted photographs were in the jury room, no inference results that other unadmitted evidence was also in the jury room. Gapen's conjecture about what may have occurred does not amount to evidence sufficient for this court to analyze the claim for purposes of determining whether he has met his burden to go forward with the filing of a motion for new trial.

3. Third Ground for Relief

In the first subpart of his third ground for relief, Gapen argues that his convictions and sentence are constitutionally invalid because the trial judge failed to disclose evidence of constitutional violations that took place after the jury retired to deliberate. Specifically, Gapen argues that the trial judge failed to inform counsel that a gun receipt, which had been excluded from the evidence, was in the jury room during deliberations. While counsel attempts to dismiss the significance of the information, Juror Maguire advised Ms. Sandford in 2002 that the receipt was in the jury room. Sandford's hearing testimony suggested that, and Gapen's argument concludes, that since there is no mention of Maguire revealing the gun receipt in Sandford's 2002 affidavits appended to Gapen's post-conviction petition, Maguire must not have revealed the information to her. The court, though, cannot ignore Sandford's notes regarding her communication with Maguire in 2002, which indicate that the gun receipt was in the jury room during deliberations. Sanford acknowledged in her oral testimony that Juror Maguire advised her in 2002 that the gun receipt was in the jury room. The fact that Maguire first disclosed years later that the trial judge was informed that the gun receipt was in the jury room does not change Gapen's duties when he obtained the information in 2002.

In the second subpart of his Third Ground for Relief, Gapen argues that the trial judge "failed to inform counsel immediately following impermissible communication with a juror before sentencing that strongly suggested jury misconduct had occurred, that an extra-judicial source of law had been applied, that the jury had not followed the court's instructions, and that a biased juror had ensured

that nothing less than a death sentence was the only possible sentencing outcome." The crux of Gapen's claim is that in 2012 Juror Nedostup revealed an email that he purportedly sent to the trial judge, John Petzold, approximately one week before Gapen's sentencing by the court. Mr. Mooney acknowledged that Nedostup had told Gapen's counsel and/or investigators in 2002 that he had emailed Judge Petzold following the verdict. Nedostup's statement in 2002 triggered Gapen's duty to diligently investigate the claim related to an email to Judge Petzold, but Gapen and his counsel failed to diligently pursue that avenue for relief. Therefore, the court finds that Gapen has failed to establish that he could not have, in the exercise of due diligence, learned of the email and its contents; Gapen learned of the communication in 2002 but chose to ignore his duty to pursue inquiry into the specific contents of the communication until ten years later.

4. Fourth Ground for Relief

Gapen's Fourth Ground for Relief states:

> Gapen's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article One, Sections One, Five, Nine and Ten of the Ohio Constitution were violated and his death sentence is constitutionally invalid because one of the jurors who was seated at his trial was biased and incapable of fairly deciding the case because he would automatically vote for death upon a guilty verdict at the trial phase.

Gapen's Fourth Ground for Relief contains five subparts which read as follows:

1. Juror Nedostup fervently believed in the principle of *lex talionis*, which mandates that the death penalty must be the sentence after a defendant is convicted of murder, because the death of the defendant is the only "just" punishment when the defendant has taken a life, and therefore actual juror bias is demonstrated.

2. Juror Nedostup failed to provide honest responses during the small group death qualification voir dire, and his correct responses would have provided the basis for a challenge for cause.

3. Juror Nedostup failed to disclose that he had violated the trial court's instructions by conducting independent research on the death penalty following the death qualification voir dire but before the large group voir dire.

4. Juror Nedostup failed to provide honest answers during the large group voir dire.

5. Juror Nedostup was impliedly biased.

In general, Gapen argues that Juror Nedostup was "constitutionally ineligible to serve in Gapen's case due to his fervent belief in the principle *lex talionis,* which requires a death sentence for anyone convicted of murder."

At his deposition taken May 31, 2012, when questioned about a book entitled *Relativism: Feet Firmly Planted in Mid-Air,"* Nedostup testified that he purchased the book prior to his jury service in the Gapen case, but received the book during the trial. Nedostup stated, "I thought it was rather intriguing that it was on morality and so at the time I didn't understand all of the implications as I do now 11 years later." (Nedostup deposition, p. 12). Nedostup was "just becoming familiar" with the concepts contained in the aforementioned book in 2001. (Nedostup deposition, p. 46). Nedostup read the book for his own personal interest and not as research for the Gapen case. (Nedostup deposition, p. 111). Nedostup admitted that he probably talked with other jurors about ideas of objective moral truth, but did not talk with jurors about the concepts from the book. When asked specifically, Nedostup denied talking with other jurors in the jury room about the concepts in *Relativism*. (Nedostup deposition, p. 52). Nedostup testified that he did not share with other jurors any information from the Bible associated with capital punishment, but he did mention the concept of *lex talionis*. (Nedostup deposition, p. 64). His recollection is that he only defined the term for other jurors, but he did not discuss the concept in any detail. (Nedostup deposition, p. 73). Nedostup had first learned about the concept of *lex talionis* from radio debates when he was in college. (Nedostup deposition, p. 67). Nedostup made personal notes on the jury instructions provided to the jury by Judge Petzold, but he did not share those notes with the other jurors, nor did he take his personal notes into the jury room with him. (Nedostup deposition, pages 116-117).

Nedostup also testified at his deposition that, after reading a newspaper article about the Gapen verdict, particularly the fact that the jury had not recommended death with regard to the two

adult victims, but had recommended a death sentence relating to Jesica Young, on Sunday, June 24, 2001, he sent an e-mail to the trial judge, Judge John Petzold. Nedostup's e-mail stated, in part:

> In order for us to secure a verdict at all, we did some compromising. As for me the verdict was death at all costs. As we discussed among ourselves it was my understanding that one count of death agreed upon by all jurors was sufficient to secure the death penalty. As to Jessica Young we also unanimously voted there were no mitigating circumstances thus the death penalty fit the crime.

(Nedostup deposition, page 94). Nedostup acknowledged that under the principles of lex talionis there is no such thing as mitigation that might result in some other sentence than death. (Nedostup deposition, page 97). Nedostup did not recall receiving a response from Judge Petzold to his e-mail, nor was he aware whether Judge Petzold actually received the email. (Nedostup deposition, pages 97 and 116). Nedostup acknowledged that he followed the jury instructions provided by Judge Petzold. (Nedostup deposition, page 116).

A review of the record demonstrates that Juror Nedostup made his personal opinions amply known to counsel during voir dire. Nedostup's answers to the written juror questionnaire, while not mentioning *lex telionis* using the Latin term, nonetheless put Gapen's trial counsel on specific notice of his personal opinions and philosophy representing the concepts of *lex telionis*. The principle of *lex telionis* suggests an "eye for an eye" in terms of punishment for any given offense. Two specific answers at Question 48 from Nedostup's juror questionnaire reveal his adherence to the principles of *lex telionis:*

> The death penalty should never be used as the punishment for any murder.
>
> Response: Strongly disagree
>
> The death penalty should always be used as the punishment for every murder.
>
> Response: Strongly agree

Nedostup also answered Question 47 of the written juror questionnaire, provided to Gapen and his counsel, as follows:

Which of the following statements best reflects your view of using the death penalty.

Response: Appropriate in every case where someone has been murdered.

Nedostup also revealed in his written juror questionnaire responses his church affiliation and that his preferred type of reading materials was "Apologetics – Christian Defense." He also placed Gapen and his counsel on notice through his written response to juror questions that he regularly read the periodicals "Christian Research Journal" and "Focus on the Family," and that He had previously visited or been inside a prison/jail "in Chicago with Bible Institute training."

Still further, Gapen was well-aware of Nedostup's personal opinions and beliefs at least as early as 2002, when Gapen made similar allegations related to Nedostup in his post-conviction petition. Gapen has failed to adequately explain why he waited eleven years to file his Motion for New Trial related to Nedostup. Whether the concept is referred to as *lex talionis*, an eye-for-an-eye, or by a belief that the death penalty should always be used as the punishment for every murder, Nedostup made his opinions abundantly clear during voir dire. Mooney and Hall, working on behalf of Gapen, also knew in 2002 of Nedostup's belief in the principle of *lex talionis*. (See Hall's affidavit dated October 1, 2002).

Additionally, when Ruth Tkacz interviewed Juror Senter on September 8, 2002, Senter revealed that Nedostup did his own research and discussed his feelings about the death penalty with other jurors during deliberations. Still further, in 2002, during an interview by Gapen's counsel with Juror Maguire, Mr. Maguire also revealed that Mr. Nedostup had done independent research and shared his philosophical or religious views on the death penalty with his fellow jurors. Mr. Maguire also advised Gapen's counsel in 2002 that Mr. Nedostup read religious texts during breaks in the proceedings.

Parenthetically, the Second District Court of Appeals has previously addressed the issue of a juror researching or considering biblical scriptures when making a determination in a death penalty case. In *State v. Franklin*, 2002-Ohio-2370, the court found that a juror's actions in researching Biblical passages outside of the jury room and then sharing those findings with the jury do not amount to constitutional violations where the defendant has presented no evidence that the juror's actions had any effect on the jury.

Whether the concept is referred to as *lex talionis*, an eye-for-an-eye, or by a belief that the death penalty should always be used as the punishment for every murder, Nedostup made his opinions abundantly clear during voir dire.

Most importantly herein, this court has already addressed Gapen's claims regarding Nedostup's biblical research in Gapen's Petition for Post-Conviction Relief. Gapen filed his Petition for Post-Conviction Relief on October 4, 2002, and raised therein the argument that Juror Nedostup had consulted religious material relating to the death penalty and that Nedostup's world view mandated the death penalty. The evidence presented by Gapen relating to Nedostup in association with his Motion for Leave to file Motion for New Trial has been known by Gapen since at least 2002, when Gapen filed his Petition for Post-Conviction Relief, and should have caused Gapen as well as his counsel since that time to diligently pursue the evidence. While Gapen argues that the evidence relating to Juror Nedostup was not "fully developed" until his deposition in 2012, Gapen knew of the issues and evidence since at least 2002, when Nedostup was interviewed by Gapen's State post-conviction counsel and had an obligation to investigate the matter, rather than sit on his knowledge for over ten years. Nothing prevented Gapen from raising the issues he now claims related to Nedostup's conduct more than a decade before he filed his Motion for Leave filed herein, as he knew about that evidence as early as 2002. The delay in pursuing the evidence associated with Juror Nedostup appears to result from a motivation to hold an arrow in Gapen's proverbial quiver, rather than to present his claims in a timely manner.

Gapen's arguments relating to the timeliness of his petition focus on the authority of his federal public defenders. However, the authority, or lack thereof, of his federal public defenders to bring claims in state court, is limited by their employment, but at no time did his counsel's employment limit Gapen's rights nor ability to file claims in state court. Gapen's explanation that he could not present his arguments relating to Juror Nedostup because his federal habeas corpus counsel were not permitted to make claims in the state court without first obtaining authorization from the federal judiciary lacks all merit. Nothing prevented Gapen from pursuing the claims, nor the numerous state public defenders and other appointed counsel representing him since at least 2002. Still further, one of Gapen's trial counsel, Mr. Greer, testified at the oral hearing on the pending motion that he believed, at the time the verdict was read, and without any juror affidavits, that the jury had gone astray and had decided on the death penalty on a non-statutory ground. The standard by which the court must consider Gapen's conduct is not what the assigned federal public defenders knew, or when they learned the information, but when Gapen and any of his legal counsel learned of the evidence.

5. Fifth Ground for Relief

Gapen's Fifth ground for relief is substantially similar to the claimed Fourth ground for relief. The court will not repeat the analysis included above related to the Fourth ground for relief, but instead incorporates that analysis herein.

The court, notes, specifically related to the Fifth Ground for Relief, that the affidavits of Attorney Sanford dated September 13, 2002 and September 16, 2002, demonstrate that Gapen was aware of Nedostup's personal opinions and beliefs, and that the jury considered Nedostup's research in its deliberations, as of September, 2002. Additionally, Gapen's trial counsel, Mr. Greer, averred in his affidavit that he knew when the verdicts were read that the jury had "gone astray and that it had decided for the death penalty on a non-statutory ground of premeditation rather than on

one of the aggravating factors." However, Mr. Greer did not investigate what he believed to be juror misconduct. Mr. Greer's knowledge of suspected juror misconduct, which he acknowledged he believed at the time of trial, required that Gapen investigate the matter. Mr. Greer's knowledge of juror misconduct in 2001 renders Gapen's 2013 motion untimely and certainly demonstrates that Gapen was aware in 2001 of the information upon which he predicates his Fifth Ground for Relief and thus did not diligently pursue investigation of that evidence.

Gapen argues throughout his memorandum that his current counsel first learned of the information upon which he bases his claims after 2011. Such an argument, though, belies the evidence, Gapen learned of much of the evidence upon which he bases his claims in 2002. Still further, it was not that Gapen could not obtain the evidence upon which he relies, but instead Gapen's counsel chose to ignore that evidence in what appears to be a strategic move to pursue other actions. Rather than diligently pursuing the information obtained in 2002, Gapen waited an unreasonable amount of time to bring his claims before this court. Gapen kept the proverbial "arrow in his quiver" in the form of the evidence he learned in 2002, while pursuing other avenues of relief. As the State of Ohio points out, Gapen's federal habeas counsel cited the juror affidavits from the 2002 post-conviction petition in his first habeas corpus petition, filed on March 10, 2009. Counsel waited until October 8, 2010 to file their request for discovery, which was granted approximately three weeks later, and then Gapen's counsel waited until December, 2011 to begin interviewing jurors and then waited approximately four years to file the Motion herein. The record simply discredits Gapen's claims that he did or could not have discovered the evidence upon which he predicates his Fifth Claim for Relief.

IV. CONCLUSION

The court finds that Gapen has failed to meet his burden herein and thus his Motion for Leave to File Delayed Motion for New Trial is **OVERRULED**. The court finds that Gapen has failed to prove by clear and convincing evidence that the evidence could not have been discovered

with due diligence before the time limit imposed by Crim. R. 33(B) expired. The court finds, in acknowledging the material difference between being unaware of the information and being unavoidably prevented from discovering that information in the exercise of due diligence, that Gapen was not unavoidably prevented from discovering the information in the exercise of due diligence. In fact, Gapen knew of the information upon which he predicates his motion as early as the trial proceedings, but no later than 2002. Gapen and his counsel chose not to exercise due diligence in pursuing that evidence, but instead made the strategic decision to pursue other options. The court finds that Gapen made a strategic decision to withhold the filing of a motion for leave to file a motion for new trial, which does not obviate or excuse the untimely filing. As with the defendant in *State v. Lenoir*, 2015-Ohio-1045, Gapen continued to pursue other avenues for relief, including a petition for habeas corpus in the federal district court, despite his knowledge of the evidence upon which he bases his pending motion. The court finds that Gapen has failed to meet his burden of establishing by clear and convincing proof that he was unavoidably prevented from filing his motion for a new trial within the statutory time limits or within a reasonable time within discovering the evidence. The court further finds that Gapen failed to file the motion for a new trial within a reasonable time after discovering the evidence. The court finds that Gapen has failed to adequately explain his delay, and that the delay of over ten years in pursuing a new trial on the evidence alleged is not reasonable under the circumstances.

In conclusion, Gapen's failure to bring his claims before this court is not excused because he developed other strategies for relief, nor is the information he obtained in 2002 somehow to be overlooked merely because other attorneys personally first learned of the information much later. As to each of Gapen's grounds for relief, the court finds that Gapen was not diligent in discovering or litigating his claims. The court further finds that Gapen has failed to prove by clear and convincing evidence that he and/or his counsel could not have learned of the grounds for relief in the exercise of due diligence and that Gapen failed to timely assert his claims herein.

SO ORDERED:
JUDGE MARY KATHERINE HUFFMAN

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NOT JUST CAUSE FOR DELAY FOR PURPOSES OF CIV. R. 54. PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED.
JUDGE MARY KATHERINE HUFFMAN

To the Clerk of Courts:
Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.

JUDGE MARY KATHERINE HUFFMAN

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Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Case Number:
2000 CR 02945

Case Title:
STATE OF OHIO vs LARRY JAMES GAPEN

Type:

Order:

So Ordered,

Mary H. Huffman

Electronically signed by mhuffman on 04/29/2020 03:35:06 PM Page 50 of 50