IN THE COURT OF APPEALS OF LUCAS COUNTY, OHIO
SIXTH APPELLATE DISTRICT

STATE OF OHIO	*	C.A. No. L-06-1182
Plaintiff-Appellee,	*	C.P. No. CR04-1915
-vs-	*	
GERALD ROBINSON	*	
Defendant-Appellant.	*	
	*	

BRIEF OF PLAINTIFF-APPELLEE

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES1TABLE OF AUTHORITIES01TABLE OF AUTHORITIES

CASES PAGE

MISCELLANEOUS PAGE

INTRODUCTORY NOTE

In its brief, the State of Ohio has designated references to the trial transcript as a numerical endnote. The corresponding page number is located at Appendix "M".

Footnotes have been designated alphabetically "A" through "KK".

STATEMENT OF THE CASE AND THE FACTS1STATEMENT OF THE CASE AND THE FACTS01STATEMENT OF THE CASE AND THE FACTS

At approximately 8:20 a.m. on Saturday, April 5, 1980, the body of seventy-one year old nun, Sister Margaret Ann Pahl, was found in the sacristy of the chapel in Mercy Hospital of Toledo, Ohio.[1] Her assailant had strangled her to the verge of death and then stabbed her thirty-one times.[2] Initially, she was stabbed nine times through an altar cloth that her assailant had placed over her.[3] The altar cloth was then removed, and Sister Pahl was stabbed twenty-two more times to her face, neck and chest.[4]

Toledo Police Detectives arrived at the hospital within minutes and immediately started their investigation.[5] By the end of Saturday, April 5, 1980, detectives had arrived at two conclusions. First, that Sister Pahl had not interrupted a robbery.[6] Assistant Chaplain Father Jerome Swiatecki did a complete inventory of the sacristy and the chapel and reported that nothing of value was missing, including items made of gold.[7] Additionally, Sister Pahl's purse was recovered from inside one of the cabinets in the sacristy.[8]

Second, investigators believed that the murderer was someone who was enraged at Sister Pahl and most likely knew her.[9] They regarded the thirty-one stab wounds as being indicative of someone who was very angry, and they also believed that this type of anger was inconsistent with the assailant being a complete stranger to the victim.[10] Moreover, the crime scene reflected that a window shade had been pulled down to block the view from other windows of the hospital.[11] An outsider would have been far less likely to be aware that the sacristy could be seen from the hospital, especially if the crime had been spontaneous.[12] Additionally, in examining Sister Pahl's hands, there were no defensive wounds and the sacristy itself was in order with no signs of a struggle.[13]

On Sunday, April 6, 1980, investigators received information from the coroner's office that the weapon used to inflict the stab wounds was no more than one-half inch in width and at least three inches in length.[14] By Monday, April 7, 1980, investigator's believed that, despite Sister Pahl being found in a state of near nudity, this crime was not motivated as a sexual assault. There was no evidence that the nun had been raped.[15] Her hymen was intact and there was no evidence of semen found on her person, clothing or at the crime scene. (State's Exhibit 82, hereinafter referred to as "(St. Ex. __)".

On Wednesday, April 9, 1980, five days after the murder, police interviewed Shirley Lucas, a housekeeper for Mercy Hospital. She stated that Sister Pahl, after a meeting with one of the two priests, had been upset to the point of tears on Good Friday afternoon, April 4, 1980. Sister Pahl, a very strict and devout nun, was distraught and crying because one of the priests had shortened the Good Friday service causing her to sob, "Why did they cheat God out of what was His?" (Defense Exhibit AA hereinafter cited as "(D. Ex. __.)"

On April 12, 13 and 14, 1980, police interviewed Mercy Hospital employees who reported hearing, at the time of the murder, frantic footsteps down a hallway connecting to the chapel.[16] These footsteps were then heard to go down a hallway which lead to a single apartment, the apartment that the appellant, Gerald Robinson, occupied.[17]

After thirteen days of investigation, the police believed the evidence led to the appellant as the principal suspect, and they asked him to appear at the Toledo Police Department for an interview on Friday, April 18, 1980. The appellant appeared and was interviewed by Lieutenant William Kina and Det. Arthur Marx.[18]

During this interview, the appellant claimed that the true killer came to him and admitted to the murder of Sister Pahl.[19] When pressed for details and specifics, the appellant admitted that his statement was a lie and that he had made the story up to protect himself.[20]

At the conclusion of the interview, the appellant consented to a search of his residence located on the same floor as the chapel.[21] During the search, police recovered State's Exhibit One, an eight inch long sword-shaped letter opener with a blade approximately one-half inch wide.[22] This letter opener was later found to have a fleck of material which tested presumptively positive for blood on three separate occasions.[23]

The appellant was re-interviewed on the following day. This interview ended when Toledo Police Deputy Chief Ray Vetter brought Monsignor Schmit of the Toledo Diocese into the interrogation room. Monsignor Schmit quickly left the police station with the appellant.[24]

Near the end of April, 1980, Toledo Police presented their evidence to the Lucas County Prosecutor's Office for assessment. At that time, the Prosecutor's Office declined to present the matter to the grand jury because of insufficient evidence.[25]

The Toledo Police Department continued to attempt to develop further evidence as to this homicide for years after April 1980.[26] Lt. Kina kept investigating the murder until he retired.[27] Det. Marx also continued to investigate until he retired in 1998.[28] In 1999, the Toledo Police Department submitted the murder weapon to BCI for testing. While the letter opener tested presumptively positive for the presence of blood, there was insufficient matter for a conclusive DNA result.[29]

On December 2, 2003, Lucas County Cold Case Investigators received a letter originally sent to the Ohio Attorney General's Office in which a nun alleged being a victim of ritualistic

sexual abuse performed by multiple individuals.[1] The group sex allegations did not include the appellant.[30] However, the letter did accuse the appellant by name of individual sadomasochistic sexual abuse.[31] Thereafter, on December 8, 2003, investigators interviewed the nun who had sent the letter to the Attorney General's Office. During this interview, the author of the letter advised the police that they should look for an upside down cross on Sister Pahl's chest.[32]

In the weeks that followed, investigators located and examined the physical evidence, interviewed original investigating officers, re-interviewed witnesses, and had physical evidence examined by specialized experts.[33] Investigators did discover the outline of an upside down cross on the altar cloth which had covered the victim's chest.[34] (See Appendix A, B, hereinafter referred to as "(Apx. __)".

On April 23, 2004, investigators went to the appellant's home with the intention of interviewing him and conducting a search of his premises.[35] During the questioning, the appellant related information that was new, significant, and inculpatory regarding the investigation. The appellant told investigators that Father Swiatecki directly accused him of being Sister Pahl's murderer.[36] The appellant stated that he made no response to this allegation. (See St. Ex. 172, DVD of the appellant's interview with police). The appellant, for the first time, admitted that he never loaned the murder weapon to anyone, that he never had cut himself with it and that he had always locked his apartment door. Additionally, contrary to church practice, the appellant claimed he never had a key to the sacristy because he had no reason to ever go into that room.[37] At the conclusion of the interview, the appellant was arrested and an indictment charging aggravated murder was returned on May 3, 2004.

[1]The author of this letter is a different nun from the plaintiff in *Survivor Doe vs. Gerald Robinson* October 26, 2007, 6th District No. 1051.

Subsequent to Appellant's arrest and indictment, witnesses came forward with heretofore unknown information and reported seeing the appellant at the door to the chapel during the very time frame in which the murder occurred.[38] This information conflicted with appellant's claim in 1980 and his statement in April of 2004 that he had never left his residence the morning of the homicide until he received a phone call that informed him of Sister Pahl's death.[39]

Appellant was indicted on a single count of Aggravated Murder on May 3, 2004. Multiple hearings were had in this matter including a Motion to Suppress which was denied; Daubert hearings as to the expert witnesses; and a Motion to Dismiss. Prior to trial, the State of Ohio amended the indictment to the lesser included offense of Murder.

Appellant's trial commenced on April 17, 2006. On May 11, 2006, the jury returned a unanimous verdict of guilty on the amended charge of Murder. This appeal follows.

The appellant has made multiple references in his Statement of the Facts and in his brief which are not only dehors the record but are factually untrue. The State of Ohio believes it is necessary to specifically point out these instances.

On page 7 of his brief, the appellant commences his argument that a pair of missing scissors, and not appellant's letter opener (which tested presumptively positive for the presence of blood), was the actual murder weapon. The appellant argues that the coroner's description of the puncture wounds described a weapon having a constant width of ½ inch from a point 1 ½ inches from the tip of the blade to a point 3 inches from the tip.

The facts are that the coroner stated that the blade of the weapon used could have been narrower than ½ inch, but not wider. (D. Ex. BB) There was no evidence that the murder weapon had a constant width of ½ inch. Moreover, Deputy Coroner Dr. Fazekas, reported that the measurements were only approximations. (D. Ex. BB)

The appellant makes much about an incredibly minute speck of cellular material that was recovered from the victim's clothing in 2004 which DNA testing established did not to belong to the appellant. In an effort to identify whose DNA it was, the State tested every person it could locate who had contact with the evidence or was in the sacristy with the victim. On page 9 of his brief, the appellant alleges that, "All other known persons (those who could have contributed the DNA from 1980 to the date of testing) were also excluded," implying that this DNA must have originated from the "true" assailant. (Appellant's Brief, page 9).[2]

The testimony at trial showed otherwise. First, not everyone in the sacristy could be located for testing. Many people entered the sacristy that day including police, doctors, technicians from radiology and lab technicians who were never tested.[40] Second, testimony demonstrated that this exceptionally tiny speck of DNA was the result of contamination of the crime scene. BCI laboratory director Dr. Elizabeth Benzinger testified about how easily a crime scene can be contaminated by extraneous DNA.[41]

On page 10 on his brief, the appellant claims that the searches of his living quarters "... produced no evidence that could possibly link him to this crime scene or otherwise implicate him in the commission of this homicide." The facts are that at least eight witnesses gave testimony proving that the letter opener confiscated at his living quarters was used in Sister Pahl's murder.

The weapon seized from the appellant's desk was unique. Near the handle of this sword-shaped letter opener was a nickle-sized circular medallion which depicted the United States Capitol Building. (See Apx. C) When examined in April of 1980 by criminalist Josh Franks, the letter opener was found to be " . . . sumptuously clean . . . . It didn't have any

[2]The appellant also claims a "hair sample" was found anywhere near the sacristy. There was no "hair sample" found at the "crime scene." The located hair was found on the planning office door. (TR. 3462)

fingerprints, no stains, no smear marks, or no -- it appeared as if it had been polished.”[42] However, after removing the medallion, Mr. Franks found a small particle of material which tested presumptively positive for the presence of blood.[43] Cassandra Agosti of BCI performed a similar test in December of 1999, and she also found that the medallion tested presumptively positive for blood.[44] Det. Terry Cousino, of Toledo Police's Scientific Investigation Unit, conducted a similar test in March of 2004 and confirmed the Agosti and Franks test results for the presumptive presence of blood.[45]

Two of the members of the Lucas County Coroner's Office, Dr. Scala-Barnett, a forensic pathologist and Julie Saul, a forensic anthropologist by training and experience, participated in the exhumation of Sister Pahl's body for the purpose of securing a DNA sample from the victim.[46] Dr. Scala-Barnett sought to use the victim's teeth, since they are an excellent source of DNA.[47] To do so, she removed a portion of the victim's mandible.[48] On June 7, 2004, Julie Saul examined the mandible and observed a small diamond-shaped defect.[49] The letter opener in question had an unusual four-sided blade which tapered to a point that was described as diamond-shaped as well as kite-shaped.[50]

Dr. Scala-Barnett inserted the tip of the blade of the appellant's letter opener into the defect she found in the mandible, and it fit very nicely. However, when she rotated the tip 180 degrees, it fit “perfectly.”[51] (Apx. D). Dr. Scala-Barnett opined that State's Ex. 1 “ . . . caused these injuries or a weapon exactly like this caused these injuries.”[52]

Ms. Saul confirmed Dr. Barnett's findings. She told the jury that when the blade was placed into the defect, “ . . . it just seemed to lock in place.”[53] Ms. Saul also testified that this unusually shaped blade fit “ . . . quite well . . .” in a defect found to the victim's sternum (St. Ex.

68) and was also **"** . . . very consistent with . . .**"** a puncture found in the victim's cervical vertebra.[54] (St. Ex. 62).

Dr. Steven Symes is a nationally recognized forensic anthropologist who specializes in sharp trauma bone analysis.[55] Dr. Symes was asked to determine if the letter opener had anything to do with the defect in the bone, and, if not, to exclude it as potential evidence.[56] Dr. Symes opined that the blade was **"** . . . a good fit;**"**[57] **"** . . . fit very well;**"**[58] and **"** . . . a tight fit.**"**[59] Dr. Symes concluded that the defect to the victim's mandible **"** . . . was created by a tool similar in size and shape to the tip of the suspected letter opener.**"**[60]

Toledo Police Scientific Investigator Terry Cousino, as well as Paulette Sutton and Dr. Henry Lee, the latter two recognized as two of only five people in the world certified as experts in blood stain pattern analysis, testified as to blood transfer patterns found on the altar cloth which covered Sister Pahl. All three of these experts found blood stains on the altar cloth which matched the size, shape, and outline of the uniquely shaped letter opener. (Apx. E, F, G, H). Dr. Sutton stated, with specific regard to the medallion depicting the U.S. Capitol Building, which she found left its imprint on the altar cloth, that for any other object to have left that stain **"** . . . it would have had to have been basically the same shape, the same size, and the same configurations. So if there's another object like that . . . .**"**[61] (Apx. C, I, J).

Terry Cousino, a police artist in the Scientific Investigations Unit, testified as to efforts made to find a similarly shaped letter opener which were unsuccessful. Det. Cousino searched online, contacted letter opener collectors, went to E-Bay, took out books from the library, looked at pictures of **"**thousands of letter openers.**"**[62] He never found one even similar to State's Exhibit 1.[63]

Also on page 10 of his brief, the appellant alleges that he became a suspect **"**. . . as the result of statements of Father Jerome P. Swiatecki -- the other priest assigned to Mercy Hospital.**"** This allegation is simply pure fiction, without any support in, or citation to the record. The appellant became a suspect in large part because of the report of the sound of **"**frantic**"** running footsteps in the hallway, where only he lived, during the time frame of the murder.[64] It was not until the appellant was interviewed in April of 2004 that the appellant himself first told police that Father Swiatecki directly accused him of being Sister Pahl's killer.[65]

The appellant, on page 11 of his brief, makes the first of repeated references to his good character and lack of history of violence. The appellant alleges in his brief that he **"** . . . had no history of violence, before or after April 15,**"**[3] that it is a **"** . . . fact there was no evidence that the appellant has ever been violent or **even angry** with anyone in his lifetime;**"**[4] that **"** . . . by all accounts, the appellant is, and always was, a mild mannered (sic) and deeply religious person;**"**[5] and again that **"** . . . there was **no evidence** that the appellant has ever been violent or **even angry** with anyone in his lifetime.**"**[6]

[3]Appellant's Brief p. 11

[4]Appellant's Brief p. 21 emphasis added

[5]Appellant's Brief p. 35

[6]Appellant's Brief p. 54 emphasis original

The appellant's lawyers have **"** . . . departed from their professional obligations by improperly bolstering**"**[7] their client's character on appeal. The reasons the jury heard no such evidence were based on strategic concerns by the defense and the rules of evidence.

Evidence Rule 404(A) precludes the State from introducing facts demonstrating that the appellant **"**had a history of violence**"** or **"**had ever been violent**"** or **"**angry**"** as to others. Therefore, the State did not attempt to introduce evidence of his character. The defense attorneys did not attempt to offer any character evidence either for a very logical, strategic, and plain reason. This reason is embodied in Evid. R. 404 A(1) which provides:

> **(A) Character evidence generally**. Evidence of a person's character or a trait of his character is not admissible . . . for the purpose of proving that he acted in conformity therewith on a particular occasion, **subject to the following exceptions**:
>
> *(1) Character of accused.* Evidence of a pertinent trait of his character offered by an accused, **or by the prosecution to rebut the same is admissible . . . .**

[7]The quoted language is taken from page 20 of appellant's brief wherein appellate counsel accuses the State's attorneys of professional misconduct apparently feeling that it is not a reasonable inference to argue that the 31 stab wounds to Sister Pahl indicate anger on the murderer's part, and that the coroner's findings of an **"**area of reddening measuring ½ x 1/8 inch to the victim's labium**"**, does not give rise to a reasonable inference that she was vaginally penetrated in some fashion.

Had the defense attorneys attempted to argue, as appellate counsel now improperly does, that the appellant had "no history of violence" or had never "been violent," the State would have rebutted these claims with evidence of the appellant's violent past conduct as referenced in the record.[8] As such, it is completely improper for appellate counsel to now attempt to have this court view the appellant as someone with a history of no past violence when the record is devoid of any evidence to this effect, and that, in reality, the appellant's past conduct would show otherwise.

The appellant further argues improperly, and without support in the record, that the State purchased the appellant's conviction by the excessive expenditure of tax dollars. Without any basis in fact, the appellant claims on page 12 of his brief that the prosecution's cold case squad hired experts and " . . . spent tens of thousands of dollars of public funds . . ." to " . . . engage prominent nationally known forensic experts . . .," and referenced " . . . the amount of money spent by the State to impeach the 1980 evidence." The appellant improperly impugns the character of the State's prosecutors by stating that:

> . . . this 24 year old case was thin from its inception, and the Assistant prosecutors knew it. The amount of money spent by the State to impeach the 1980 evidence makes this knowledge clear. Appellant Brief p. 56.

The problem with these "factual" assertions by appellate counsel is that there is no support for them in the record. Based on the record below, this court does not know if the State paid each expert one million dollars, or if it only reimbursed them for their out-of-pocket expenses because they did not charge for their time as the uniqueness of the case and their

[8]A nun wrote a letter to the local Catholic Diocese accusing the appellant by name of subjecting her to non-consensual sado-masochistic sex. (TR. 2736) This letter was forwarded to the Ohio Attorney General's Office which in turn forwarded it to the Lucas County Prosecutor's Office. This nun is a different individual from the nun who made similar allegations in *Survivor Doe v. Gerald Robinson*, October 26, 2007, 6th District No.

desire to assist the court toward a correct outcome was sufficient. Since the record is silent on this matter, the appellant's arguments are improper and should not have been articulated.

Further, Appellate counsel has chosen unilaterally to rename the murder weapon from a **"**letter opener**"**, which it has been called since 1980, to a **"**souvenir sword.**"** (See for example, St. Ex. 74, 77, 80). More accurately, it is a saber because the blade is curved. While the label used to describe the murder weapon is unimportant, the import of the appellant's next effort to deceive this court is his unsupported statement that, **"**It (State's Exhibit 1) was not used to open letters, because it is too wide and too dull to do so. It simply cannot open a sealed envelope without tearing the envelope to shreds.**"** Appellate Brief, page 27.

The above two sentences are fiction, totally made up by appellate counsel, totally unsupported by the record, and they are the epitome of improper appellate advocacy. The appellant's saber- shaped letter opener was labeled as such in April of 1980.[66] (See St. Ex. 74, 77, 80.) It was called a letter opener at trial at **defense counsel's** insistence.[67]

The appellant wants this court to believe that the tool is too dull to have caused Sister Pahl's injuries. The appellant resorts to arguing facts outside the record to support this proposition. There was not a syllable of testimony about the ability of this object to open an envelope, sealed or otherwise. However, there was substantial evidence to prove that it was plunged in to Sister Pahl thirty-one times.

While it is truly difficult to pick just one, perhaps the most outrageous misrepresentation the appellant attempts to mislead this court with is his statement that the pair of missing scissors

> . . . had blades that were approximately **3 inches in length** (<u>precisely</u> the depth of the deepest stab wounds to the neck and chest) and one half (½) inch the width,

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when measured at 3 inches from it (sic) tip (precisely the width of the deepest stab wounds to the victim's neck and chest). (Appellate Brief, page 28; emphasis added.)

Once again, appellate counsel has decided to make up "facts" which are not in the record to support his fantastical arguments. There apparently was a pair of scissors missing from the room in which the victim was murdered.[68] The only reference in the record is to a tracing of a pair of **similar** scissors which were in fact an inch **shorter** and **narrower** than the pair of scissors thought to be missing. There is no evidence in the record as to the specific length of these scissors. (D. Ex. T&U).

Additionally, the appellant desperately argues that, had Dr. Fazekas testified, she would have offered testimony " . . . that would have wholly negated a finding of guilt on the critical element of identity." (Appellate Brief, page 29). The appellant bases this in part on a hearsay statement contained in a police report in which Dr. Fazekas reportedly opined at a point in time **prior** to conducting the actual autopsy that the victim may have been manually strangled by someone with large hands.[69] The appellant claims that he is small in stature and was ". . . physically incapable of committing this offense . . ." as described in Det. Marx's report. (Appellate Brief, page 29) .

The facts of the case show that the victim was 71 years old, 5 feet 2 inches tall and 134 pounds. (St. Ex. 82.) The appellant was forty-two years old, five feet seven inches to five feet eight inches tall and 160 pounds in 1980.[70] The official autopsy report, authored, of course, after the actual autopsy was conducted, says nothing about large hands and nothing about manual strangulation. In fact, Dr. Fazekas opined that the crime could have been committed by "a man

or a woman.”[71] (St. Ex. 84). Thus, the appellant's claim that Dr. Fazekas’ personal testimony in court would “have wholly negated a finding of guilty” is worse than speculative. It is fiction.

The appellant also states on page 29 of his brief that it is an impermissible conflict of interest for Deputy Coroner Dr. Scala-Barnett to be a member of the “cold case squad” which investigates past homicides, citing Ohio Attorney General Opinion No. 98-032 (Aug. 31, 1998). The cited Attorney General’s Opinion holds no such thing. Nowhere does the cited opinion state that it is a conflict of interest for Dr. Scala-Barnett to act as a member for the cold case squad. The referenced opinion only reflects that a deputy coroner has a conflict of interest if also serving as a deputy sheriff.

On page 30, the appellant goes into a lengthy dissertation as to why Dr. Scala-Barnett's opinion regarding frontal ligature strangulation was not possible. In doing so, he lists multiple “factual” statements of medical specifics which were not testified to and not contained in the record. In short, the appellant is making stuff up.

Assignment of Error Number 41Assignment of Error Number 401Assignment of Error Number 4[9]
APPELLANT'S CONVICTION WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.2APPELLANT'S CONVICTION WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.02APPELLANT'S CONVICTION WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

The appellant argues that the jury's finding on the element as to the killer's identity was contrary to the manifest weight of the credible evidence presented at trial. In making his claim, the appellant urges this court to utilize legal standards long since reversed by the Ohio Supreme Court. Appellant failed to articulate a standard of review. Instead, he articulates a standard for sufficiency of circumstantial evidence that has long been overruled by the Ohio Supreme Court.

[9] Assignment of Error No. 4 is discussed out of order because the facts pertaining to the weight of the evidence will assist the court in understanding the other issues in this appeal.

See, *State v. Jenks* (1991), 61 Ohio St. 3d 259, 273. The correct standard for appellate review was recently specified by this court in *State v. Terry*, 6th Dist. No. L-06-1298, 2007-Ohio-4088 at ¶12, wherein this court held:

> Our function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 1997-Ohio-52. Under this standard, this court sits as a "thirteenth juror" and reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses, and determines whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. Id., citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. If we decide that the fact finder clearly lost its way, we must reverse the conviction and order a new trial. Id.

Nevertheless, we will not reverse a conviction so long as the state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193-194, 1998-Ohio-533. Moreover, we must keep in mind that the credibility of the witnesses who testified at trial is chiefly a matter to be determined by the trier of fact. *State v. McDermott*, 6th Dist. No. L-03-1110, 2005-Ohio-2095, _ 25, quoting *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

The State presented more than substantial evidence at trial for the jury to conclude that the appellant was the perpetrator of this homicide. The evidence showed that the mutilated body of Sister Margaret Ann Pahl was found in a small room known as the sacristy located within the chapel at Mercy Hospital in Toledo, Ohio, on April 5, 1980. Sister Pahl's body was discovered by Sister Gordon at approximately 8:15 a.m. on Holy Saturday, the day before Easter.[72] The victim was last seen alive shortly before 7:00 a.m. on that morning by two separate hospital employees.[73]

The hospital chapel, which contains the sacristy where Sister Pahl's body was discovered, was continuously occupied by various nuns from approximately 7:30 a.m. that morning until Sister Pahl's body was discovered at 8:15 a.m.[74] Thus, the homicide occurred sometime after 6:50 a.m., but before approximately 7:30 a.m.. The appellant has always maintained that he remained in his living quarters that morning, located down the hallway from the chapel, until **after** Sister Pahl's body was discovered.[75]

Perhaps the most critical aspect of the State's evidence of the appellant's guilt was the fact that other hospital employees testified that the appellant's alibi statement was completely false. The appellant was seen directly outside the chapel doors both shortly before and after the murder on Holy Saturday morning.

Leslie Kerner testified that she was an EKG technician employed by Mercy Hospital on the morning of April 5, 1980.[76] Ms. Kerner had been working at Mercy Hospital for years prior to April 1980 and had seen the appellant almost daily.[77] She recalled the date of April 5, 1980, because it was the day Sister Pahl was murdered near her office and because she had run to the chapel in response to the screams of Sister Gordon who first found the body.[78] Ms. Kerner was one of the first people to enter the sacristy and view Sister Pahl's body.[79] Ms. Kerner testified that, as was her habit and routine, she had arrived at work between 6:50 and 7:00 a.m. on the morning of April 5, 1980.[80] She further testified that after clocking in to work and as she was walking to her office she observed the appellant by the doors of the chapel.[81] Ms. Kerner stated that the appellant was wearing dark clothing.[82] Shortly after April 5th, 1980, Ms. Kerner told her fiancé, Richard Kerner, about seeing the appellant by the chapel doors that morning.[83]

Grace Jones was also employed by Mercy Hospital on April 5, 1980, and worked in the lab.[84] Contrary to the appellant's claim of not having left his living quarters until well after Sister Pahl's body was found, Ms. Jones testified that she too saw him at the chapel doors at some point after 7:00 a.m., but before Sister Pahl's body was found.[85] Ms. Jones was in the hallway near the chapel because she had gone to get a newspaper.[86] Ms. Jones testified that while waiting for the elevator in the hallway by the chapel she saw the appellant **come out of the door to the chapel**.[87] She testified that the appellant walked by her and that they nodded to one another.[88] She described him as wearing a black robe, a small cap and carrying a dark colored bag.[89] Her best recollection as to the time that she saw the appellant was about thirty minutes

after her co-worker, John Teems, got off work.[90] John Teems' shift was from 11:00 p.m. to 7:00 a.m.[91] Additionally, one of the physicians who rushed to respond to the emergency call for aid to Sister Pahl testified that while running to the chapel he passed an individual dressed as a priest who matched the exact physical description of the appellant.[92] Dr. Jack Baron was the chief resident at Mercy Hospital on April 5, 1980,[93] and he responded to a "Mr. Swift" call, a term the hospital used to indicate there was a medical emergency in the hospital requiring mass medical assistance.[94] Dr. Baron testified that while he was running down the hallway by the chapel he passed a man dressed as a priest who was wearing dark trousers, a dark tunic and white collar, and that he was 35-45 years old, 5'7"- 5'8", medium build with dark hair.[95] While Dr. Baron did not identify this person to be the appellant, he did testify that it was not the other priest, Father Swiatecki, whom he knew quite well.[96] Father Swiatecki weighed between 250-260 pounds.[97] The appellant, in 1980, was in his early 40's, 5'7" and 160-165 pounds and had dark hair.[98] (St. Ex 26).

The fact that the appellant was seen at the door to the chapel minutes after Sister Pahl was last seen alive and also seen exiting the chapel minutes before Sister Gordon entered the chapel, was sufficient evidence for the jury reasonably to infer that the appellant was responsible for Sister Pahl's death. However, the State's evidence against the appellant was much more than this.

Sister Gordon entered the chapel on Holy Saturday morning sometime between 7:15 and 7:30 a.m.[99] After saying her morning prayers, she went to work arranging music for the afternoon service.[100] At sometime after 8:00 a.m., she went to the sacristy to use the telephone.[101] After unlocking the sacristy door and entering, she discovered the lifeless body of Sister Pahl.[102] Sister Gordon's screams for help were heard by Leslie Kerner and others.[103]

Sister Pahl's body was described by those who first saw her as being laid on the floor, legs straight and together, arms straight to her side, head also straight.[104] Her clothing had been arranged as follows: dress was rolled neatly up to or over her breasts, underwear and girdle down to her ankles and off her left leg.[105] The causes of death were strangulation and thirty-one stab wounds.[106] Someone, at sometime after 6:50 a.m., strangled the victim to the edge of death, stripped her nearly naked and stabbed her thirty-one times.

The object used to stab Sister Pahl was of a unique shape. It left oddly shaped punctures to the altar cloth through which the murderer stabbed the victim nine times, also to the victim's clothing and to her flesh.[107] It also left the bloody impression of its shape on the altar cloth with which the murderer covered the victim.[108] Among the bloody impressions on the altar cloth was a nickel-sized blood stained imprint of the United States Capitol Building in Washington D.C.[109] During the course of the 1980 police investigation of this crime, the Toledo Police recovered a sword-shaped letter opener from the appellant's desk.[110] The appellant admitted ownership of this accouterment.[111] Next to the hilt of this letter opener was a nickel-sized medallion depicting the United States Capitol Building in Washington, D.C.[112] This letter opener also left the imprint of its hilt, handle and blade on the altar cloth.[113] (Apx. E, F, G, H). The appellant admitted that he never loaned the letter opener out and that his room was always locked.[114] Critically, the tip of the diamond-shaped blade of the letter opener was found to be a "perfect fit" into a diamond-shaped defect found in the victim's mandible.[115, 10] (Apx. D).

The fact that the appellant's uniquely shaped letter opener left its "fingerprint" in the victim's blood on the altar cloth which covered her body, and the fact that it perfectly fit her

[10] The terms "diamond-shaped" and "kite-shaped" were used interchangeably by various witnesses. "Kite-shaped" was a bit more accurate.

wounds constituted sufficient evidence for the jury reasonably to infer that the appellant was responsible for Sister Pahl's death.

When interviewed by the police, the appellant repeatedly lied, both in 1980 and in 2004. In 1980, the appellant told the police that the "killer" had confessed to him about the murder. When pressed, however, the appellant admitted to making this story up to prevent suspicion upon himself.

In 2004, the appellant told police that he could not have gotten into the locked sacristy because he had no key to the door.[116] Two nuns testified that this story was absurd.[117] They unambiguously testified that the appellant had his own key to the sacristy because his priestly duties required almost daily entry to prepare for and conduct communion and other services in the adjoining chapel.[118]

In 2004, the appellant told police he was dripping wet from his morning shower when he answered the telephone and received news of Sister Pahl's murder. In 1980, the appellant told police he had already finished dressing when he answered the telephone and received the news of Sister Pahl's death.[119]

In 2004, the appellant repeatedly described his actions after being informed of Sister Pahl's death as quickly dressing from his morning shower and running to the chapel.[120] However, when confronted with witness statements reporting hearing the sounds of running footsteps in the appellant's hallway that morning **prior** to Sister's body being discovered, the appellant changed his story to say he could not run because of the length of his cassock.[121]

Because the appellant's letter opener was determined to be the murder weapon, access to his personal residence became a factor. In 2004, the appellant tried to convince police that he

kept his door unlocked and that anyone could have entered his residence. He later conceded the fact that he kept his apartment locked.[122]

Appellant's lies and deceptions made to the police were sufficient evidence for the jury to conclude that the appellant was responsible for Sister Pahl's death as it is universally conceded that **"** . . . lies told by an accused are admissible evidence of consciousness of guilt, and thus of guilt itself.**"** *State v. Tressler*, 6th Dist. No. WM-02-005, 2003-Ohio-1418, ¶42.

The appellant is correct in that the central issue at trial was the identity of the killer because there was no eye witness to the killing itself. As such, the murderer's identity had to be inferred from all the facts and circumstances of the case. In addition to the above-listed circumstances as to the appellant being seen at the door to the chapel shortly before and shortly after the murder took place, and, in addition to the list of the appellant's self-serving statements which were proved to be false, the State proved other facts which implicated the appellant.

In 2004, the appellant told police that he arrived at the sacristy as Father Swiatecki was praying over the body of Sister Pahl. Upon arrival at the sacristy, the appellant stated that Father Swiatecki directly accused him of Sister Pahl's murder, asking, **"**Why, why did you do this?**"** The appellant, by his own admission, offered no reply to this direct accusation of murder. The appellant made no reply at the time the accusation was made, which, by his own admission occurred in front of others, nor at any time thereafter. Appellant's failure to deny Father Swiatecki's direct accusation of murder was an implicit admission of his involvement in the homicide, and a jury could reasonably have convicted him solely on his silent admission. *State v. Alexander*, 11th Dist. No. 93-T-4948, 1996 Ohio App Lexis 5418; *State v. Hardison,* 9th Dist. No. 23050*,* 2007 Ohio App. Lexis 330.

The appellant lived on the same level of the hospital as the chapel, but in a different structure called the Professional Building.[11] On April 5, 1980, hospital employee Wardell Langston was cleaning the floor under the balcony in the Professional Building.[123] Shortly after 7:30 a.m., Mr. Langston heard the loud footsteps of someone running on the floor above him, coming down the hallway from the bridge which connected to the chapel.[124] The footsteps made their way around the balcony above him to another lone connecting hallway.[125] The sound of the footsteps made him think that something was wrong.[126] The footsteps went down the other hallway, at the very end of which was the apartment where the appellant had been living for six years. (See, St. Ex. 32). It was in this apartment that the appellant claimed to have been at the time of Sister Pahl's murder.[127]

Detectives testified that they initially examined the crime scene for evidence of motive for the purpose of including or eliminating potential suspects.[128] Thus, it was relevant to investigators that there was no indication that a robbery occurred.[129] Sister Pahl's purse was not taken, nor were any of the items made of gold missing from the sacristy.[130] The only item reported missing was a pair of scissors.[131] As such, investigators concluded that Sister Pahl had not interrupted a burglary in progress.[132]

As stated, the 71 year old victim was found in a state of near nudity. Her overgarments had been pulled up to her chest, and her undergarments had been pulled down to and off one foot.[133] Yet, investigators found no evidence of semen and the victim's hymen was intact. The autopsy did note an abrasion to the victim's labia. Therefore investigators discounted sexual assault as a likely motivating factor in the homicide.

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[11] The hospital and Professional Building were connected by a short enclosed foot bridge. (TR 1572) Because April 5, 1980, was Holy Saturday, the Professional Building was essentially devoid of occupants. (TR 2557) From the lobby of the Professional Building, one could look up to the balcony which over-hung part of the lobby. (TR 2549) The appellant's apartment was located near this balcony. (TR 1572)

Detectives concluded that it was likely that the assailant and the victim were not strangers to each other.[134] This was based in part on the absence of indicators for a more "typical" stranger assault (robbery and rape) in contrast to the hands-on, personal nature of this murder, i.e., strangulation and multiple stab wounds.[135] Investigators believed this was highly indicative of the victim and the killer knowing one another.

Moreover, the manner, circumstances, and setting for the murder were unusual to say the least. Again, Sister Pahl was found naked from shoulder to ankle. Her body had been placed in an unnatural position in the sense that her legs were straight and together, her arms were straight by her sides, and her head was straight and looking up.[136] The victim had clearly been posed. As Sister Phyllis Ann, a former emergency room nurse, testified, "People don't usually die very straight."[137]

Further, some of the thirty-one stab wounds were certainly not made in a random fashion.[138] Nine of them were so evenly spaced that they formed the shape of a cross. (Apx. A, B). In addition, the victim had a smear of blood on her forehead, between her eyes, yet there was no wound or scratch to her forehead to account for this blood. (Apx. K).

In an effort to determine if any of these facts and other circumstances at the scene had relevant significance, investigators contacted Father Jeffery Grob of the Archdiocese of Chicago.[139] Father Grob testified that he was employed by the Archdiocese of Chicago as an associate vicar for canonical services. As such, he was the principal point of contact for the 317 parishes in the diocese in regard to questions involving church law.[140] He was also involved in the field of providing imprimaturs, the Catholic Church's seal of approval for books.[141] He further indicated that he was a trained canon lawyer as well a judge on the diocesan court of appeals.[142] Additionally Father Grob was the assistant to the exorcist for the Archdiocese of

Chicago. As such, he was the first point of contact for anyone who might call regarding the occult or other related matter.[143] He also testified that because of his education, background, and employment that he was familiar with the rituals of the Catholic Church as well as other rituals not of Catholic origin.[144]

It was Father Grob's opinion that Sister Pahl's killer would have to have been someone with specialized knowledge of Catholic ritual, such as a religious sister, a seminarian, or a priest.[145] Father Grob opined that much of what occurred to the victim was an attempt to mock and degrade the victim.[146] Father Grob based his opinion on several facts in evidence from the crime scene, including the finding of an inverted cross punctured upon the altar cloth which had covered the victim;[147] the very fact that she was covered with an altar cloth prior to any stabbing;[148] the anointing or marking of her forehead with blood;[149] the indication of some vaginal penetration;[150, 12] and the fact that all of this occurred in the presence of the Eucharist, which Catholics believe is the actual body of Jesus Christ.[151]

At the time of the homicide, everyone in the hospital with such specialized religious knowledge was accounted for except for one person.[152] Father Swiatecki, the other priest, was observed to be in the cafeteria at the time of the homicide.[153] All the nuns also had their whereabouts accounted for by other witnesses.[154] Only the appellant's whereabouts could not be verified.

Testimony established that the appellant was less than content working for the nuns at Mercy Hospital. The appellant had twice asked permission to become a military chaplain.[155] These requests were denied. The appellant, in his taped interview, referred to Mercy as "their

[12]The victim's girdle was not just pulled down to her ankles, but pulled off her left foot allowing her legs to be more easily spread. (See St. Ex. 47).

(the nuns') hospital" and that he "just worked there." Sister Pahl, who had been the Chief Executive Officer of St. Charles Hospital during her career, was described as "a perfectionist";[156] one who could be "very, very strict"; "very stern"; "things had to be done a certain way"; if not "then she would come and tell you";[157] having been a previous CEO of a major hospital, she was not hesitant to state her opinion.[158] She was also described as very serious about her religion. (D. Ex. AA). The appellant himself described Sister Pahl as having a dominant personality.[159]

Shirley Lucas, a housekeeper, met with the victim in the chapel on Good Friday, the day before the murder, to get the key to clean the convent. When giving Ms. Lucas the key, Sister Pahl stated that she was waiting to talk to "Father" about the changes he wanted to make for Easter Services.[160] Ms. Lucas returned the key to the victim after her cleaning duties were finished. At that time, Sister Pahl was literally in tears, crying, "Why do they cheat God out of what belongs to Him?"[161] This was either a reference to the fact that the Good Friday services had been shortened or a reaction to her talk with "Father."[162] (D. Ex. AA). The next morning, Sister Pahl was found dead in the chapel sacristy. Ms. Lucas did not know which of the two priests Sister Pahl had been referring to, Assistant Chaplain Swiatecki was in the dining room at the time the murder occurred.[163] Senior Chaplain Robinson, however, was seen at the chapel door during the time frame of the murder.[164]

As such, there was substantial evidence for the trier of fact to conclude that the appellant was the perpetrator of this murder. The record is void of any indication that the jury "clearly lost its way" or that this case constitutes "a manifest miscarriage of justice," *Martin*, *supra*, all of which must be found to have occurred in order for this court to reverse Appellant's conviction and order a new trial.

Assignment of Error Number 11Assignment of Error Number 101Assignment of Error Number 1

THE PERIOD OF PRE-INDICTMENT DELAY DID NOT CAUSE THE APPELLANT SUBSTANTIAL ACTUAL PREJUDICE. THE APPELLANT FAILED TO RAISE THIS ISSUE AT TRIAL AND THUS WAIVED IT.2THE PERIOD OF PRE-INDICTMENT DELAY DID NOT CAUSE THE APPELLANT SUBSTANTIAL ACTUAL PREJUDICE. THE APPELLANT FAILED TO RAISE THIS ISSUE AT TRIAL AND THUS WAIVED IT.02THE PERIOD OF PRE-INDICTMENT DELAY DID NOT CAUSE THE APPELLANT SUBSTANTIAL ACTUAL PREJUDICE. THE APPELLANT FAILED TO RAISE THIS ISSUE AT TRIAL AND THUS WAIVED IT.

The appellant claims, for the first time, that the delay in bringing charges against him resulted in substantial actual prejudice to his right to a fair trial. None of the appellant's five attorneys ever raised this issue in the court below.[13] Since the appellant failed to object to the indictment on these grounds, he has waived any claimed error. *State v. Williams* (1977), 51 Ohio St.2d 112. As a result, this issue has been waived and is not properly before this court.

Waiver aside, the seminal case in Ohio on this issue is *State v. Luck* (1984), 15 Ohio St.3d 150, which articulates the standards for appellate review. In *Luck*, the Court held that the appellant had the burden of establishing that the pre-indictment delay caused "substantial actual prejudice" to his case. Prejudice alone is not enough. It must be **substantial** prejudice. Moreover, any prejudice to the defendant must be viewed in light of the reasons for the delay. Because the appellant never raised this issue in the court below, the State did not have the opportunity to fully develop the record as to the reasons for the delay in bringing charges. Nonetheless, even if this matter had been raised, the appellant's arguments fail in that he did not suffer substantial actual prejudice and the record, sparse as it is on this point, still establishes justification for any delay.

[13] At trial the appellant was represented by the following five licensed attorneys: John Callahan, Nicole Khoury, Alan Konop, John Thebes, and Richard Walinski.

Statutes of limitation provide the primary protection for defendants against overly stale criminal charges. *United States v. Lovasco* (1977), 431 U.S. 783, 789. Statutes of limitation **"**. . . represent legislative assessment of [the] relative interest of the state and the defendant in administering and receiving justice.**"** *United States v. Marion* (1971), 404 U.S. 307, 322. Therefore, where a defendant asserts prejudice from pre-indictment delay, the defendant must first resort to the applicable statute of limitations. *Id*. at 323.

In most instances, claims of pre-indictment delay can be adequately disposed of by application of the appropriate statute of limitations. Significantly, Ohio, like most states, has no limitation period for one accused of murder. Because of this, the defendants in murder cases frequently claim that, as a result of the time period between the murder and commencement of prosecution, they suffered actual prejudice in violation of their due process rights. The U.S. Supreme Court has held that the **"**Due Process Clause has a limited role to play**"** in protecting against prejudice in such instances. *Lovasco*, 431 U.S. at 789. Thus, *Marion* and *Lovasco* recognized that prosecution may be barred where pre-indictment delay resulted in substantial prejudice to the defendant**'**s rights to a fair trial and the delay was an intentional device to gain tactical advantage over the accused. However, in both cases the Supreme Court expressly declined to identify the significance of the various reasons for delay and also declined to promulgate a rule which would require prosecutors to bring an indictment immediately upon receipt of some evidence, noting that a delay occasioned by good faith investigation is fundamentally different from a delay designed to gain a tactical advantage. *Lovasco*, *supra*, at 795, 797. As a result, a majority of the United States Circuit Courts of Appeal require the defendant to prove **actual prejudice** as a result of the government**'**s delay in addition to **an improper government motive**. *Comment: Pre-Indictment Delay: Establishing a Fairer*

Approach Based on United States v. Marion and United States v. Lovasco, Michael J. Cleary, 78 Temp. L. Rev. 1049 (2005).

In Ohio, as previously stated, in order to warrant dismissal on the basis of pre-indictment delay, the defendant has the burden of presenting and proving **substantial**, **actual** prejudice. Proof of actual prejudice must be specific, particularized and non-speculative. *State v. Luck*, *supra*. Further, it is the defendant's burden to demonstrate the exculpatory value of the alleged missing evidence or witnesses. *United States v. Doerr*, (C.A.7, 1989), 886 F.2d 944. Only after the defendant has met that burden is the State required to produce evidence to justify the delay, *State v. Whiting* (1998), 84 Ohio St.3d 215; *State v. Walls*, (2002) 96 Ohio St.3d 437. Unjustifiable delay, according to *Luck*, arises when the prosecution is delayed to gain a tactical advantage or when it is the result of negligence or an error of judgment. The due process protections afforded in pre-indictment delay cases are protections against the prejudice that a defendant might suffer at trial. *United States v. Marion*, *supra* at 326. As such, the prejudicial factors claimed must be balanced against the other evidence in order to determine whether actual prejudice has been suffered by the defendant at trial. The Court in *Marion* held that "a preindictment delay does not violate due process unless it causes prejudice to the defense that is actual and concrete, not merely speculatory." *Marion*, *supra*.

A. The appellant cannot sustain his burden of demonstrating actual, substantial prejudice.

3A. The appellant cannot sustain his burden of demonstrating actual, substantial prejudice.03A. The appellant cannot sustain his burden of demonstrating actual, substantial prejudice.

The appellant claims that he suffered actual and substantial prejudice because of the "death" of four potential witnesses.

First, the appellant alleges actual, substantial prejudice due to the intervening death of assistant county coroner, Steven Fazekas. As will be argued below, because the appellant failed to introduce evidence that Steven Fazekas died during the period of alleged delay, the appellant thereby waived a claim that Steven Fazekas' death prejudiced the defense. Just as importantly, a careful examination of the record reveals that Steven Fazekas' only involvement in this matter was his attendance at the original autopsy which his spouse, Renata Fazekas, performed. She also authored the autopsy report.[165] (St. Ex. 82). Steven Fazekas had no other involvement in the investigation. Thus, a claim that his testimony would be somehow helpful to the defense amounts to the rankest of speculation.

The appellant also asserts that the intervening death of Dr. Renata Fazekas, the assistant county coroner who actually conducted the initial autopsy of Sister Pahl, caused the defense substantial, actual prejudice. Here again, the appellant failed to introduce evidence at the trial substantiating that Dr. Fazekas died during the period of the alleged delay, thus waiving any claim of detriment from her death.

The appellant claims actual, substantial prejudice, because Dr. Fazekas' alleged non-availability to testify as a defense witness at trial prevented the appellant from developing defense theories that: (1) the appellant could not have strangled Sister Pahl because, allegedly according to Dr. Fazekas, the murderer had "large hands" and the appellant does not, and (2) the murder weapon, rather than the appellant's letter opener, was likely a pair of scissors discovered "missing" from the sacristy on the day of the murder.

An examination of these claims of prejudice, as they pertain to Dr. Fazekas, reveals that the appellant's ability to advance his defense theories was not in the least impeded by the alleged unavailability of Dr. Fazekas since her autopsy report, and all police reports discussing

such possibilities were introduced into evidence and skillfully, but unsuccessfully, used by the defense to advance its claim that the appellant was innocent. More importantly, the reality of what Dr. Fazekas expressed corroborates the State's evidence and not the defense's theory.

1.) *The appellant's "large hands" theory*. In support of this theory, the appellant introduced Defendant's Exhibit E, a police report from the day of the murder relating Det. Marx's brief interview of Dr. Fazekas **before** she conducted the autopsy. Det. Marx reported that Dr. Fazekas was of the opinion that Sister Pahl was

> . . . strangled from behind by an individual with large hands. This was the doctor's opinion due to the fact that a rather large bruise was noticed on the back neck. The doctor did state that **the cause of death could not be determined until after complete autopsy.** An autopsy would be scheduled for the following morning. (D. Ex. E). (Emphasis Added).

Dr. Fazekas performed the autopsy on the following day, and the autopsy report was introduced into evidence. The autopsy report made no mention of manual strangulation or of "large hands."[166] (St. Ex. 82). Dr. Diana Scala-Barnett, who conducted a second autopsy, noted that Dr. Fazekas did not subscribe to a manual strangulation theory in her official report. Dr. Scala-Barnett noted in 2004 that the 1980 autopsy photographs revealed that Sister Pahl's necklace chain made an impression encircling her neck. This, coupled with the absence of finger or fingernail marks to the neck, led her to conclude that that Sister Pahl was the victim of ligature strangulation.[167]

Contrary to the appellant's claim, Dr. Scala-Barnett did not "impeach" any autopsy findings of Dr. Fazekas because Dr. Fazekas made no such official finding. Moreover, the police report, at the appellant's instance, was introduced into evidence and the jury was aware of the "large hands" theory that counsel vigorously argued during trial. Most importantly, however, Dr. Fazekas clearly stated two days after the autopsy, that this murder could have been committed

by either a man or a woman. (St. Ex. 84). The appellant was not precluded from advancing this claim, and Dr. Fazekas' testimony would not have necessarily exculpated him since she opined that either a male or a female could have been the perpetrator. As such, the "big hands" theory does not rise to the level of substantial actual prejudice.

2.) *The appellant's scissors theory.* Armed with information that a pair of scissors appeared to have been "missing" from the sacristy, the police obtained a sample pair of scissors from the hospital and questioned Dr. Fazekas concerning whether scissors could have been the murder weapon. It is important to understand that the "missing" scissors were never recovered and that the sample scissors were only intended to be a reasonable approximation of what the "missing" pair might have looked like. The sample scissors were not retained, but a tracing was made of them and introduced into evidence at the behest of the defense. (D. Ex. U). The nun who provided the sample scissors to the police specifically indicated that the "missing" scissors were about one inch longer and slightly wider than the sample. (D. Ex. U).

The shorter and slightly narrower scissors were inspected by Dr. Fazekas a couple of weeks after the murder. According to the police report, (D. Ex. C) Dr. Fazekas, based upon her examination of photographs and skin samples, felt that the sample scissors

> . . . could very well have been the weapon, but would not say with 100% certainty. She stated that some of the punctures on the body appeared to be made with the scissors closed and some with the scissors open. The neck wounds appeared to be made with the scissors open. She stated that the wounds on the victim's face appeared to have been made with a weapon, sharper than the scissors.

Two days later, Dr. Fazekas examined the appellant's letter opener. According to the police report, (St. Ex. 77), "Dr. Fazekas measured the instrument and compared the instrument as to depth of wound and to width of blade. Her conclusion was that the instrument was compatible with each of the wounds found in the body and could have been the weapon used."

The appellant had the benefit of the opinions of Dr. Fazekas concerning the scissors versus the letter opener as a possible murder weapon. The appellant was able to introduce all of the contemporaneous police reports as to this issue.[14] Moreover, her statement was admitted with the additional benefit of not being subject to cross-examination. Additionally, the appellant could have presented the testimony of a forensic pathologist to advance his big hands manual strangulation and scissors-as-a-murder-weapon theories, but he chose not to do so. Presumably, this was a strategic decision on the part of appellant's five attorneys, since some expert witnesses were called by the defense.

[14] The introduction of the police reports rather than the live testimony of Dr. Fazekas substantially benefitted the defense because any testimony that she would have provided would have contained much that was not helpful to the defense. As an example, Dr. Fazekas did not have the benefit of examination of toolmarks made by the letter opener in Sister Pahl's mandible, manubrium and vertebrae because she conducted the autopsy about two weeks before the letter opener was discovered in the defendant's room. Had she been given an opportunity to examine this evidence and to observe how well the letter opener matched these toolmarks, it is unlikely that the defendant would have called her to support this case. As previously noted, Dr. Barnett concluded that the tip of the appellant's letter opener was "a perfect fit" in the puncture found in the victim's mandible.

The appellant also insists that Dr. Fazekas could have assisted the defense in the exploration of an asserted inconsistency between the wounds observed on Sister Pahl's body and the letter opener. The appellant asserts that the letter opener is a little less than one-half inch in width when measured at a distance of 1 ½" from the tip and a little more than one-half inch when measured at 3" from the tip.[15] But, the outline of the sample scissors (keeping in mind that the actual missing scissors were about one inch longer and slightly wider) also appears to have been a little less than one-half inch wide at 1 ½" and a little more than one- half inch wide at 3". In other words, both items have roughly the same dimensions near the end and both taper toward the tip. Thus, based only upon observed wound depths and widths and the dimensions of the sample scissors and the letter opener, the sample scissors are no more likely to have been the murder weapon than the letter opener. The wound measurements are not completely consistent with the dimensions of the letter opener or, for that matter, the sample scissors. Dr. Scala-Barnett explained that this is so because "Langer's lines" created by the disposition of flesh on a body can affect the apparent width and depth of wounds on a body depending upon how such line of cleavage is penetrated by a stab wound and its angle of entry.[168]

In *State v. Walls*, 12th Dist. No. CA99-10-174, 2000 Ohio App. Lexis 5779, affirmed, *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, the defendant argued that a fifteen year delay in his indictment for murder caused actual substantial prejudice, in part, because a coroner's investigator, who would have established the victim's time of death, had died. The court of appeals and Supreme Court found no substantial prejudice, pointing out that the investigator's report was introduced into evidence and used by the coroner in his testimony addressing this

[15] No such measurements are part of this record. The appellant appears to have conjured these numbers up.

issue. Although the Supreme Court found that the defendant may have sustained "some prejudice," his claims of prejudice were speculative, and when coupled with the State's justification for its delay, did not suffice to sustain the defendant's claim of a denial of due process. Id., at 54-56. As such, the appellant has failed to prove even "some prejudice" let alone his burden of "substantial actual prejudice" with regard to matters relating to Dr. Fazekas because all of Dr. Fazekas' opinions were entered into evidence, argued by defense counsel, and advanced for the jury's consideration.

3.) *The other priest did it theory*. Despite an absence of evidence in the record, the appellant asserts that Father Jerome Swiatecki, an assistant chaplain at the hospital in 1980, had died prior to trial, thus causing prejudice due to an alleged inability to call him as a defense witness. The appellant also asserts, with absolutely no basis in the record, that in 1980 Father Swiatecki "deflected attention from himself, by directing the police to the appellant . . . ." (Appellant's brief, p. 34).

The true facts developed at trial are that, in his 2004 interview, the appellant told the investigators that Father Swiatecki, while kneeling before the victim's body, accused the appellant of killing Sister Pahl.[169] (St. Ex. 172). There was no evidence presented at trial that this information was supplied to the police in 1980 or that Father Swiatecki sought to implicate the appellant to authorities in anyway, let alone that Father Swiatecki was motivated by a desire to hide his own involvement. The evidence indicated that Father Swiatecki believed the defendant was guilty. Thus, Father Swiatecki's testimony explaining his reasons would have been helpful to the prosecution, not the appellant. As earlier noted, the police investigation focused on the appellant without any input from Father Swiatecki. Rather, it was the victim's tearful interaction with a priest on Good Friday and the frantic footsteps leading to the appellant's

apartment that led the police to suspect him. It was not until April of 2004, when the appellant himself told police that Father Swiatecki accused him of the crime, that authorities first learned of this. It was this totally new information, brought forth by the appellant himself, that was critical to his indictment in 2004.

The appellant argues that Father Swiatecki's alleged unavailability at trial prevented the defense from calling him in order to develop a theory that Father Swiatecki, not the appellant, was the true murderer. First of all, the death of a witness alone is insufficient to establish actual prejudice arising from pre-indictment delay. *State v. Peoples*, 10th Dist. No. 02AP-945, 2003-Ohio-4680, at ¶30. It would be preposterous to argue that Father Swiatecki would have testified that he, rather than the appellant, committed the crime. Father Swiatecki was eliminated as a potential suspect early on because several nuns confirmed his presence in the cafeteria at the time of the murder.[170] Other than the appellant's unsubstantiated "large hands" theory referenced to above, and the fact that Father Swiatecki and the appellant were Catholic priests who were knowledgeable of Catholic rituals, there was not one iota of evidence which could possibly implicate him. Moreover, had he been called at trial, Father Swiatecki would have been unlikely to help the appellant since he apparently believed the appellant killed Sister Pahl as evidenced by his accusation to the appellant made immediately after the homicide.

Like the defendant in *Walls*, the appellant argues that delay prevented him from developing facts supporting a theory of innocence, i.e., a claim that Father Swiatecki was the murderer. But the appellant is unable to do more than speculate as to how the testimony of Father Swiatecki would have been helpful to his defense, and this court, as did the court in *Walls*, should reject such unsupported speculative conjecture.

4.) *The black guy did it theory.* In yet another blatant attempt to recast the evidence in a way totally unsupported by any evidence in the record, the appellant claims, at page 35 of his brief, that at least two witnesses saw a suspicious black male in "close proximity" to the crime scene whom the appellant could not call at trial due to their intervening deaths. The only testimony at trial about anyone other than the appellant being seen on the same floor as the chapel came from Sister Gordon who related seeing a person very small in stature (no "big hands") in a corridor near the planning office at some time between 7:05 and 7:10 AM on the morning of the murder.[171] The man was in a hurry, and Sister Gordon thought he was late for work. She did not recall her statement to the police in 1980, but she did not think that this individual was black.[172] Moreover, this person was not seen "in close proximity to the crime scene . . . and right where one of the bloody altar cloths was found" (Appellant Brief p.35), but in fact was spotted at the opposite end of the main hallway leading from the chapel doors and around another hallway by the curved room called the planning office.[173] (Apx. L). In fact, this person could not have been farther away from the chapel and still been in the building. Thus, the appellant's claims about at least two deceased witnesses who saw suspicious black men in close proximity to the chapel are completely unsupported by the evidence, are completely speculative and should be ignored by this court.

5.) *The death of Margaret Warren theory.* Margaret Warren was deceased at the time of trial, but her statements taken by the police in 1980 were admitted into evidence at the specific and vehement insistence of the appellant for strategic reasons.[174] Thus, her intervening death caused no prejudice to the appellant in constructing his case, especially because her observations were provided to the jury without the opportunity for cross-examination by the State. In addition, the appellant improperly fused Margaret Warren's statements about hearing

frantic footsteps with Sister Gordon's testimony about a man in a hurry in a corridor near the crime scene. The true facts at trial demonstrated that: (1) Sister Gordon saw the man at no later than 7:15 a.m. while Margaret Warren reported hearing the frantic footsteps at 8:50 AM. (D. Ex. B), well over an hour later and, (2) Ms. Warren heard the footsteps leading up to the appellant's room, not leading away from the chapel.

The appellant further complains that he was prejudiced because the detectives' notes of the appellant's interview in 1980 were lost. The appellant suggests that incriminating statements alleged to have been made by him in 1980 **might not** be in the notes, thus impeaching the testimony of the detectives. However, the only incriminating statement the appellant made in 1980 was that he had received a confession to the murder from someone, followed by a denial that such a confession had occurred.[175] Contrary to appellant's claim, this statement was memorialized and survived in a document wherein Det. Marx requested the appellant be polygraphed by Lt. Wiegand. (Motion to Suppress State's Exhibit 2). Moreover, the appellant confirmed in 2004 that he in fact made these statements.[176]

Additionally, it should be pointed out that the interview notes to which the appellant refers were not lost. The notes were destroyed by the author per his normal practice and not out of dereliction, bad faith, or unjustifiable negligence.[177] Lost evidence, for due process purposes, is not prejudicial unless the lost evidence would reasonably assist the appellant at trial. *State v. Brown* 2000 Ohio App Lexis 1203, citing *Luck*, *supra*. Thus, the appellant's arguments in this regard are total speculation.

The appellant also alleges that he might have made exculpatory statements in 1980 which, in the absence of the interview notes, he was unable to bring out at trial. Yet, the detectives who interviewed him in 1980 freely conceded that the appellant denied the murder.[178]

The appellant fails to suggest in any way what additional exculpatory statements he might have made or how they would be admissible. Again, all of this is rank speculation.

Most importantly, even if the appellant's rank speculation were accurate, i.e., that there were exculpatory statements made by him which had been reduced to writing in 1980, any such statements would constitute inadmissible hearsay pursuant to Evid R. 801(C). As a result, appellant could not have introduced his own self-serving hearsay statements. Moreover, Art Marx, the detective who would have authored any such report, was not called as a State's witness, so the appellant can not claim that any exculpatory statement (which, the State submits, does not exist) would be admissible under Evid R.106.

Finally on this point, any of these make-believe exculpatory statements, if actually made, still exist in an admissible form: the appellant. The appellant had every opportunity to take the witness stand and tell the jurors anything that he felt was relevant to, contradictory of, or explanatory of any false accusation.

The appellant also complains that a police report of Father Swiatecki's interview in 1980 was not available. He does not indicate how the report would have been exculpatory or of even the most remote assistance to him. In *State v. Bruce*, 5th Dist. No. 02 CA 40, 2003-Ohio-1714, the defendant complained of a twenty-three year delay which he asserted caused him prejudice in defending a murder charge because of the loss of the taped statements and transcripts of key witnesses, the loss of physical evidence, and the death of four potential defense witnesses. The court held that a review of the totality of the claimed prejudices articulated by the defendant amounted to little more than mere speculation and failed to demonstrate any actual prejudice. *Id.*, at ¶27.

Here, the absence of interview notes, if anything, burdened the State's case, allowing the defense to imply that the detectives' memories of their interviews of the appellant in 1980 were somehow impaired. Actual prejudice is unlikely when any alleged loss of evidence is as detrimental to the State's case as it is to the defendant's. *State v. Gulley*, 12th Dist. No. CA99-02-004, 1999 Ohio App. LEXIS 6091, at 9, citing *State v. Loomer*, 8th Dist. No. 68103, 1995 Ohio App. LEXIS 4357. Any assistance from the 1980 interview notes is purely speculative.

In determining whether the appellant has sustained his difficult initial burden to demonstrate "actual substantial prejudice", it is necessary to consider the strength of the State's case, because a compelling case will require a higher level of prejudice. *Luck,* supra at 154, *Wall*s, supra at p. 52. Recognizing that the strength of the State's case is an extremely important factor in deciding the issue of substantial prejudice, the appellant lists, at pages 35-36 of his brief, reasons why he considers the evidence to be "flimsy."

The State will not restate the overwhelming evidence of the appellant's guilt adduced at trial which has been summarized in the assignment of error dealing with the weight of the evidence. However, the State must point out that the appellant has again misrepresented the evidence in several important respects. While the appellant's clothes were tested for blood with negative results, the clothes were not obtained until almost two weeks after the murder.[179] There was no evidence, as claimed by the appellant, that the items seized were worn by the appellant on the day the murder occurred. Further, although the appellant repeatedly claims that no scientific evidence tied his personal effects to blood or DNA, he ignores the fact that **his** letter opener was tested three different times and by three different agencies, and that the results were presumptively positive for blood on each occasion.[180]

B. Even if the appellant sustained his burden to demonstrate actual, substantial prejudice, the delay in initiating prosecution was justified.3B. Even if the appellant sustained his burden to demonstrate actual, substantial prejudice, the delay in initiating prosecution was justified.03B. Even if the appellant sustained his burden to demonstrate actual, substantial prejudice, the delay in initiating prosecution was justified.

In instances in which pre-indictment delay is alleged, where the reviewing court determines that the defendant has failed in his attempt to demonstrate actual, substantial prejudice, the inquiry ends, and the reasons for the delay need not be addressed. *State v. Bruce*, supra, at 24, P27. However, if this court determines that the appellant was somehow prejudiced and therefore concludes that it is obligated to evaluate the reasons for the delay, it should hold that under the unique circumstances of this case the delay was entirely justified, keeping in mind that the appellant failed to raise this issue pretrial and the State was precluded from fully explaining what took place during the pre-indictment period.

The appellant does not seriously argue that delay in his prosecution was a calculated effort by the State to prejudice his defense, although the appellant does suggest that the State delayed prosecution out of an improper motive, i.e., an alleged unwillingness to proceed until after recent sexual abuse allegations against Catholic priests permitted lay jurors to even consider that a priest could commit a murder. This, of course, would have required the State to have anticipated the Catholic sexual abuse scandals of the past two decades.

Interestingly, a similar argument was made, and soundly rejected, by the Mississippi Supreme Court in *State v. Killen* (2007), 958 So.2d 172, at ¶¶77-80, a case which involved a forty-one year delay in prosecuting the defendant for the murders of civil rights activists Chaney, Schwerner and Goodman. In *Killen,* the defendant claimed that Mississippi improperly delayed prosecution until the racially prejudiced political climate of the Sixties had abated, with the result that his trial in 2005, in effect, deprived him of a chance to have an all-white, racially prejudiced

jury. Here, the appellant seems to imply that had he been tried for murder in the 1980's he would have had jurors incapable of even considering that a Catholic priest might commit a murder. Thus, according to the appellant, his trial in 2006 unfairly deprived him of a jury potentially biased in his favor. Like the court in *Killen*, we are amazed that this unfounded argument has even been made.

As referenced above, there is no evidence that any delay in bringing the appellant to trial was intentional, or based on an improper motive, or done in bad faith. The police authorities took the case to the Lucas County Prosecutor's Office at the end of April, 1980.[181] The Prosecutor's Office declined to present the case to the grand jury, feeling there was insufficient evidence to secure a conviction at that time.[182]

Lt. Kina testified that his investigation as to this murder continued another twenty months until he retired.[183] Det. Marx testified that he personally engaged in efforts to investigate Sister Pahl's homicide for "years" after her death.[184] Employees of the hospital testified that they were periodically questioned by police through the years.[185] In 1999, the Toledo Police Department submitted the appellant's letter opener to the Attorney General's Office for scientific testing.[186] As previously explained, investigators personally inventoried and examined the available physical evidence on December 4, 2003. Clearly, the investigation of Sister Pahl's death had never been abandoned.

In late 2003, the letter of a Catholic nun, which referenced the appellant by name and concerned sexual abuse involving Catholic priests, came to the attention of the police. The investigators interviewed this nun, and she advised the police to look for an inverted cross on the chest of Sister Pahl as well as stab wounds to her left side.[187] This ultimately led to the appellant being interviewed on April 23, 2004. During this interview, appellant provided information which

was totally new to the case. That information not only contradicted prior statements made by the appellant, but the statements were also directly inculpatory. (Motion to Suppress p. 176, St. Ex. 172).

It is universally recognized that a delay in prosecution is always justified where new witnesses or evidence comes to the attention of the police after an initial investigation has failed to uncover enough to indict a suspect. For example, in *State v. Christman*, 7th Dist. No. 786, 1999 Ohio App. LEXIS 2486, at 15-19, the court of appeals found that an eleven and one-half year delay was justified since several witnesses did not come forward until long after the murder was committed.

In any procedural due process case, the essential question is whether the State's actions violate "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and define 'the community's sense of fair play and decency'." *Lovasco,* supra, at 790, (citations omitted). Here, the delay in bringing the appellant to justice was not prejudicial, was justified, and did not violate fundamental conceptions of justice and fair play.

This was a case in which the State chose to proceed cautiously, realizing that the defendant was a priest and that the issue of identity would be dependant on circumstantial evidence. On a pragmatic level, asking a jury to convict a Catholic priest is far different from and, quite frankly, may well require more compelling evidence, than asking a jury to convict a vagabond.

Investigators worked on this case through the years, and, once additional evidence presented itself, mainly the appellant's own inculpatory statements, they sought an indictment. This case is a prime example of why Ohio, like virtually every state in the Union, has no statute of limitations for the offense of murder.

The determination of whether actual prejudice exists because of pre-indictment delay is, of necessity, fact specific to the particular case. The defendant in *Luck, supra,* was indicted on a charge of murder stemming from a homicide that occurred fifteen years earlier. The Court found that her defense was prejudiced because she claimed she was first attacked by the victim and that her actions constituted self-defense. Critical to her defense was the testimony of a person who was present at the time of the homicide who had since died. This rationale has no application to the appellant's situation because he has always claimed an alibi, and he never once claimed that anyone else could verify it.

Moreover, in *Luck*, supra, **all** tape recorded interviews of witnesses and suspects were destroyed. In the present case, only two people's statements could not be located: one was that of Father Swiatecki, who could not have aided the appellant's defense in any way.[16] The other was that of the appellant, but that would have constituted inadmissible hearsay and, as such, would not have aided in his defense as discussed previously.

The Court in *Luck* found it relevant that the police **never** presented the case to the Prosecutor's office for review. The police ceased investigating, and then, fifteen years later, they indicted on the **exact** same evidence they had at the time of the crime. The court emphasized this point by stating the case was indicted **"**without **a shred** of new evidence.**"** Such was not the case in this matter. The appellant's arrest was based on additional evidence that was developed since 1980 and on statements made by the appellant to police on April 23, 2004, (Motion to Suppress hearing, p. 176, St. Ex. 172).

[16] The appellant failed to allege what Father Swiatecki could possibly have said which could be considered relevant, other than to ask the appellant why the appellant murdered Sister Pahl.

Additionally, some of the reasons for no indictment in 1980, though never fully articulated at trial or before, since this issue was never raised in the court below, are apparent from this very appeal. First, there were no eye witnesses to this murder. The evidence as to the killer's identity was circumstantial. And, though the State feels that the evidence was clearly sufficient and credible, there is nothing like an eyewitness, especially when the defendant is a priest. Further, there was no rock-solid motive present to explain why this priest would kill a seventy-one year old nun on Holy Saturday. Also, as noted in appellant's brief, the scissors are a theoretical counter argument to the letter opener being the murder weapon. It is ironic that appellant argues that there is insufficient evidence to support his conviction, yet also complains that he should have been indicted in 1980 on even less evidence.

In *Luck,* the Court pointed out that the judiciary should not assume the role of the prosecutor in determining whether there is sufficient evidence to indict in any given case. The Ohio Supreme Court agreed with the U.S. Supreme Court in *Lovasco* in that there should not be and is not a rule requiring the commencement of prosecution whenever someone thinks there might be **"**sufficient evidence to prove guilt beyond a reasonable doubt.**"** *Luck, supra*. Such decisions should best be left in the hands of those who have the responsibility for it.

C. The appellant did not raise his due process claim or provide evidence in support of it prior to or during trial, and, therefore, the claim is waived or forfeited.3C. The appellant did not raise his due process claim or provide evidence in support of it prior to or during trial, and, therefore, the claim is waived or forfeited.03C. The appellant did not raise his due process claim or provide evidence in support of it prior to or during trial, and, therefore, the claim is waived or forfeited.

A criminal defendant may not raise constitutional errors on appeal unless such claims were specifically found to have been raised below. *State v. Awan* (1986), 22 Ohio St. 3d 120, syllabus; *State v. Payne*, (2007) 114 Ohio St.3d 502. The appellant did not raise his due

process claim regarding pre-indictment delay in the trial court. The appellant's "Motion to Compel and Request for Suppression or Dismissal" filed prior to trial, as the appellant basically concedes in his Second Assignment of Error, did not seek dismissal of the case on due-process grounds as a result of allegedly excessive delay. More importantly, the appellant offered no proof at trial that any individuals, including Steven Fazekas, Renata Fazekas, and Jerome Swiatecki had died.[17] Therefore, appellant waived his right to litigate this issue.

D. A finding that the appellant waived or forfeited the delay issue does not constitute plain error.3D. A finding that the appellant waived or forfeited the delay issue does not constitute plain error.03D. A finding that the appellant waived or forfeited the delay issue does not constitute plain error.

The law pertaining to the criteria enabling an appellate court to reverse for plain error was recently set forth in *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, 759 N.E.2d 1240, as follows:

> Under Crim.R. 52(B), 'plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.' By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, *i.e.*, a deviation from a legal rule ... . Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings... . Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial. . .
>
> Even if a forfeited error satisfies these three prongs, however, Crim.R. 52(B) does not demand that an appellate court correct it. Crim.R. 52(B) states only that a reviewing court 'may' notice plain forfeited errors; a court is not obliged to correct

[17] Contemporaneously with filing his brief, the appellant requested that this court take judicial notice of the three alleged deaths, which request the State opposed. On August 29, 2007, this court denied the appellant's judicial notice request, quite properly, as being contrary to App. R. 9(A) and *State v. Ishmail* (1978) 54 Ohio St.2d 402, 377 N.E.2d 500. Accordingly, the appellant waived or forfeited, not only his due process claim, but the evidentiary basis upon which such claim is necessarily predicated.

them. We have acknowledged the discretionary aspect of Crim.R. 52(B) by admonishing courts to notice plain error **'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice' . . .** *Id*., at p. 27, emphasis added.

In addition, the defendant bears the burden of demonstrating plain error. *State v. Payne*, supra, at ¶17.

Applying these criteria to this case, it is clear that the appellant cannot sustain his burden to demonstrate that plain error occurred. First, as set forth above, there was no error because the appellant's due process claim is without merit. Second, any error was not obvious because the absence of a statute of limitations for murder cases is generally accepted as permitting prosecution of a murder indictment at any time. The third element fails as well, because, in the unlikely event the trial court would have found actual prejudice because of the delay, the indictment would have withstood challenge because the State did not act in bad faith in causing any delay. *State v. Burnell* (Apr. 28, 1989), 11th Dist. No. 1948, 1989 Ohio App Lexis 1545.

The last criterion involves this court's exercise of its discretion to reverse for plain error under exceptional circumstances and only to prevent a manifest miscarriage of justice. This court should rule that any plain error that might have occurred did not rise to the level of a miscarriage of justice. To the contrary, it would be a far greater miscarriage of justice for the murderer of Sister Pahl not to be held to account.

Assignment of Error Number 21Assignment of Error Number 201Assignment of Error Number 2

THE APPELLANT'S TEAM OF DEFENSE LAWYERS COMPETENTLY AND EFFECTIVELY REPRESENTED THE APPELLANT THROUGHOUT THE PRETRIAL AND TRIAL PROCEEDINGS.2THE APPELLANT'S TEAM OF DEFENSE LAWYERS COMPETENTLY AND EFFECTIVELY REPRESENTED THE APPELLANT THROUGHOUT THE PRETRIAL AND TRIAL PROCEEDINGS.02THE APPELLANT'S TEAM OF DEFENSE

LAWYERS COMPETENTLY AND EFFECTIVELY REPRESENTED THE APPELLANT THROUGHOUT THE PRETRIAL AND TRIAL PROCEEDINGS.

In his second assignment of error, the appellant claims that he was denied his right to effective assistance of counsel. First, he complains that the trial court's file was not thick enough for a murder case. (Appellant's "Opening Brief," at 40). In this regard the appellant asserts that trial counsel did not file enough "pieces of paper" to reflect sufficient legal analysis. *Id.* Second, the appellant claims that he was denied effective assistance of counsel because of trial counsels' failure to file a motion to dismiss the indictment on the grounds of "due process--pre-accusation delay." *Id.* Both of these claims are meritless.

The standard for determining whether a trial counsel's assistance was so defective as to require reversal of a conviction is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 687, as follows:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components**. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.** Unless a defendant makes **both showings**, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

(Emphasis added) *Strickland v. Washington* (1984), 466 U.S. 668, 687. See also, *State v. Dixon*, 101 Ohio St. 3d 328, 2004 Ohio 1585, ¶ 43.

"This is an extremely high threshold to meet." *State v. Willard*, 6th Dist. No. L-05-1169, 2006 Ohio 6804, ¶ 13. To demonstrate ineffective assistance of counsel, an accused must satisfy both prongs of the Strickland two-part test. A failure to prove one prong makes it unnecessary for a court to consider the other. *Strickland*, 466 U.S. 668, at 687; *State v. Kerr*, 6th Dist. No. WD-05-080, 2006 Ohio 6058, ¶¶ 29-30.

The reviewing court must strongly presume that counsel's performance was competent and must avoid the distorting effects of hindsight. In this regard, the *Strickland* court stated:

Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that **every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time**. A court must indulge **a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.**

(Emphasis added). *Strickland,* 466 U.S. 668, at 687; See also, *State v. Sanders*, 92 Ohio St. 3d 245, 2001 Ohio 189, ¶ 73; *State v. Walker*, 6th Dist. No. L-05-1207, 2006 Ohio 2929, ¶¶ 22-24.

In Ohio, a properly licensed attorney is presumed competent and the burden of proving ineffectiveness is on the defendant. *State v. Kerr*, 6th Dist. No. WD-05-080, 2006 Ohio 6058, ¶¶ 29-30, citing *State v. Lott* (1990), 51 Ohio St.3d 160, 174. Moreover, "[b]ecause of the complexity of trial preparation and the infinite ways in which one case can be presented, a strong presumption exists that the defendant's counsel rendered effective assistance." (Citation omitted). *State v. Johnson* (December 22, 1989), 6th Dist. No. S-89-1, 1989 Ohio App. LEXIS 4789, p. 4-5. ". . . [M]ere errors of judgment regarding tactical matters do not substantiate a

claim of ineffective assistance of counsel.*"* *Id.* *"*The fact that a better strategy was available also does not constitute ineffective assistance.*"* *Id.*

A trial counsel's failure to file a pretrial motion *"*does not *per se* constitute ineffective assistance of counsel.*"* *State v. Hamilton* (February 11, 2002), 12th Dist. No. CA2001-04-044, 2002 Ohio 560, p. 9-10. (Failure to file motion to suppress held neither error nor prejudicial). In order to prevail on a claim of ineffective assistance based on failure to file a dispositive motion, an

"[a]ppellant must demonstrate not only an error, but prejudice from the error." *State v. Castile*, 6th Dist. No. E-02-012, 2005 Ohio 133, ¶¶ 58-59 (Failure to file motion to suppress held neither error nor prejudicial); see also *State v. Harrison* (June 30, 1988), 12th Dist. CA87-11-151, 1988 Ohio App. LEXIS 2765 (Failure to file a motion to suppress and a motion in limine did not render counsel's representation ineffective). A trial attorney is not required to "file a meritless motion to place it on the record to avoid a charge of ineffective assistance." *Id.*

In the instant case, this Court's analysis of the appellant's claims of ineffective assistance of counsel should begin with the recognition that the defense team consisted of five (5) attorneys, all of whom were licensed to practice in the state of Ohio.[188] The Court must presume that each member of this defense team rendered competent assistance in the preparation and trial of this case. *State v. Kerr*, 6th Dist. No. WD-05-080, 2006 Ohio 6058, ¶¶ 29-30; *State v. Willard*, 6th Dist. No. L-05-1169, 2006 Ohio 6804, ¶ 13.

Turning to the appellant's specific allegations, he first argues that the sufficiency of trial counsels' representation should be judged by the thickness of the trial court's file and the aggregate number of pages contained in the appellant's pretrial motions. (Appellant's "Opening Brief" at 40.) In light of *Strickland, supra,* and its progeny, the notion that counsel's performance should be judged by the weight or mass of the court's file is ridiculous. Moreover, contrary to the appellant's contentions, the defense engaged in considerable pretrial motion practice, beginning with a motion to compel, filed December 9, 2005, over four months prior to trial.[18] The defense

[18] In its motion to compel the defense team sought production of tape recorded law enforcement interviews of the defendant. (Motion to Compel, R. 78). Ultimately, through this motion, the defense moved for dismissal of the indictment on due process grounds. (Brief on Motion to Compel and Request for Suppression or Dismissal, R. 112).

also filed: a supplemental motion to compel on December 15, 2007 [19]; a motion in *liminie* and request for Daubert hearing on January 17, 2006;[20] a motion to suppress on January 17, 2006;[21] and a second supplemental motion to compel on January 17, 2005.[22] Additionally, in compliance with the court's scheduling orders, the defense filed separate briefs relating to their various motions including: a brief in support of its motion to compel, requesting suppression or dismissal (R. 112), filed February 15, 2006; a brief in support of its motion to suppress (R. 113), filed February 15, 2006; and a memorandum concerning its request for a Daubert hearing (R. 106), filed February 10, 2007. On February 3, 2005, the court held an evidentiary hearing on the appellant's motion to suppress and motion to compel. (Trial Docket). The court held an evidentiary hearing relating to the Daubert claim on February 16, 2005. (Trial Docket). A review of the transcripts also reveals that the defense engaged in meaningful examination of each of the State's testifying witnesses. The record simply does not support the appellant's attempt to portray the defense team as sitting by idly while trial approached. The appellant has failed to meet his burden.

Next, the appellant claims that he was denied effective assistance of counsel based on counsel's failure to file a motion to dismiss the indictment on the grounds of "due process--pre-accusation delay." (Appellant's "Opening Brief" at 40). Here, the appellant merely rehashes

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s Supplemental Motion to Compel (R.79).

T In their motion in limine, the defense sought exclusion of testimony from Criminalist T. Paulette Sutton regarding blood transference testimony, testimony from Father Jeffrey Grob, of the Archdiocese of Chicago, and of Steven Symes, relating to bone trauma analysis. Motion in Limine and Request for Dabuert Hearing, (R. 83).

[21] The defense moved to suppress all statements made by Defendant Gerald Robinson during the police interrogation at his home and at the police station on April 23, 2004. Motion to Supress. (R. 85).

[22] (R. 84).

his first assignment of error, i.e., his claim a delayed prosecution violated his due process rights. At this juncture, the state will not reiterate all of its arguments relating to delayed prosecution which are presented in detail under the First Assignment of Error. Suffice it to say that, even if such motion had been filed, it would have been denied. First, the appellant could not have shown that he suffered **actual**, **substantial prejudice** by such delay. (See, First Assignment of Error, above). Moreover, a delayed prosecution was justified because initially there was insufficient evidence to obtain a conviction. *Id.* The delay was not the result of bad faith or improper motive by the State. *Id.* Finally, viewing these factors in light of the overwhelming evidence against the appellant, it must be concluded that he would not have prevailed on a motion to dismiss for pre-indictment delay.

The Sixth District Court of Appeals has ruled that an appellant claiming ineffective assistance based upon failure to file a dispositive motion **"**must demonstrate not only an error, but prejudice from the error.**"** *State v. Castile*, 6th Dist. No. E-02-012, 2005 Ohio 133, ¶¶ 58-59. To demonstrate prejudice, the appellant **"**must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.**"** *Strickland*, *supra*, at 694. **"**An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.**"** *State v. Bradley(1989),* 42 Ohio St. 3d 136, at 142.[23] Since the appellant in the this case would not have prevailed on a motion to dismiss for delayed prosecution, he can not demonstrate prejudice.

[23] The *Strickland* court specifically rejected lesser standards for demonstrating prejudice, stating that **"**[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet the test . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.**"** *Strickland*, *supra*, at 693.

Because the appellant has failed to prove the "prejudice" prong of the two-part *Strickland* test, his claim of ineffective assistance must fail, and it is unnecessary for a court to consider the other. *Strickland*, 466 U.S. 668, at 687; *State v. Kerr*, 6th Dist. No. WD-05-080, 2006 Ohio 6058, ¶¶ 29-30. Even so, it must be concluded that not filing a motion to dismiss based on a claim of pre-indictment delay was not deficient representation in the first instance, but may have strategically benefitted the appellant.

The discovery provided by the State revealed that the vast majority of evidence that had been collected shortly after the murder was still available and that few, if any, witnesses had died. Rather than file a motion to dismiss due to delay, which had little prospect of success, defense counsel filed a motion to suppress/dismiss based upon a spoliation theory. (See, Brief on Motion to Compel and Request for Suppression or Dismissal, R. 112). While not successful, that motion had an advantage over a motion to dismiss for pre-indictment delay because a hearing on the motion was able to be accomplished by the testimony of two witnesses, former Detectives Marx and Kina. (See, February 3, 2006 transcript of Motion to Suppress Hearing, hereinafter "Suppression TR."). A motion to dismiss for pre-indictment delay, however, would have required a lengthy, full-blown hearing in which the prosecution would, in all likelihood, have called many of its trial witnesses to justify the delay and demonstrate a lack of prejudice. Such a hearing might well have stimulated and revived the memories of prosecution witnesses and provided the prosecution with a dry run of its trial testimony. From the viewpoint of the appellant, the opportunity for the prosecution to fine tune its case before trial could be considered undesirable. Moreover, such a hearing would have generated considerable pretrial publicity, a significant concern in the instant case.

A trial attorney is not obliged to file a futile motion. As established in the state's response to the first assignment of error above, a motion to dismiss on delay grounds was without merit. Therefore, a trial tactic designed to challenge some of the evidence, but carefully crafted to prevent a benefit to the prosecution, was entirely reasonable under the circumstances.

The appellant cannot demonstrate that his defense team rendered deficient representation in the first instance. Even assuming *arguendo* that the defense made unprofessional errors, the appellant cannot demonstrate that he suffered actual prejudice. The appellant cannot meet his burden of satisfying both prongs of the *Strickland* test for ineffective assistance of counsel. The appellant's second assignment of error is entirely without merit and must be found not well taken.

Assignment of Error Number 31Assignment of Error Number 301Assignment of Error Number 3
THE USE OF AN EXPERT WITNESS IN RELIGIOUS MATTERS TO TESTIFY ABOUT RELIGIOUS RITUALS AND PRACTICES AND RELATE THEM TO A CRIME SCENE DOES NOT VIOLATE A DEFENDANT'S RIGHT TO A FAIR TRIAL. 2THE USE OF AN EXPERT WITNESS IN RELIGIOUS MATTERS TO TESTIFY ABOUT RELIGIOUS RITUALS AND PRACTICES AND RELATE THEM TO A CRIME SCENE DOES NOT VIOLATE A DEFENDANT'S RIGHT TO A FAIR TRIAL. 02THE USE OF AN EXPERT WITNESS IN RELIGIOUS MATTERS TO TESTIFY ABOUT RELIGIOUS RITUALS AND PRACTICES AND RELATE THEM TO A CRIME SCENE DOES NOT VIOLATE A DEFENDANT'S RIGHT TO A FAIR TRIAL.

In this assignment of error, the appellant alleges that the State improperly used expert testimony on "satanism" to establish the appellant's guilt. To support this contention, the appellant chooses to rely on the "Salem Witchcraft Trials" which he cited at page 43 of his brief. The appellant fails to acknowledge the purpose for which the State offered Father Grob's testimony. A careful review of the testimony of Father Jeffrey Grob reveals that his expert testimony did not focus on "satanism" but rather efforts made by the killer to degrade and humiliate the victim.

Prior to testifying at trial, Father Grob was subpoenaed to testify at a pretrial hearing held in February, 2006. The purpose of the hearing was to have the court determine the admissibility of Father Grob's testimony as an expert. At the last moment, the appellant did not want to have a hearing concerning the admissibility of Father Grob's testimony. Instead, the parties entered into a written agreement concerning the admissibility and scope of his testimony. Specifically, it was agreed that, **if** the State laid the proper tactual foundation, Father Grob could testify as to 1.) whether the perpetrator had a high level of knowledge of the Catholic Religion; 2.) whether the perpetrator had a conscious design to mock or degrade the church; 3.) whether some type of ritual was conducted over the body, and; 4.) whether the appellant's statement about a confession made to him broke the Church's doctrine on the seal of the confessional. (See Docket 4-28-06, Stipulation).

At trial, Father Grob was called and questioned as to his credentials to testify as an expert witness.[24] Evidence Rule 702 provides that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand matters beyond their knowledge and experience, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise. The four prongs of the *Daubert v. Merrel Don Pharms Inc*. (1993) 509 U.S. 579, cited by the appellant as the basis for

[24]After obtaining a master in divinity he was ordained as a priest in 1992. (TR. 2640). He had a license in sacred theology, the equivalent to a Master's Degree in Theology, a licensed master's degree in canon or ecclesiastic law, and he was in the process of completing a doctorate in "canon law or ecclesiastic church law." (TR. 2640). He testified that he was employed by the Archdiocese of Chicago as an associate vicar for canonical services. (TR. 264). As such, he was the principal point of contact for the 317 parishes in the diocese in regard to questions involving church law. (TR. 2641). He was also involved in the field of providing imprimaturs, the Catholic Church's seal of approval for books. (TR. 2642). He also indicated that he was a trained canon lawyer as well a judge on the diocesan court of appeals. (TR. 2645, 2642). He also indicated that he was the assistant to the exorcist for the Archdiocese of Chicago. (TR. 2643). As such, he was the first point of contact for anyone who might call regarding the occult or other related matter. (TR. 2643). He also testified that because of his education, background, and employment that he was familiar with the rituals of the Catholic Church as well as other rituals not of Catholic origin. (TR. 2645-6).

admissibility, are neither exclusive nor are they even relevant to the subject matter to which Father Grob testified. He was clearly offered, qualified, and accepted by the court as an expert witness in the fields of Catholicism and rituals, and the subject matter of his testimony clearly related to matters beyond the understanding and experience of most jurors.

Father Grob explained that the Eucharist is central to the Catholic religion.[189] The Eucharist, sometimes referred to as a Host, as Holy Communion, or as the Blessed Sacrament, is a consecrated wafer of bread which Catholics believe to be the body of Jesus Christ. It was created by Him at the Last Supper which took place on what is now called Holy Thursday.[190]

Father Grob also explained the Catholic rituals concerning Easter. He referred to the three days preceding Easter Sunday as the Triduum.[25] On Holy Thursday, the focus of the evening service is on the Last Supper, the meal at which Christ created the Eucharist by blessing bread and wine and turning them into His body and blood.[191] At the end of the Holy Thursday service, the Eucharist is removed from the tabernacle on the altar of the church or chapel and placed in a repository in the sacristy.[192]

On Good Friday, the focus of the service is on Christ's crucifixion and veneration of the cross.[193] At the end of the service, the altar is stripped bare as a means of emphasizing Christ's death on the cross.[194] On Holy Saturday, there is only an evening service.[195]

Applying this information to the data relating to the crime scene at Mercy Hospital, Father Grob found that it was significant that the murderer chose the sacristy rather than the chapel as the site of his sacrifice because that was the place where the Eucharist had been kept since the

[25] Father Grob explained that "triduum" was a Latin word meaning three days. The days were measured in accordance with Jewish tradition from sundown to sundown, i.e., sundown Holy Thursday to sundown Good Friday was one day, sundown Holy Saturday was two, and sundown on Easter Sunday was three.

Holy Thursday service.[196] He indicated that Sister Pahl was a nun, and, as such, a bride of Christ.[197] He viewed the fact that she had been stripped naked from her shoulders to her feet, the fact that her forehead had been marked with blood, the manner in which she had been posed, and the fact that she had been covered with an altar cloth and stabbed through it nine times in the shape of an inverted cross as indicators that this was a ritualized murder in which the perpetrator sought to mock and degrade Sister Pahl, God, and the Catholic Church.[198] And, based on his experience and training, he believed that the murderer had to have had specialized knowledge of Catholic rituals for the crime to have been committed in the manner it was.[199]

Evidently recognizing that his extravagant satanism claims cannot bear fruit, the appellant asserts that the State offered prejudicial "profiling" testimony. Father Grob was not requested to engage in criminal "profiling," nor did he attempt to do so. Criminal profiling is the attempt to link the general characteristics of a unique kind of crime, such as serial murder, to the specific characteristics of the defendant. Father Grob's testimony ". . . concentrated on his opinion of what the crime scene and the physical condition of (the victim's body) suggested happened during the murder--similar to the testimony of an expert in the field of accident reconstruction." See, *Simmons v. State* (AL Crim. App. 2000), 797 So.2d 1134, at 1151; 2000 Ala. Crim. App.LEXIS 98. Father Grob's testimony had nothing to do with "profiling," as the appellant claims. This crime involved a Catholic nun being killed in the sacristy of a Catholic chapel in a Catholic hospital on Holy Saturday. The murderer clearly performed rituals as part of the slaying, and that was all that Father Grob testified about.

Although the appellant used the term "satanic" or derivatives thereof thirty-seven times in his brief, Father Grob used the term only four times during his entire examination. His first use of the term, at page 2643, was a harmless reference to his duties as an assistant to the exorcist

for the Diocese of Chicago.[26] The second use occurred at page 2646 when he was explaining his doctoral thesis on exorcism.[27] Again, the use of the term was totally innocuous.

The third use of the term occurred on page 2674 when he was discussing the degrading manner in which Sister Pahl's body had been displayed in the sacristy. He was discussing the term "mockery reversal," and he merely pointed out that such conduct frequently occurs in ". . . any kind of ritual abuse, particularly satanic ritual abuse."

His final use of the term occurred at page 2684 when he was discussing the significance of an inverted or upside down cross. Father Grob explained that an inverted cross was first associated with the death of St. Peter. Father Grob went on to explain that " . . . [u]nfortunately, for many centuries now, that image has been usurp (sic) and is used in satanic worship as an effrontery, again, to the sacred."

Although the appellant alleges in his brief that the State sought to stereotype him as an anti-Christ and that there was a satanic motivation in Sister Pahl's murder, Father Grob never testified that Sister Pahl's murder was "satanic." He never described the appellant as a "satanist." When asked to explain what he believed the photographs and descriptions of the crime scene meant to him as a priest, he expressed his opinion primarily in terms of the murder being a mockery of Sister Pahl's life of devotion to Christ.[200]

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[26] "I also am the first point of contact if anybody calls the Archdiocese of Chicago regarding matters of the occult, anything of satanic matters, anybody that calls and beleives they are possessed, anybody that calls on somebody else's behalf, all those calls are fielded to me, and then I in turn process this as an assistant to the exorcist for the Archdiocese of Chicago."

[27] "[A] person can't write on the rite or the ritual of exorcism, be it the ancient or the revised, without having to study a whole background of practices of things that people do. Again, you fall into the realm of satanism, satanic worship, you can go into Tarot cards, you can go in to horoscopes, you can go into any number of things, but anything that is not focused on the divine, on God, other gods with a small G and quotation marks, it would be an area of study."

It was not the State's theory of the case that there was a "satanic motive" for the homicide as the appellant claims. The assistant prosecutors never used such a term until closing argument when the State specifically argued that what occurred was clearly not satanic. Father Grob's testimony was not offered in an attempt to prove the motivation for the murder. The testimony was offered to explain certain unusual circumstances which surrounded the crime scene that were beyond the knowledge and experience of the trier of fact. John Thebes, one of appellant's counsel, acknowledged as much at page 2749, when he corrected an assistant prosecutor's in-chambers comment by pointing out that Father Grob **". . . never said satanic. Father Grob talked only about mocking."**

Assignment of Error Number 51Assignment of Error Number 501Assignment of Error Number 5
THE APPELLANT'S TEAM OF DEFENSE LAWYERS COMPETENTLY AND EFFECTIVELY REPRESENTED THE APPELLANT THROUGHOUT THE PRETRIAL AND TRIAL PROCEEDINGS.2THE APPELLANT'S TEAM OF DEFENSE LAWYERS COMPETENTLY AND EFFECTIVELY REPRESENTED THE APPELLANT THROUGHOUT THE PRETRIAL AND TRIAL PROCEEDINGS.02THE APPELLANT'S TEAM OF DEFENSE LAWYERS COMPETENTLY AND EFFECTIVELY REPRESENTED THE APPELLANT THROUGHOUT THE PRETRIAL AND TRIAL PROCEEDINGS.

In his second assignment of error, the appellant argued that his trial counsel were ineffective in failing to file a motion to dismiss the indictment for alleged pre-indictment delay. In this related assignment of error, the appellant recites a litany of instances of alleged ineffectiveness, which will be discussed seriatim.[28]

[28]The State outlined in detail the standard for determining whether a trial counsel's assistance was so defective as to require reversal of a conviction in Assignment No. 2 above.

The appellant first complains that, "13 days into the trial, his counsel agreed that Father Jeffrey Grob could properly stereotype him as the perpetrator of this crime." (Appellant's Brief at 52-53). In this regard, he cites a written stipulation (R.162), filed April 28, 2006, wherein the parties agreed that, conditioned upon an appropriate factual foundation, Father Grob could give certain expert and opinion testimony.[29] The appellant claims that counsels' willingness to enter the stipulation is an indication that the defense tried this case "off-the-cuff." (Appellant's Brief at 52-53). The appellant opines that his trial counsel should have instead filed a motion in limine to exclude Father Grob's testimony, as well as that of the deputy coroner, Dr. Scala-Barnett. *Id*.

[29] In the subject stipulation, the parties agreed that, conditioned upon an appropriate factual foundation, Father Grob could give expert and opinion testimony concerning the following: "His opinion that the perpetrator of this homicide had a high level of knowledge, and/or training; and/or experience as to the Catholic religion as an organized Denomination; 2) His opinion that the facts and circumstances of the subject homicide indicate a conscious design and/or intent by the perpetrator to mock and/or degrade and/or diminish the Catholic religion and/or Sister Pahl as a Catholic nun; 3) His opinion that the facts of this homicide indicate some type of ritual or ceremony was conducted with, over, or to the person of sister Margaret Pahl; 4) His opinion relating to the scope and extent of the Confessional Seal, and that Father Robinson risked disciplinary action, up to and including excommunication, by his comments to Det. Marx about the alleged confession." Stipulation and Agreement of the State Of Ohio and the Defendant. (R. 162).

The appellant's description of the record below is, at best, inaccurate. First, contrary to the appellant's contention, his defense team did file a motion in limine asking the trial court to prohibit testimony from Father Grob.[30] As a result, a hearing was scheduled for February 16, 2006, to determine the admissibility of his testimony pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579. (Transcript of February 16, 2006, proceedings, hereinafter "Daubert TR".) At that hearing, the State intended to present testimony to qualify Father Grob pursuant to Evidence Rule 702. (Daubert TR. 2.) In the end, a hearing was not necessary. After a discussion in chambers, the parties reached a stipulation concerning Father Grob's testimony. (Daubert TR. 3-4.) That same day, the stipulation was reduced to writing, and, thereafter, counsel and the appellant orally acknowledged their acceptance of the agreement on the record. *Id*. Additionally, it was signed by John B. Thebes, Alan S. Konop, John J. Callahan and the appellant, all of whom were present at the hearing. (Daubert TR. 58-59.) Ultimately, the stipulation was filed with the Clerk on April 28, 2006, before Father Grob testified. (Daubert TR. 3-4; R. 162.) Hence, contrary to the appellant's contentions, the referenced stipulation was initially entered on February 16, 2006, sixty (60) days prior to trial, not "13 days into appellant's trial." (Appellant's Brief at 52.) The record plainly does not support the appellate counsel's attempt to portray trial counsels' performance as "off-the-cuff." With respect an allegation of ineffective assistance of counsel, the most significant aspect to the stipulation is the fact that it was a matter of trial strategy. On its face, the stipulation provides, "[d]efendant has been advised by his attorneys as to the implications of this stipulation and agrees with his lawyer's counsel and advice that for trial strategy reasons this stipulation is in his

[30] The motion in limine also sought exclusion of testimony concerning blood transfer testimony from Criminalist T. Paulette Sutton of the Regional Forensic Center, Memphis, Tennessee, as well as, testimony from Dr. Steven Symes, Erie, Pennsylvania, regarding bone trauma analysis. (R.162).

best interest in terms of proceeding to the trial of the charges against him.**"**[31] (Emphasis Added). The law is well-settled that counsel's actions that might be considered trial strategy are presumed effective and should not be second-guessed by a reviewing court. *Strickland*, *supra*, at 687; *State v. Dixon* (2004), 101 Ohio St. 3d 328, 337; *State v. Noling*, 98 Ohio St. 3d 44, 2002 Ohio 7044, ¶ 65; *State v. Kerr*, 6th Dist. No. WD-05-080, 2006 Ohio 6058, ¶ 30.

Finally, even if the appellant had proceeded to a hearing, his motion in limine would have been denied. As the State argues in the third assignment of error, Father Grob's testimony was proper and admissible. The State of Ohio was meticulous in laying an appropriate foundation for his testimony.[202] (See Assignment of Error No.3, above). The same can be said regarding Dr. Scala-Barnett.[32]

The appellant next suggests that trial counsel was ineffective for failing to request a jury instruction that, **"**. . . to find the appellant guilty the jury had to exclude all inferences that might support a reasonable theory of innocence.**"** (Appellant's Brief at 52.) A request for such instruction would have been denied because it does not correctly reflect Ohio law. In, *State v. Jenks*, (1992) 61 Ohio St. 3d 259, 273, the Ohio Supreme Court held, **"**. . . when the state relies on circumstantial evidence to prove an element of the offense charged, there is no requirement

[31] The discussions leading to the stipulation were held in chambers. (Daubert TR. 3) Consequently, the precise reasons for the stipulation do not appear on the record.

[32] Dr. Scala-Barnett testified that she has been a forensic pathologist employed as a deputy coroner with the Lucas County Coroner's Office since 1985. During that time she was also a clinical associate professor at the Medical College of Ohio, Medical University of Ohio (MUO), teaching pathology and forensic pathology. Her education includes of four years of college, one year of graduate school, four years of medical school, four years of pathology training at MUO, and one year of fellowship training in forensic pathology at the Cook County Medical Examiner's Office in Chicago. At the time of her testimony, she had previously performed a total of approximately 6,800 autopsies. Those included approximately 501 homicide cases. Of those approximately 70 involved sharp force injuries and 35 involved strangulation. Dr. Scala-Barnett is board certified in pathology and forensic pathology and is licensed in two states, Ohio and Illinois. She is also a member of the American Academy of Forensic Sciences, where she gives presentations at their national meeting. Dr. Scala-Barnett is also a member of the National Association of Medical Examiners. (TR 1937-1947)

that the evidence must be irreconcilable with any reasonable theory of innocence in order to support a conviction." Because trial counsels' failure to request the subject instruction was neither error nor prejudicial, the appellant cannot meet his burden of satisfying both prongs of the *Strickland* test for ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Kerr*, 6th Dist. No. WD-05-080, 2006 Ohio 6058, ¶¶ 29-30; *State v. Triplett*, L-04-1135, 2006 Ohio 5465, ¶ 48.

The appellant next contends trial counsel was ineffective for failing to request a jury instruction that a coroner's verdict is entitled to "presumptive evidentiary significance." (Appellant's Brief at 53.[33]) In this regard, the appellant suggests that the 1980 corner's report contains "exculpatory facts" which the jury should have been instructed to presume were true. He fails, however, to identify a single exculpatory fact. *Id.* The opposite is true. The State of Ohio moved for admission of the 1980 coroner's report as inculpatory evidence of the defendant's guilt.[203] The 1980 report was authored by former deputy coroner, Renata Fazekas.[204] (St. Ex. 82). At trial, the 1980 report was referenced by Deputy Coroner Scala-Barnett, who described Dr. Fazekas as her "'. . . mentor and . . . teacher.'"[205] The 1980 report concluded that, "[t]his 71-year-old white female, Sister Margaret Ann Pahl, died of multiple, 31, stab wounds to the left side of the face, neck, and the chest. There also was evidence of strangulation."[206] Dr. Scala-Barnett testified that she performed a second autopsy in 2004.[207] (St. Ex. 83.) Her report is entitled to the same presumption as that of Dr. Fazekas concerning the cause of death because she too is a deputy coroner. The procedure followed was very

[33] Appellant relies on *Vargo v. Travelers Ins. Co.(1987*), 34 Ohio St. 3rd 27, which held "that the coroner's factual determinations concerning the manner, mode and cause of the decedent's death, as expressed in the coroner's report and death certificate, create a non-binding, rebuttable presumption concerning such facts in the absence of competent, credible evidence to the contrary."

similar to the first autopsy, but she also collected DNA evidence and a piece of bone from the victim's jaw.[208] She subsequently inserted the appellant's letter opener (St. Ex. 1) into the jaw bone and found that it was "a perfect fit".[209] Based upon her experience, knowledge and training, Dr. Scala-Barnett concluded ". . . that this weapon (St. Ex. 1) caused these injuries or a weapon exactly like this caused these injuries."[210] Her report did not conflict with or contradict the 1980 coroner's report but supplemented it.[34] Together the two reports established overwhelming evidence of the appellant's guilt. Had trial counsel requested the subject jury instruction, it would have benefitted of the State of Ohio, not the appellant.[35] Consequently, any claimed error is harmless.

On page 53 of his brief, the appellant enumerates five additional instances of alleged ineffective assistance. (Appellant's Brief at 53.) These are listed in a single paragraph, in shotgun fashion, with little or no substantive discussion. First, he complains trial counsel failed to cross-examine the state's forensic witnesses effectively. *Id.* He proffers no substantive argument relating to the subject cross-examinations. Rather, in a footnote, he complains about the number of transcript pages devoted to cross-examination of the State's experts. The notion that the effectiveness of cross-examination should be judged by the number of pages is patently absurd in light of *Strickland, supra,* and its progeny. In any event, "[t]he extent and scope of

[34] During cross examination of Dr. Scala-Barnett, trial counsel confronted her with certain police reports containing information about the probable size of the victims hands, as well as the possibility that scissors may have been the murder weapon.(TR 1112, 2002-3). However, neither of those reports were authored by Dr. Fazekas and, therefore, are not entitled to any factual presumption. (TR 2005).

[35] Even presuming *arguendo* that the 1980 report might have included arguably exculpatory information, it was plainly rebutted by " . . . competent, credible evidence to the contrary . . ." through the testimony of Dr. Scala-Barnett and the other forensic experts who testified in this case. *Vargo v. Travelers Ins. Co.* (1987), 34 Ohio St. 27, (coroner's factual determinations regarding cause of the decedent's death in coroner's report/death certificate create a ". . . non-binding, rebuttable presumption concerning such facts in the absence of competent, credible evidence to the contrary.") (Emphasis added).

cross-examination clearly fall within the ambit of trial strategy, and debatable trial tactics do not constitute lack of effective assistance of counsel.**"** *State v. Dixon*, (2004) 101 Ohio St. 3d 328, 2004 Ohio 1585, ¶ 45.

Without citation to authority or the record, the appellant claims that trial counsel erred by failing to file any motions regarding the propriety of the State's evidence. Contrary to this contention, trial counsel filed a motion in limine to exclude the testimony of several state witnesses. (R. 162).

Again, without citation to authority or the record, the appellant complains that trial counsel demonstrated an inability to cite applicable law during key in-chambers and bench conferences. Contrary to this conclusory allegation, the defense team demonstrated a sophisticated knowledge of the law, both constitutional and evidentiary. An example is the team**'**s success in arguing for application of the **"**ancient documents**"** as an exception to the hearsay rule.[211]

Next, the appellant complains that the defense team called certain police officers to the stand in its case-in-chief. He claims this was done for **"**no apparent tactical reason.**"** The record reveals that the appellant called these witnesses to impeach key State witnesses and to attack the quality of the police work done in 1980. The appellant elicited testimony from Det. Forrester to challenge the credibility of three witnesses,[36] each of whom observed the appellant in the vicinity of the Chapel near the time of the murder.[212] With this witness, trial counsel also challenged the adequacy of the 1980 police investigation.[213]

The appellant called Det. Daniel Foster to challenge the credibility of a witness who observed the appellant not far from the Chapel.[214]

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[36] These include Dr. Baron, Ms. Kerner, and Grace Jones.

Through Det. Weinbrecht's testimony, trial counsel challenged the credibility of Wardell Langston concerning the footsteps he reported hearing in the hallway leading to the appellant's living quarters.[215]

Counsel also elicited testimony concerning a pair of missing scissors that counsel later argued was the murder weapon.[216] Through Det. Weinbrecht, the appellant presented testimony suggesting that footsteps heard by Margaret Warren near the time of the murder were not those of the appellant.[217] Counsel was able to attack the accuracy of police reports.[218] Moreover, the appellant was able to elicit testimony that the appellant had been referred to as a "very meek and mild type of individual."[219]

Det. Thomas Ross was initially called by the State in its case-in-chief. The defense recalled him in its case to elicit testimony supporting its argument that the footsteps heard by Margaret Warren were not the appellant's.[220] He also used Det. Ross to lay an appropriate foundation for the admission of Defendant's Exhibit V, the smock that was removed from Sister Pahl's body on the day of her autopsy.[221]

Through Det. Marx, the appellant attempted to impeach Leslie Kerner's trial testimony with a statement she provided to an investigator back in 1980.[222] Det. Marx testified that Connie Schroeder reported she was near the chapel doors around 7:00 A.M. and observed that the doors were open, arguably contradicting the testimony of Rose Byers that the door was locked.[223] Likewise, trial counsel established that Sister Alacoque traveled on the elevator near the chapel corridor and saw no one.[224] Through Det. Marx, trial counsel again challenged the sufficiency of the 1980 police investigation. Counsel elicited testimony allowing him to argue that the police failed to preserve or collect evidence at the murder scene;[225] that there were missing technicians' reports;[226] and that the police arguably did an incomplete job of testing for

fingerprint evidence.[227] Also from Det. Marx, counsel educed testimony concerning missing police reports.[228]

These witnesses were essential to the appellant's defense to diminish the testimony of State witnesses and to attack the initial police work done on this case. With the exceptions of Det. Forrester and Det. Ross, the appellant was forced to call all of these witnesses because the State did not use them in its case-in-chief. In his closing argument, the appellant turned this to his advantage, arguing that the State did not call Det. Marx "[b]ecause the investigation was so poor, and that's important in terms of evaluating this case."[229] Trial counsels' decision to call these witnesses was a matter of sound trial strategy.

Next, the appellant argues that trial counsel was ineffective for failing to renew a motion for judgment of acquittal at the close of the evidence. Trial counsel did make a motion for acquittal at the close of the State's case, which the trial court denied.[230] A motion for judgment of acquittal pursuant to Ohio Criminal Rule 29 should be denied "if the evidence, viewed in the light most favorable to the government, is such that "a reasonable mind might fairly find guilt beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St. 2d 261, 263; *State v. Catlett* (July 24, 1981), 6th Dist. No. L-80-312, 1981 Ohio App. LEXIS 10257. In light of the overwhelming evidence of the appellant's guilt, it must be concluded that the appellant's motion for acquittal was properly denied. Even if trial counsel had renewed the motion at the end of the defense case, it would also have been properly denied. The appellant cannot demonstrate the requisite showing of prejudice under *Strickland v. Washington* (1984), 466 U.S. 668, 687. Accordingly, any claim of ineffective assistance of counsel must fail.

Finally, appellant claims that trial counsel did not appreciate the exculpatory nature of "crucial physical and forensic evidence in this case." (Appellant's Brief at 53-54.) He describes

the crucial evidence in a footnote. In a conclusory fashion and without citation to the record, the appellant asserts the letter opener measures "_ inches in width at 1½ inches from its tip," and, therefor incompatible with Dr. Fazekas' finding as to the facial wounds. These measurements do not appear in the record. Even if they did, the appellant fails to identify how they are inconsistent with anything in Dr. Fazekas' report. The appellant then claims that the letter opener blade varies in width "between 1½ and 3 inches from its tip" and is therefore, incompatible with Dr. Fazekas' findings as to the characteristics of the murder weapon. Again the appellant fails to identify any specific inconsistency with the report. The appellant asserts counsel was ineffective for failing to make these arguments to a jury.

In a similar fashion, without citation to the record, the appellant asserts that "the sample scissors had blades that were "3 inches in length (compatible with the deepest deep stab wounds to the victim's neck and chest) and one-half (½) inch in width at that length (compatible with all of the deepest stab wounds to the victim's neck and chest)." While appellate counsel presents these as matters of "fact," they do not appear in the record. There apparently was a pair of scissors missing from the room in which the victim was murdered. The record is void as to the exact length of the blades of the "missing" scissors. The only reference in the record is to a tracing of a pair of **similar** scissors which were in fact **an inch shorter** and **narrower** than the pair of scissors thought to be missing. (D. Ex. T&U) Moreover, Dr. Fazekas stated that the measurements of the wounds to the victim's body were only approximations. (D. Ex. BB). Nonetheless, the appellant argues that counsel was ineffective for failing to argue that the missing scissors were the murder weapon. In fact, almost all of defense attorney John Thebes closing argument was dedicated to the proposition that the murder weapon was a pair of scissors and not the letter opener.

"[I]t is well-established that if demonstrating ineffective assistance of counsel requires proof outside the record, then such claim is not properly raised in a direct appeal. *State v. Baker*, 7th Dist. No. 03 CO 24, 2003 Ohio 7008, ¶16. Accordingly, this Court should ignore this argument. In any event, opening and closing statements fall under the rubric of **"**trial strategy.**"** *Id.* Even a decision to make no closing statement at all is not per se ineffective assistance.**"** *Id.* As previously stated, a reviewing court must refrain from second-guessing sound trial strategy decisions. *State v. Dixon*, 101 Ohio St. 3d 328, 2004 Ohio 1585, ¶ 45; *Strickland*, *supra*, at 687-690 *State v. Kerr*, 6th Dist. No. WD-05-080, 2006 Ohio 6058, ¶30.

Assignment of Error No. 61Assignment of Error No. 601Assignment of Error No. 6 THE PROSECUTION'S CLOSING ARGUMENT DID NOT CONTAIN REMARKS WHICH CONSTITUTED PREJUDICIAL ERROR, I.E., REMARKS SO EGREGIOUS THAT IT IS CLEAR BEYOND A REASONABLE DOUBT THAT ABSENT THE PROSECUTOR'S COMMENTS, THE JURY WOULD NOT HAVE FOUND APPELLANT GUILTY.
***STATE V. BENGE* (1995), 75 OHIO ST. 3D 136, 141.2THE PROSECUTION'S CLOSING ARGUMENT DID NOT CONTAIN REMARKS WHICH CONSTITUTED PREJUDICIAL ERROR, I.E., REMARKS SO EGREGIOUS THAT IT IS CLEAR BEYOND A REASONABLE DOUBT THAT ABSENT THE PROSECUTOR'S COMMENTS, THE JURY WOULD NOT HAVE FOUND APPELLANT GUILTY. TA STATEV.BENGE(1995),75OHIOST.3D136 1 02THE PROSECUTION'S CLOSING ARGUMENT DID NOT CONTAIN REMARKS WHICH CONSTITUTED PREJUDICIAL ERROR, I.E., REMARKS SO EGREGIOUS THAT IT IS CLEAR BEYOND A REASONABLE DOUBT THAT ABSENT THE PROSECUTOR'S COMMENTS, THE JURY WOULD NOT HAVE FOUND APPELLANT GUILTY. TA STATEV.BENGE(1995),75OHIOST.3D136 1**

The appellant has raised numerous allegations of prosecutorial misconduct on the part of the State claiming that they are egregious enough to warrant reversal of his conviction. A careful examination of each claim will prove that none of the allegations raised by the appellant justifies reversal of the conviction secured in this case.

The appellant claims reversible error based on statements made by the State during closing argument. Courts are exceptionally reluctant to reverse a conviction based on statements made during closing arguments. The rationale for this is obvious. Juries are to make their decisions based on evidence, not upon argument. Arguments are just that, arguments. They are not evidence. The jury in this case was instructed on this point. Juries are presumed to follow the court's instructions. *State v. Jones* (2000) 80 Ohio St.3d 403, 414.

In general terms, the conduct of a prosecuting attorney during trial cannot be made a ground of error unless that conduct deprives the defendant of a fair trial. *State v. Papp* (1978), 64 Ohio App. 2d 203, 211; *State v. Wade* (1978), 53 Ohio St. 2d 182, 186; *State v. DeNicola* (1955), 163 Ohio St. 140, 148. Courts must review the closing argument in its entirety to determine prejudicial error. *State v. Frazier* (1995), 73 Ohio St. 3d 323, 342; *State v. Moritz* (1980), 63 Ohio St. 2d 150, 157. The touchstone of this analysis "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L. Ed. 2d 78, 87.

Courts have consistently held that wide latitude is given to counsel during closing argument to present their most convincing positions. *State v. Stephens* (1970), 24 Ohio St. 2d 76; *Shelton v. State* (1921), 102 Ohio St. 376; *State v. Phillips* (1995), 74 Ohio St. 3d 72. Where prosecutorial misconduct is alleged, the court must determine whether the remarks in closing argument were improper and, if so, whether the remarks prejudicially affected the substantive

rights of the defendant. *State v. Smith* (1984), 14 Ohio St. 3d 13, 14; *United States v. Dorr* (C.A. 5, 1981), 636 F.2d 117.

Prosecutors are entitled to latitude as to what the evidence has shown and what inferences can be drawn therefrom. *State v. Rickey* (1982) 64 Ohio St. 3d 353, 362. In reviewing claims of prosecutorial misconduct during argument, the Ohio Supreme Court has acknowledged that "realism compels us to recognize that criminal trials cannot be squeezed dry of all feeling." *State v. Keenan* (1993), 66 Ohio St. 3d 402, 409. A conviction should only be reversed "where it is clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would not have found Appellant guilty." *State v. Benge* (1995), 75 Ohio St.3d 136, 141.

In this assignment the appellant again claims that the State's theory of its case was that this homicide was part of a "devil-worship" ritual undertaken by the appellant. The appellant cries foul because the State, during closing argument, said the following to the jury:

> *You listened to this evidence. You heard what took place in that sacristy. Is this some sort of satanic cult killing? No. Was this part of some ritualistic black mass? No. Sorry to disappoint. This case is about perhaps the most common scenario there is for a homicide. A man got very angry at a woman, and the woman died. The only thing different is the man wore a white collar, and the woman wore a habit.*[231]

The appellant argues that these remarks are "misconduct" and constitute a prejudicial "bait and switch tactic" on the part of the State. Again, the State never offered the "bait" that this homicide was a satanic endeavor on the part of the appellant. The State outlined its contention that the appellant was motivated by anger with Sister Pahl in its opening statement, which **never** once mentioned satanism.[232] The State introduced evidence of this motive at trial and summarized this evidence for the jury during closing argument. The evidence did indeed show that this case involved a man who became angry at a woman. Father Grob testified at

least on seven occasions that what took place in that sacristy was meant to mock either the victim, the Catholic Church, or God.[233] The "devil-worship" theory belongs to the appellant, not the State of Ohio.

The appellant also takes issue with the State's argument that this was a case about "anger", since there was "**no evidence** that the appellant had ever been violent or **even angry** with anyone in his lifetime." (Appellant Brief p. 54; emphasis original.) Most reasonable minds would agree that the thirty-one stab wounds to the victim can give rise to the inference that the perpetrator was angry. The remainder of the State's evidence permits the reasonable inference that the appellant was the perpetrator.

The appellant also objects to the arguments concerning the blood found on the victim's forehead. The evidence showed that there was an obvious mark of blood on the victim's forehead, yet there were no corresponding wounds to explain the blood. (Apx. K.) The evidence also proved that at some point the entire letter opener was saturated with blood from the tip to the hilt. (St. Ex. 12). One would not have expected the entire letter opener to be covered in blood unless it was done so intentionally.

From the evidence adduced at trial, it is reasonable to infer that the killer caused the entire letter opener to be coated with blood and then placed the blood soaked letter opener across Sister Pahl's forehead in an act mirroring the anointing process of the Catholic ritual of the last rites. The circular pattern of the medallion is visible on Sister Pahl's forehead.[234] (Apx. K). The testimony established that the ritual of the last rites involves anointing the forehead of a dying person, an act which can only be performed by a priest.[235] Therefore, the State's arguments were fairly based on reasonable inferences.

Moreover, the appellant claims error because the State implied that the marking of the cross was to Sister Pahl's chest. Here, the appellant evidently contends that while there was evidence of an upside down cross in the altar cloth that covered Pahl's body, no such wounds extended into her body. However, Det. Cousino did testify that the upside-down cross pattern was observable in Sister Pahl's dress[236] and the autopsy findings did not contradict this evidence. Trial counsel are granted wide latitude in summation as to what the evidence has shown and what reasonable inferences may be drawn therefrom. *State v. Lott* (1990), 51 Ohio St.3d 160, 165.

The appellant also claims reversible error based on the State's argument that the evidence showed that the victim has been vaginally penetrated. The autopsy confirmed evidence of reddening or bruising to the victim's labia. (St. Ex.182, p. 11). Thus there was sufficient foundation for the prosecutor's argument that the victim had been penetrated. The prosecutor did not suggest that the penetration was conducted for purposes of sexual gratification, but rather as an expression of anger and degradation.

The appellant also objects to the State's arguments that the DNA found in the sacristy was the result of contamination. While efforts were made to test those involved in the chain of custody of Sister Pahl's clothing, the list of those tested was not exhaustive, and many who came in contact with the murder scene, especially shortly after Sister Pahl's body was discovered, such as the emergency medical team, could have contaminated the evidence. The significance of the DNA evidence and the fact that it could have been easily contaminated was grist for the jury mill. To point out that the DNA evidence did not and could not tell the whole story was certainly not improper.

The appellant further objects to how the State characterized the defense's expert witness. The State's primary criticism of defense expert Kathleen Reichs was that she had never actually bothered to examine the evidence or attempted to discuss her opinions with the other experts in the case.[237] Referring to her as a hired gun was fair comment. The prosecutor also made a comment in response to defense counsel's contention that a nickel could have made a blood transfer rather than the medallion by noting that the building portrayed on a nickel is not, as on the letter opener medallion, the Capitol, but rather Monticello. Defense counsel not only did not object to this comment (which was accurate), but treated it in a jocular fashion.[238] The prosecutor's comment about defense counsel's outline of a sample pair of scissors looking like a third grade drawing, if not accurate, was certainly not improper. (See, D. Ex. J)

Additionally, the appellant argues that the State improperly involved a "golden rule" type of argument. In *State v. Roberson*, 5th Dist. No. 5828, 1982 Ohio App. LEXIS 14010, the court explained that invocation of the "golden rule" is usually prohibited in final arguments. The "golden rule" argument, said the court, improperly seeks to invoke the sympathy or prejudice of the jury by asking that it step into the shoes of another:

> The 'golden rule' technique of argument to a jury runs afoul of this clear limitation upon the right of the attorney to comment upon the evidence as opposed to appealing to the passion or sympathy of the jury. 'Do unto others as you would do unto me' carries an improper implication in final argument. *Id*., at 5,6,15.

However, in this case, the prosecutor's request that the jury bring justice for Sister Pahl was not only perfectly proper, but it was patently *not* a "golden rule" request because the prosecutor did not ask that the jury put itself in the shoes of the victim.

The appellant concedes that his trial counsel failed to object to any of these alleged improper arguments and that reversal would only be justified under plain error analysis. Again, the appellant has failed to sustain his burden to demonstrate that the closing arguments about which he now complains, even if improper, rise to a level constituting outcome determinative substantial prejudice. They clearly do not. The rhetoric of closing argument is not evidence, and the trial court so instructed this jury.

The test for prosecutorial misconduct is whether remarks were improper **and**, **if so** whether they **prejudicially affected substantial** rights of the accused. *State v. Smith* (1999), 14 Ohio St. 3d 13, 14-15. In *State v. Rahman* (1996), 23 Ohio St. 3d 146, the Ohio Supreme Court confronted allegations of prosecutorial misconduct in a death penalty prosecution. In holding that the prosecutor's comments did not constitute prejudice to appellant's substantial constitutional rights, the Court stated:

> This court has, however, also granted prosecutors wide latitude in closing argument. *State v. Maurer*, *supra*, at 269. The effect of any prosecutorial misconduct "'must be considered in the light of the whole case.'" *Id.* at 266. We must also remember that "'[i]f *every remark made by counsel outside of the testimony were grounds for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced of counsel are occasionally carried away by this temptation*.'" *Id*. at 267, quoting *Dunlap v. United States* (1897), 165 U.S. 486, 498. Thus, while the prosecutor's remarks in the case *sub judice* were improper, we do not consider these [*155] remarks standing alone to have risen to the level of plain error requiring reversal.

Moreover, the appellant has failed to articulate how he was prejudiced. Appellant does not offer even one theory as to how any or all of his claims were outcome determinative. *Benge*, supra.

Assignment of Error Number 71**Assignment of Error Number 7**01**Assignment of Error Number 7**
THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION TO SUPPRESS HIS 2004 STATEMENTS2**THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION TO SUPPRESS HIS 2004 STATEMENTS**02**THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION TO SUPPRESS HIS 2004 STATEMENTS**

The central issue in this assignment of error is whether Detectives Forrester and Ross were required to advise the appellant of his *Miranda* warnings prior to being interviewed at his house. On April 23, 2004, investigators went to the appellant's house to question him concerning the death of Sister Pahl and his claim

of an alibi. The appellant has now claimed that his interaction with the investigators constituted a custodial interrogation.

Miranda v. Arizona (1966) 384 U.S. 436, requires that "... when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning ... procedural safeguards must be employed ...." Id., at 478. "A person is in custody for purposes of *Miranda* when he is placed under formal arrest or his freedom of action is restrained in a manner consistent with a formal arrest." *Minnesota v. Murphy* (1984) 465 U.S. 420, 430. In *Oregon v. Mathiason* (1977) 429 U.S. 492, 495, the Court stated that "a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" The Court recognized that "any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." Id.

In *Beckwith v. United States* (1976), 425 U.S. 341, the Court rejected the notion that the "in custody" requirement was satisfied merely because the police interviewed a person who was the "focus" of a criminal investigation, because "*Miranda* implicitly defined 'focus' ... as 'questioning initiated by law enforcement officers after a person had been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Id.*, at 347. Custodial interrogation only occurs, therefore, "when a reasonable person in the suspect's situation would view the situation as being custodial." *Berkemer v. McCarty* (1984), 468 U.S. 420, 442. Thus, "... a policeman's unarticulated plan has no bearing on the question of whether a suspect is 'in custody' at a particular time: the only relevant inquiry is how a reasonable man in the suspect's

position would have understood the situation.'' *Id*. The Court affirmed this principle in *Stansbury v. California* (1994), 511 U.S. 318, by clarifying that ''. . . the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.'' *Id.*, at 323.

The testimony at the motion to suppress hearing clearly established that a reasonable man in the appellant's position would not have felt that he was in custody during the interview in his own place of residence. Both detectives arrived at the appellant's home in plain clothes and in an unmarked car; they introduced themselves as cold case investigators and provided the appellant with a business card as a means of identification.[37] (Motion To Suppress Hearing, p. 134-135.) The appellant invited the detectives into his residence and offered them seats in his living room. Thereafter, Detectives Forrester and Ross interviewed the appellant in the living room for forty-five to sixty minutes. Because of the need to display a series of photographs, the three moved into the appellant's kitchen and Det. Forrester returned to the living room leaving Det. Ross and the appellant alone together. The kitchen interview lasted fifteen to thirty minutes. It is uncontroverted that the appellant was never handcuffed, restrained, threatened, or told that he could not leave. Nor does the appellant claim that he ever tried to leave his residence, or that he asked the two investigators to leave, or that he requested an attorney. The appellant was well aware of his rights in this regard because he had been interviewed on two occasions in 1980, and he was able to terminate the second one abruptly.

In *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, the appellant, who was questioned by police about a murder after they entered his house with guns drawn to

[37] They parked their unmarked car in the appellant's driveway, not to block him in, but because there was no street parking.

execute a search warrant, argued that the resulting "coercive atmosphere" created a custodial interrogation requiring Miranda warnings. The Ohio Supreme Court approved admission of the appellant's uncautioned statement since he was not subject to formal arrest or restraint of his freedom of movement to the degree associated with a formal arrest. *Id.*, at p. 27. Thus, the record amply supports the trial court's finding that the appellant was not in custody until his arrest and transportation to the Scott Park Station.

Accordingly, the trial court did not err in determining that the interview of the appellant at his place of residence was not custodial and that it, therefore, was not subject to *Miranda.* The statement was fully admissible. Because of this, *Missouri v. Seibert* (2004), 542 U.S. 600, does not apply. *Seibert* only applies where an initial interrogation, conducted without *Miranda* warnings, is followed by a second *Mirandized* interrogation, and where both were custodial. *State v. Abner*, 2nd Dist. No. 20661, 2006-Ohio-4510 at ¶.18; *State v. Winterbotham*, 2nd Dist. No. 05CA100, 2006-Ohio-3989, at ¶. 25; *State v. Estes*, 12th Dist. No. CA2005-02-001, 2005-Ohio-5478, at ¶. 8.

Assignment of Error Number 81Assignment of Error Number 801Assignment of Error Number 8
DEFENDANT IS NOT ENTITLED TO REVERSAL BASED UPON CUMULATIVE ERROR2DEFENDANT IS NOT ENTITLED TO REVERSAL BASED UPON CUMULATIVE ERROR02DEFENDANT IS NOT ENTITLED TO REVERSAL BASED UPON CUMULATIVE ERROR

The Ohio Supreme Court has held in *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256, that multiple errors that are separately harmless may, when considered together, violate a defendant's right to a fair trial under certain limited circumstances. In order for the doctrine of cumulative error to be applicable, however, an appellate court must find that multiple errors, none of which individually rises to the level of prejudicial error, actually occurred in the

trial court. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 398, 2000-Ohio-448, 721 N.E.2d 52. The doctrine of cumulative error is inapplicable where there are not multiple instances of harmless error. *State v. Leach,* 150 Ohio App.3d 567, 2002-Ohio-6654 at ¶57; *State v. Ball*, 6th Dist. No. E-02-024, 2004-Ohio-2455, at ¶44. As set forth in the State's response to the appellant's other assignments of error, no error, and certainly no plain error, occurred in the trial of this case. The appellant received a fair trial, and any errors which might have occurred were harmless and non-prejudicial, cumulatively as well as individually. The appellant was not constitutionally entitled to a perfect trial, only to a fair one. *State v. Mason*, 6th Dist. No. L-02-1211, L-02-1189, 2003-Ohio-5974, at ¶15. The appellant's niggling and inaccurate complaints concerning alleged errors and his counsel's failure to object to them fall far short of a constitutional deprivation of a right to a fair trial.

Unlike the appellant's statement in this case, the taped statement in *State v. Lane* (1998), 48 Ohio App. 3d 172, was unintelligible in its entirety, leading the jury to believe that its introduction by the State must have been because it was a confession. In the present case, the appellant was interviewed at a police station on April 23, 2004, which lasted one hour and twenty-eight minutes. (St. Ex. 172.) At the very end of the interview, appellant was left alone in the interview room for three minutes and fifteen seconds. While alone, the appellant can be heard mumbling to himself. This is what appellant now claims constitutes reversible error. The appellant never objected to this portion of the tape. In fact, as reflected at pages 3537-41 of the trial transcript, the defense wanted it played and tried its best to make this portion of the tape audible for the jury. Moreover, the appellant had every opportunity to take the witness stand and repeat what he said if it would have inured to his benefit.

The appellant also claims reversible error because two witnesses saw part of the proceedings on television. These two witnesses were under no explicit order to refrain from watching television coverage. These witnesses were voir-dired by the court and counsel. Ms. Jones expressly stated that what little she heard on television would not affect her testimony. The trial court agreed.[239] Mr. Tressler stated that what he saw on television would not influence his in-court testimony.[240] Moreover, witness Ulysses Howard confirmed that Ms. Jones told him in 1980 that she observed the priest coming from the area of the chapel.[241] More importantly, this was an issue which went to the weight to be given this testimony and not to its admissibility. The trial court ruled on the admissibility of the evidence. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected. Evid. R. 103. Defense counsel had full opportunity to cross-examine as to the weight to be given the testimony. As such, no error of any kind occurred.

The appellant also claims that various hearsay statements were admitted into evidence which resulted in reversible prejudice to his case. First, none of the referenced statements constituted hearsay by definition because they were not offered for the truth of the matter asserted. Evid. R. 801(C). They were offered to explain the sequence of how the cold case portion of his investigation developed. Just as importantly, the "declarant" of each of the challenged statements had already testified in detail before anything was later repeated by any subsequent witness. Thus, the jury had already heard the properly admitted testimony which the appellant had subjected to thorough cross examination.

The appellant next claims error because the State referenced a letter while cross-examining a defense witness. The appellant called former Deputy Police Chief, Ray Vetter, as a witness during the defense's case. During the State's cross-examination, Mr. Vetter was asked if

he made certain statements which were attributed to him and referenced in a letter authored by Father Ray Fisher to Bishop Hoffman of the Catholic Diocese. Referring to a document during cross-examination is proper. As Judge Osowik stated in overruling the defense's objection, "He can use a letter, a dictionary, a newspaper or whatever - Objection overruled - Go ahead."[242] Moreover, the appellant could have offered the letter into evidence had he so desired.

Lastly, as to the appellant's final complaints, the court did give the proper instruction as to the law of circumstantial evidence, and the defense never requested an instruction as to a coroner's verdict.

CONCLUSION1CONCLUSION01CONCLUSION

1. The State did not need to eliminate all reasonable theories of the appellant's innocence. The appellant has failed to sustain his burden that his conviction was against the manifest weight of the evidence.

2. The appellant was not deprived of due process in that, although there was a lengthy period between the murder and his indictment, he has failed to demonstrate that he suffered actual, substantial prejudice. In any event, such delay was justified under the circumstances. Moreover, the appellant waived or forfeited his claim of excessive delay by not raising such issue in the trial court and by failing to introduce evidence of the alleged deaths of three witnesses. The trial court did not commit plain error in permitting the prosecution to continue.

3. The appellant was not deprived of effective assistance of trial counsel by their failure to raise the due process delay issue because there were practical, tactical reasons not to do so. More important, since the delay claim lacks merit, the appellant has not shown that his counsel's alleged ineffectiveness caused him any harm.

4. The State did not inject satanism into the case nor offer "profiling" evidence. The testimony of Father Grob was properly admitted under Evid. R. 702, and, since the appellant failed to object, any error in its admission was waived and did not constitute plain error.

5. The appellant was not deprived of effective assistance of counsel during trial. The alleged errors have not been shown to be deficiencies, but were the result of tactical decisions that had no impact upon the outcome of the trial.

6. There was not prosecutorial misconduct. Any alleged misconduct was not objected to and therefore waived.

7. The doctrine of "cumulative error" does not apply to the facts of this case.

The appellant received a fair trial. For all of the foregoing reasons, the judgment and sentence of the court below should be affirmed.

Respectfully submitted,
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By:_____
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CERTIFICATE OF SERVICE1CERTIFICATE OF SERVICE01CERTIFICATE OF SERVICE

This is to hereby certify that a copy of the foregoing was sent this 14th day of December, 2007 by U.S. ordinary mail to the following:

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