

AN OPEN LETTER TO OHIO SUPREME COURT JUSTICE PAUL PFEIFER

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Justice Paul E. Pfeifer
Supreme Court of Ohio

Dear Justice Pfeifer:

Let me introduce myself. I am an attorney licensed to practice in state and federal courts in Ohio. I am also an historian: I taught American history at Spelman College, Atlanta and Yale University, and have been a candidate for president of the American Historical Association. Finally, I am a member of the Society of Friends, or Quakers.

In 2004 Temple University Press published my book, Lucasville: The Untold Story Of A Prison Uprising, based on eight years of research. I have arranged for a copy to be mailed to you.

This is a letter of protest arising from the opinion you authored in State v. Skatzes (2004), 104 Ohio St.3d 195 (hereafter, the Opinion), and also from the column entitled "The Lucasville Prison Riot" (hereafter, the Column) that you circulated for publication on May 18, 2005. The Column, like the Opinion, concerns itself almost entirely with the alleged role of prisoner George Skatzes in the April 1993 disturbance.

I do not intend this communication as an attack and do not wish to harm you in any way. On the contrary, please understand this lengthy critique as a plea for your attention to serious flaws in Ohio's death penalty decisions. I believe that you are one of the more fair-minded state court judges in deciding capital cases. I believe that, for whatever reason, your opinions concerning Skatzes represent a departure from this norm. What I write may help to explain why State Rep. Shirley Smith, other legislators, and a significant section of the Ohio bar, seek a moratorium on executions in Ohio so that the way we make these life and death decisions can be more carefully considered. Reliance on "snitch" testimony, central to the Lucasville convictions because of the absence of physical evidence, is one among many reasons for a moratorium.

Because you have caused your views to be distributed to the media, I feel compelled to do the same.

I

First of all, I object to your public comment through your Column on a case that may yet return to the Ohio Supreme Court on appeal from a state post-conviction verdict, has not been finally adjudicated in the federal courts, and could be remanded for further proceedings in Ohio courts. Canon 3(A)(6) of the Code of Judicial Conduct adopted in 1972 by the American Bar Association states:

A judge should abstain from public comment about a pending or impending proceeding in any court

Similarly, Canon 3(B)(9) of the Ohio Code of Judicial Conduct, amended effective May 1, 1997, states:

While a proceeding is pending or impending in any court, a judge shall not make any public comment that might reasonably be expected to affect its outcome or impair its fairness

The Preamble to the Ohio Code makes clear that: "When the text uses 'shall' or 'shall not,' it is intended to impose binding obligations the violation of which can result in disciplinary action." The Commentary on subsection (B)(9) dispels any doubt as to the continuing relevance of its prohibition: "The requirement that judges abstain from any public comment regarding a pending or impending proceeding **continues during any appellate process and until final disposition**" (emphasis added).¹

In my opinion, what you say in your Column should indeed reasonably be expected to affect the outcome and impair the fairness of future court proceedings. You refer to the actions of prisoners including George Skatzes as "foul deeds." You characterize the uprising as "the worst humankind has to offer." As I will demonstrate below, a number of your factual assertions are inaccurate.

II

Statements of fact in the Opinion and the Column are offered without citation to the record. Many of these statements are false or misleading. Insofar as these statements occur in the State v. Skatzes Opinion, they are especially prejudicial because they constitute determinations of factual issues by a State court and, as such, must be presumed to be correct in any future habeas

¹The Ohio State Highway Patrol and the Lucasville Special Prosecutor will not release investigatory interviews in any Lucasville case as public records until proceedings in all courts have been finally concluded.

proceeding in federal court. The habeas petitioner, in this case Skatzes, would "have the burden of rebutting the presumption by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Paragraph 3: The Rebellion Begins

According to Paragraph 3 of the Supreme Court Opinion in State v. Skatzes: "On the evening before the riot, April 10, high-ranking members of the Aryan Brotherhood, including Jason Robb, Dewey Bocook, and Freddie Snyder, and the Muslims, including Sanders and James Were, met in the L block gym. Upon seeing this, inmate Robert Brookover knew 'there was something going on.' Robb told fellow Aryan Brotherhood member Roger Snodgrass to 'be on our toes tomorrow'."

The reader is left to infer that Skatzes might have approved the riot in advance, or at least might have known about it. The record refutes any such inference. **The Opinion fails to mention what Prosecutor Daniel Hogan stated to Skatzes' jury in closing argument: "No one has ever raised the issue of whether Mr. Skatzes planned this riot. The State certainly never alleged that."** Tr. at 6096. Inmate Kenneth Hazlett testified that Skatzes was in his cell, catty-corner across from Hazlett in L-6, when the riot began. Tr. at 4722. According to inmate Tom Hurst, the riot caught Skatzes by surprise. Neither he nor Skatzes understood what was going on. Tr. at 5003. Everyone wanted to know what was happening, but Skatzes had no more answers than the rest of the inmates. Tr. at 5019. These witnesses corroborated Skatzes' unrebutted testimony that no one told him that a riot was going to break out, and that he was in his cell writing a letter when the riot began. Tr. at 5311-12, 5314-15.²

Moreover, **the meeting alleged by the Opinion to have occurred on the evening of April 10 is not as clear in the record as the Opinion suggests.** Brookover and Snodgrass were prisoners who turned State's evidence. The jury instructions approved by the Supreme Court in this case indicate that the testimony of such persons should be assessed with care. Indeed, after the Robb trial, the State made a special investigation that called

²The Supreme Court cannot claim that it was unaware of the claim that Skatzes had no part in planning, and no prior knowledge of, the Lucasville disturbance. Skatzes' attorney Adele Shank emphasized the fact that there was no evidence for any such allegation in her oral argument to the Ohio Supreme Court on Sept. 28, 2004.

Brookover's credibility into question.³ But the Opinion does not hesitate to credit the facts testified to by these inherently unreliable witnesses.

Furthermore, Snodgrass did not testify to any meeting between Aryans and Muslims on April 10. He recalled a so-called "walk-around meeting in the gym" between Snyder (AB), Hasan (Muslims), and Anthony Lavelle of the Black Gangster Disciples, but did not mention a date. He also remembered an occasion when Snyder and Hasan talked on the diet line in the chow hall "probably about three weeks, maybe two, prior to the riot itself." Tr. at 4357-59. Neither Brookover nor Snodgrass were able to overhear anything that was said in any of these alleged encounters.

Paragraphs 4-5: The Early Hours of the Rebellion

In the Opinion's recital of events on the afternoon and evening of April 11, Skatzes is mentioned only in connection with the fact that a day or two later Aryan Brotherhood members moved into cell block L2 ("the Aryans, led by Jason Robb and Skatzes, controlled L2").

The Opinion reports, "Several corrections officers ('C.O.s'), including Robert Vallandingham, who was working in L1 that day, were taken hostage," but fails to mention that **there was no testimony implicating George Skatzes in the taking of correctional officers as hostages on April 11, nor was he shown to have captured or locked up any prisoners.**

The Opinion also states that "C.O.s Darrold Clark and Jeff Ratcliff . . . were confined for most of the riot in L2." It omits the testimony of prosecution witness Clark that, while under the control of Muslims in L6, **he asked Skatzes to get him**

³Judge Algeron Marbley of the United States District Court for the Southern District of Ohio has found that "there was ample reason to question the truthfulness of Brookover's testimony" at the trial of Jason Robb, and has granted habeas petitioner Robb discovery "as to all prior statements made by Robert Brookover in connection with the Lucasville riot investigation." The basis for this holding, according to Judge Marbley, is that there were "[r]epeated questions about Brookover's truthfulness leading up to and in connection with his testimony at petitioner's trial, combined with the revelation subsequent to petitioner's trial that Brookover may have been untruthful about his claims of having assisted other prison authorities in other prison investigations." That revelation came about as the result of an investigation conducted by chief Lucasville investigator Howard Hudson at the request of Lucasville Special Prosecutor Mark Piepmeier. Opinion and Order of Sept. 16, 2004 (Docket 34) at 23-27, Robb v. Ishee, Case No. C-2-02-535.

out. Skatzes left, came back and said, "You are going into my block," and took Clark to L2. Tr. at 2328-29. Clark himself testified that when he could not sleep he asked for George, that George got a mattress and laid down between him and the door, that is, between Clark and anyone who might come to harm him. Tr. at 2380-81; see also Tr. at 5152-53. According to prosecution witness Snodgrass, after Clark was transferred to L2 Skatzes

told him that he was going to do everything that he could to get him out of there. He told him that he didn't have nothing to worry about, that he wasn't going to let nothing happen to him, that he was safe. . . .

It came to where Clark would, when George was gone, Clark would be even more nervous and he would ask for George, where is George, where is George, I want to talk to George, and basically he wouldn't talk to no one else at times

Tr. at 4581.

Similarly, the Opinion says nothing about the fact that when Skatzes heard that Officer Ratcliff had been beaten by inmates, Skatzes came and got Ratcliff and took him to L2 also. Tr. at 5995A, 5999A-6000A. Skatzes removed the blindfold and some red tape from Ratcliff's eyes, took water, cotton balls and towels, and cleaned away a red substance that was burning Ratcliff's eyes. Tr. at 5145-46, 5199. Ratcliff testified, "[I]f he wouldn't have come and got me, I probably wouldn't be here, I would probably be dead." Tr. at 6000A. Judge Mitchell surmised that the reason Skatzes was not sentenced to death for the aggravated murder of Officer Vallandingham was because of Officer Ratcliff's testimony. Opinion of the Trial Court at 5.

The Opinion is also silent about Skatzes' very substantial activity during the early hours of the rebellion in saving the lives of hostage correctional officers, as to which both prosecution and defense witnesses testified.

The first person whose life Skatzes helped to save was Correctional Officer Harold Fraley. After the takeover, prosecution witness Snodgrass testified, he saw Skatzes screaming to correctional officers on the other side of the gates that there was a correctional officer who needed to be evacuated. Skatzes was saying: "He's hurt. He needs help. We need to get him out of here before he dies. . . . I am goin' to take him to the back of L-8 and I will put him there and you all better come and get him." Snodgrass saw Skatzes pick the man up and take him to the stairwell at the back of L8. Tr. at 4379-80; see also Tr. at 5911-16. State personnel retrieved Correctional Officer Fraley from the L8 stairwell at 4:45 p.m. Stipulation, Tr. at 6058; Tr. at 1858.

Inmate Dwayne Johnson described the efforts he and Skatzes made to save the lives of other officers on the first night of the riot. Johnson, Skatzes and other prisoners arranged for officers Kemper and Schroeder to be carried out to the yard where

they could be picked up. Johnson said Skatzes stayed until the last guard was released from a makeshift infirmary in the L3 dayroom. This was at some personal risk because, as Johnson testified, it required going behind the backs of the leaders of the riot to get the injured officers out. Tr. at 5939-48; see also Tr. at 1858-59, 6040.

Skatzes did what he could to insure the safety and well-being of the guards who remained on L side as hostages. Negotiation tapes reveal that **Skatzes made rounds to be sure that the hostage officers were safe, delivered food and water, delivered medication to officers Buffington and Dotson, and even offered Officer Dotson his own blood pressure medication.** Tr. at 4219-20, 5995A; Neg. Tape #4, Ex. 295 (Ex. 295A at 4-5); Neg. Tape #5, Ex. 296 (Ex. 296A at 21); Neg. Tape #12, Ex. 303 (Ex. 303A at 29). (Exhibit numbers in parentheses are transcripts.)⁴

Skatzes also saved the lives of prisoners. On the first night of the riot, Frank Williams saw Skatzes come into the L3 dayroom where the injured inmates were. He heard Skatzes say repeatedly, "Man, this is bad. These guys are hurt. Get these guys out of here." Tr. at 5048-49, 5062. Tim Williams, an inmate who testified for the prosecution, said that he was accused of being involved in a plot to kill Skatzes and a leader of the Muslims. When confronted by the Muslim leader, Skatzes said he did not think Williams had anything to do with it. Williams later told a Highway Patrol investigator that Skatzes helped to save his life. Tr. at 3087, 3195.

When prosecution witness Brookover went to Skatzes and asked whether he was going to be killed, Skatzes assured Brookover that he would not let that happen. Tr. at 3695. Brookover testified: "[N]o matter what George feels about me today, I believe in my heart he saved my life" Tr. at 3771; see also Tr. at 3480, 3490.

Paragraphs 6-7, 136-37: The Murder of Earl Elder

The Opinion and Column repeat, without evaluation, the prosecution theory that Skatzes ordered AB member Snodgrass to kill Elder and remained outside Elder's cell while "Snodgrass went into the cell and stabbed Elder numerous times."

Moreover, **the Column states untruthfully that after Snodgrass supposedly emerged from Elder's cell, "Elder was dead."** This statement is in conflict with the Opinion, which concedes that after the alleged stabbing a prisoner named Roper "told Snodgrass that Elder was not dead." Opinion at Paragraph 137.

⁴Officer Dotson confirms these facts in his own account of the uprising as told to ODRC training officer Gary Williams. Gary Williams, Siege in Lucasville: The 11 Day Saga of Hostage Larry Dotson (Bloomington: 1st Books Library, 2003), pp. 163-64.

In fact Snodgrass, if indeed he did stab Elder, did not succeed in killing him. Prosecution witnesses Snodgrass and Tim Williams testified that Snodgrass stabbed Elder repeatedly with an icepick type shank. Tr. at 4395, 3072. The coroner, Dr. Tate, testified that an icepick type instrument made only superficial non-lethal wounds. Tr. at 4842-4845. The lethal injuries appeared to have been made with a "large edge" like a knife. Tr. at 4843, 4845. "When you use a knife, you get an elongated type injury," Dr. Tate explained. Tr. at 4842-43. "The large wounds going into the chest are all elongated, which makes it less likely to be an icepick or an auger type of instrument," Tr. at 4843, and "seemed to be [made with] a large edge," Tr. at 4845.

Snodgrass himself testified that Elder was still alive and moaning when Snodgrass came out of Elder's cell. Tr. at 4395, 4590-91. The fatal stabbing attack occurred afterwards. Tr. at 3076-77, 4550-51, 4590.

Of course, if Skatzes had anything to do with that later attack he would still be complicit in Elder's murder. But he did not. The Opinion asserts that when Roper told Snodgrass that Elder was still alive, Skatzes told Snodgrass that he (Skatzes) would "take care of it." Opinion at Paragraph 137. **This is untrue.** Snodgrass' testimony was as follows:

Q. You said how Lucky Roper came back to the gym after you had been in L-6?

A. Yes.

Q. And yesterday I think you said that someone said, I'll take care of it. Is that Lucky?

A, **Lucky said it. . . .**

Tr. at 4590 (emphasis added). And again:

Q. And then sometime after that, he [Roper] came down to the gym and said he's still alive?

A. Yes.

Q. **And then said he would take care of it?**

A. **Yeah.**

Tr. at 4591 (emphasis added).

Paragraph 8: What Skatzes and Officer Ratcliff Did on April 12

The Opinion accurately recites that on April 12, prison authorities turned off the electricity and water in L block. It then states:

Skatzes shouted from a window with a bullhorn, demanding that the authorities turn the power back on. **He also had C.O.-hostage Ratcliff identify himself using the bullhorn and demand that power be restored inside L block.** [Emphasis added.]

The Court's version of events appears to be drawn from the testimony of prisoner David Lomache, a prosecution witness. See Tr. at 2521.

But Officer Ratcliff's own account of speaking on the bullhorn does not suggest that he felt coerced or that he considered he was asking for something that he did not himself

want. The prisoners told Ratcliff that "they wanted me to speak to my fellow officers because I have been there the longest, they knew me and I could respond and say: I'm alive and I'm okay, and we need water and electric." In answer to the question, "Were you told what to say?" Ratcliff answered:

A. Well, I wasn't told. They said I should ask them if they would turn the water and electricity on so we could see. It was hard to get around the place, we tripped over people on the way up through there.

Ratcliff testified further, "I proceeded to give my message, which was nothing they wanted me to say. It was what I wanted to say." He was also asked at trial, "Were you feeling any pressure in there or it was just go ahead and talk to them, say whatever you want?" and answered, "No, just say what you got to say" Tr. at 5186-90.

Paragraph 10: Skatzes as Negotiator, April 12-14

The following is the totality of what the Opinion provides concerning Skatzes' activity as a negotiator before April 15: During the first half of the riot, Skatzes was one of the lead inmate negotiators. He told the prison negotiators to stop tear-gassing K block, which they were doing to quell a disturbance, "or you are going to cost an officer's life." As he continued to argue with the authorities over the phone, Skatzes declared, "You just cost an officer's life." At that time, however, the inmates did not kill a guard. This is a dramatically incomplete account.

On Monday, April 12, Skatzes accompanied by prisoner Cecil Allen went out on the yard with a bullhorn. According to prosecution witness Snodgrass, other prisoners were fearful that Skatzes might be shot but **Skatzes volunteered with the purpose of starting negotiations and getting the riot over with.** Tr. at 4564-66.⁵

Skatzes became the principal telephone negotiator for the prisoners on Tuesday, April 13 and continued into the evening of Wednesday, April 14. "I'd like to see those officers get out of here," Skatzes said on April 14, and David Burchett, who was negotiating for the State, replied, "I know that you'd like to see them get out of here, because you care about them too. I know you do. So, you and I can work through this." Ex. 295A at 27-28. Skatzes argued that the safety of the officers depended greatly on being able to see what was going on around them. Ex. 295A at 33. Expressing hesitations about inmates talking to the

⁵The authorities made a videotape of Skatzes' negotiations with a megaphone on April 12 and it was entered into evidence as Exhibit 315. I have transcribed it and a summary will be found in Lynd, Lucasville, pp. 54-55.

news media, Burchett asked Skatzes, "How am I going to know that you're not going to hurt one of the news people?" Skatzes responded, "if I wanted to hurt somebody, I'd be in here cutting these hostages' heads off." Ex. 295A at 49. Skatzes also stated, "I'm trying to do everything I can do to assure the safety of these guards." Ex. 295A at 49. Skatzes asked Burchett, "Do you realize what that is to keep people from going off on one another and to keep peace in here and, and everything like that to keep these people from going at them guards?" Ex. 295A at 58. Responding to Burchett's concern that there were so many media that might want to talk to the inmates, Skatzes said, "We're not worrying about hurt feelings, because somebody didn't get to be first. We're worried about lives in here." Ex. 296A at 18.

On the evening of April 14, Skatzes and Burchett agreed that in the morning two hostages would be released in exchange for a live media broadcast by the prisoners. Even according to Sergeant Hudson, principal investigator for the State, spirits were elevated on both sides. Tr. at 2158-61; Ex. 296A at 22-26. Unfortunately this negotiated accord was repudiated at a meeting of gang leaders the next morning.

Paragraph 11: The Hole in the Wall of L7

According to the Court's version of events, at some point during the siege

Skatzes and Robb ordered a crew of inmates to make a hole in a back wall of L7. They planned to kill a C.O. and dangle his body out of the back of L7 where it could be seen from the front of the SOCF by members of the media.

Thus, the hole in the L7 wall alleged in the Opinion was a hole in an outside wall through which an object could be lowered and made visible to media outside L block.

A hole was made in the back wall of L7 but, three prosecution witnesses indicate, it was not made in an outside wall and was for a purpose entirely different than displaying the dead body of a guard. Sergeant Hudson, lead investigator for the State, testified that the hole was "where they had pounded through walls **down into the tunnels**," and referred to "the area where the walls were breached **and they gained access to the tunnel below L-7**." Tr. at 1977 (emphasis added). FBI agent Marc Hopper agreed that the breach in the L-7 wall went "down into the tunnel." Tr. at 2433. Prisoner Tim Williams, a prosecution witness, was the most specific. The hole was in the unit manager's office at the back of the block. It was a hole about "two to three feet in height and about three feet wide." He said that the hole was put there because the prisoners "wanted to tap into the pipes that was down in the pipe chase to get water." And finally:

Q. Do you know who was involved in making that hole?

A. Stick Man [Salyers], Doc Creager and somebody else

. . . .

Q. Do you know who gave them the orders?

A. No, but I know who was there issuing orders after awhile. It was Namir or Elmore.

Tr. at 3109-10.

Paragraph 12: The Purported Meeting of April 14

The Court's narrative describes a meeting on April 14 at which, "[a]ccording to Lavelle, a vote was taken to kill a guard if their demands were not met." Skatzes is said to have attended the meeting and not to have spoken against the decision.

No one other than Lavelle testified so specifically about a meeting on April 14, and even Lavelle stated that no guard was selected to be killed and no detailed plans were made as to how the killing would be done, nor could he recall that a time for the murder was agreed to. Tr. at 3856-57. And very much in contrast to a similar meeting the next morning, April 15, although FBI recording equipment was in place there is no objective record of the meeting Lavelle thought he remembered. Indeed, there is every reason to believe that Lavelle confused the supposed meeting of April 14 with the meeting that took place the next day.

The significant happening on the morning of April 14, not mentioned in the Opinion, was a statement at a press conference by State representative Tessa Unwin to which prisoners listened on battery-powered radios. Unwin was asked about a message painted on a sheet hung out of L block windows to the effect that a guard would die if the authorities ignored prisoners' demands. She responded, "They've been threatening something like this from the beginning. It's part of the language of the negotiation."

All sources -- including prisoner informants David Lomache and Anthony Lavelle, Tr. at 2530-31, 3860-61, and hostage Officer Larry Dotson, who, although blindfolded, could sense the increase in tension around him⁶ -- agree that Ms. Unwin's remark caused many prisoners to feel that they were not being taken seriously, and set the stage for Officer Vallandingham's murder the next day.

Paragraphs 13, 139: Skatzes' Alleged Statement, "I Will Kill the CO"

Skatzes is supposed to have made this statement to Hasan on the evening of April 14. This is perhaps the most striking example of the tendency in the Opinion to select the testimony most damaging to Skatzes, and to set it forth as fact without any effort to assess its truthfulness. If one makes such an attempt one finds:

1. The sole witness to Skatzes' alleged statement was a

⁶Williams, Siege in Lucasville, pp. 129, 131, 143.

prisoner named Miles Hogan. Hogan was cross-examined about his previous description of the incident when interviewed by representatives of the Ohio State Highway Patrol in January 1994, before trial. It was pointed out to him that in January 1994 he did not attribute these words to Skatzes but merely said that Skatzes was standing there at the time.

Q. [Y]ou didn't say that George Skatzes said anything like that, right?

A. I may not have.

Tr. at 3015. In fact, Hogan conceded that in the 1994 interview he confused Stanley Cummings with Siddique Abdullah Hasan, and confused Siddique Abdullah Hasan with Anthony Lavelle. Tr. at 3016-17.

2. Hogan testified that Skatzes made his alleged remark "around nine or ten o'clock" the evening of April 14. But **the State's own records show that Skatzes was negotiating on the telephone at this time:** the transcript of Negotiation Tape #5 states expressly that Skatzes and prison negotiator Dave Burchett were talking on the telephone from 8:23 p.m. to 10:50 p.m. Ex. 296A at 1. Moreover, the transcript shows that the two negotiators ended the evening in a state of exhausted mutual congratulation because, so they had agreed, two hostages were to be released the next day.

Paragraphs 14-15, 140-41: The Meeting of April 15

The Opinion asserts that between 8 and 9 a.m. on the morning of April 15 there was a meeting of gang leaders at which "a vote was taken to kill a C.O., and a member from each inmate gang was chosen to participate in the killing."

Additionally the Opinion states, "According to witnesses at the meeting, Skatzes agreed with the decision to kill a C.O." The Column says that "Skatzes and the others voted to kill a guard if their demands were not met."

Finally, according to the Opinion, after Officer Vallandingham was murdered "Skatzes walked behind those who carried the body" to the yard.

Every one of these assertions is unsupported or dubious. It is true that the April 15 meeting repudiated the agreement Skatzes had negotiated the previous evening for the release of two hostage officers. It is not true that the meeting decided to kill a guard.

There was no vote to kill a C.O. The FBI taped the April 15 meeting. The transcript of that tape is part of the record as Ex. 322A. The following are the only references in the transcript to votes and decisions.

Ex. 322A at 2. Stanley Cummings, who appears to have chaired the meeting, states:

. . . [W]hen I said that I would ask for a show of hands. I want to hear a voice. When we leave up out of here this morning, let's have this established. All three

things. Going to the phone. All that what we talked about in the past concessions.

There is nothing here about killing an officer. Cummings' reference to "all three things" is clarified by his next words:

Let's this be the format. . . . We might have to sit a day or two to do that. Stall to them. We might have to tighten our own belts like they been doing us. Let the first business be our first format for the day. Water, electricity, turn it back on. . . . People up underneath this basement [of the occupied cell block] out from down there. Let this be our first format.

This was a vote on negotiating demands for the day, not about a murder.

Ex. 322A at 15. Cummings summarizes the 45 minute discussion as follows:

Okay, we can but we can sit down and come back in and we put the non-negotiable things up then we came back with the time element that we give them to do it. Hey Jason, ahh, Hasan, why don't we put the non-negotiable things up, George, go back in. Talking about the hardliners came up with non-negotiable things. **Then we going to set down and go over the time element, if they don't do these things. . .** if you don't do these things, the non-negotiable things we going with the time element, then we going to kill them one. Then we open up negotiations again. I mean, is everybody in agreement on that? (Emphasis added.)

In its statement of facts in State v. Robb (2000), 88 Ohio St.3d 59, 62, the Court used certain words taken from the foregoing paragraph to argue that Cummings' statement proved a vote to kill a guard. On the contrary, Cummings projected a second meeting at which participants would "set down and go over the time element" before a guard was to be killed.

Anthony Lavelle, the prosecution's principal witness concerning the April 15 meeting, testified explicitly in State v. Skatzes that "we was going to meet back up later on that afternoon" before making a final decision to kill a guard.

Q. What you are saying is that when you left the meeting on the fifteenth there had been talk of killing a guard, there had been talk of these demands, there had been talk of deadlines, ultimatums, correct?

A. Yes.

Q. But the conversation among the inmates, including yourself, progressed beyond that to the notion of a meeting that afternoon to decide what to do, correct?

A. That's correct.

Q. **When you left that meeting, in your mind, there had not been a final decision made to kill a guard?**

A. That's correct.

Tr. at 4067 (emphasis added.)

Skatzes did not agree with killing a Correctional Officer; according to prosecution witness Snodgrass, Skatzes was the only

participant in the April 15 meeting who expressed misgivings.

The prosecutor asked Snodgrass about Skatzes' participation in the discussion of killing a guard at the April 15 meeting.

A. . . . [T]here was one time when Mr. Skatzes made a comment personally about how he felt about the situation.

Q. What did he say?

A. He said -- well, he put it across like, look brothers, I'm with you; don't get me wrong now, I'm with you, but, you know, before we do this, we better give this a lot of thought because once you kill the correctional officer, it is going to change the whole ball game. In other words, he was trying to dissuade them or make them think of another alternative. . . .

Q. . . . Tell me now who were the people that voted to kill the guard?

A. The only one that actually spoke up anything to the contrary was Mr. Skatzes.

Tr. at 4435-36.

The allegation that a member of each gang was chosen to take part in a killing contradicts the State's own evidence.

This supposed fact appears to be drawn from the testimony of a prisoner informant named Stacey Gordon.

The April 15 meeting ended just before 9 a.m. and the murder of Officer Vallandingham appears to have occurred between 10:30 and 11 a.m. Gordon says that "Robb was on the phone talking to a negotiator, and they eventually got into an argument, real heated exchange, where they slammed the phone down a couple of times." Tr. at 4253. However, the State's own transcripts indicate that Skatzes was the only prisoner who negotiated on the telephone that morning. Gordon was apparently under the mistaken impression that Robb was the prisoners' negotiator that morning and that "me and George Skatzes, we was securing the phones." Tr. at 4253.

Equally implausible is Gordon's account of how Skatzes acted as doorkeeper for the death squad, letting them into L2 and then informing them, one or two hours later, that they would not be needed. Tr. at 4254, 4256. According to the State's own evidence, Skatzes was negotiating on the telephone all this time.

Skatzes could not have walked behind those who carried Officer Vallandingham's body to the yard because he was still negotiating on the telephone or at the cell of Officer Ratcliff.

Notes taken by officers who were listening in on the telephone negotiations from the tunnels underneath L block report the following:

10:45 Skatzes talking -- not clear . . .

10:50 Still talking. Phone rings Talking about last night's deal [between Burchett and Skatzes for the release of two hostages]. Phone rings again while Skatzes talking. . . .

10:53 Background voice said something about a dead

body.

Defense Ex. D. These notes were recorded by Officer Richard Cunningham. See Tr. at 2195-96.

There is an additional page of notes by Officer Cunningham that was not entered into evidence. It records that Skatzes was still talking on the telephone after 11 a.m.

10:54 Skatzes talking on phone. Appears to be negotiating with someone

10:55 Skatzes still talking. Phone rings once while Skatzes talks.

11:02 Skatzes still talking on phone. Content unclear. Seems to be dealing with demands and how to work them out. . . . Seems to be talking about turning power on. "Wasting valuable time."

11:06 Off phone (I believe). No more of Skatzes' voice.

According to an observation by Lieutenant Newsome in Tower 5, also not entered into evidence, at 11:05 a.m. he observed "4 black inmates dragging a sheet containing ? [sic] from M2 gym door. Back in M2 gym door and secured at 11:09."

There is a second reason for believing that Skatzes did not accompany Officer Vallandingham's body to the yard. It will be recalled that Skatzes had moved Officer Ratcliff into a cell in L2. Ratcliff was asked how he learned about Officer Vallandingham's death. He answered:

A. George came up to the cell, and he sat there and he wasn't himself, you know, usually, he would be a different way, and he was quiet. We was like: What's wrong? What's going on? . . .

Inmate came up and asked to speak to George privately out of our cell, and he went out. He come back. He said: Man, I can't believe it. He just -- I can't act the way he was acting when it happened. He come in, he had his head down, he was rubbing his head, he said: I can't believe this, I can't believe it happened. I said: What? He says, I think they really did a guard. . . .

Tr. at 5157-58.

Ratcliff testified that, at Skatzes' suggestion, Skatzes, Officer Ratcliff, Officer Clark, and one of two other prisoners then got on the floor, held hands, and prayed. Tr. at 5159. Officer Clark corroborated this testimony. Tr. at 2353.

Paragraphs 14, 140: The Words "Guaranteed Murder"

Both the Opinion and the Column stress the fact that when Skatzes resumed telephone negotiations after the April 15 meeting, he demanded that water and electricity be turned back on or there would be a "guaranteed murder." It is true that he used those words. It is also true that, read in context, their evident intent was to try to save life.

Skatzes testified that he went to the phone when the morning meeting ended. He had been told what to say. He was trying to

get the State's negotiator to understand that the threat was real. He was worried that a correctional officer would die and in absolute frustration he used the words, "guaranteed murder": the State feared that if water and electricity were turned on, someone might be electrocuted; but if they were not turned on, Skatzes realistically predicted, an officer would be killed. Tr. at 2238, 5377-83.

The fragmentary record supports Skatzes' recollection. Sergeant Hudson himself was at the command post at this time, and he read into the record his notes on the conversation between Skatzes and negotiator Dirk Price beginning at 9:35 a.m. Tr. at 2235-39. When Skatzes returned to the telephone as instructed, he predicted that an officer would be killed if the water and electricity were not turned back on. Tr. at 5380-81; Neg. Tape #6, Ex. 297 (Ex. 297A at 2); Defense Ex. A. Skatzes stated further that he could not negotiate anything else until the inmates had water and electricity. Price expressed a concern that there was a question of safety because of electric damage, to which Skatzes responded that there was no electric damage and he knew what would happen if the electricity were not turned on. Tr. at 2237-38.

At 10:19 a.m. Skatzes alerted the State, "If you don't get the lights and water on, there's going to be a dead hostage." Tr. 2195. This same patch of conversation was recorded on Negotiation Tape #6. A fragment catches these words by Skatzes, Ex. 297A at 2:

I stress to you, . . . if you turn this on, you, you think you might electrocute somebody. . . . If you don't turn it on, it's a guaranteed murder.

Paragraphs 20-21, 143-45: The Murder of David Sommers

The Opinion's narrative of the murder of David Sommers on April 21 begins with the statement: "during a meeting in L2 between Robb, Lavelle, and Sanders, the gang leaders decided that inmate David Sommers, who controlled the phones and ran the inmates' tape player throughout the negotiations 'had to die, he knew too much'." Continuing, the Opinion declares: "Brookover [,] . . . Skatzes, Snodgrass, and Bocook . . . changed into different clothes. . . . Skatzes struck Sommers in the head with a baseball bat at least three times. . . . The coroner attributed death to a massive blow on the head."

There are several problems with this narrative.

There is no evidence of prior intent by Skatzes to kill Sommers. Skatzes was not part of the reported meeting of "gang leaders" about Sommers. Even if intent can be inferred from a change of clothes, prosecution witness Snodgrass was unclear whether Skatzes was among those who changed clothes on April 21. Snodgrass testified: "I can't say if Mr. Skatzes did or not." Tr. at 4480. Finally, Snodgrass also testified that the intent of whichever Aryans went to L7 on April 21 was not to kill

Sommers, but was directed at three other prisoners, Tr. at 4477, and Ohio law does not contemplate transferred intent from one victim to another.

In another trial the State designated another prisoner as the man who struck the massive blow that killed Sommers.

Brookover testified that Bocook, Jefferson, and he himself each struck Sommers with a baseball bat. Tr. at 3506, 3543, 3564. And in the later trial of Aaron Jefferson, Prosecutor Crowe told the jury:

If there was only one blow to the head of David Sommers, the strongest evidence you have [is that] this is the individual -- I won't call him human -- this is the individual that administered that blow. . . . **If there was only one blow, he's [Jefferson] the one that gave it.** He's the one that hit him like a steer going through the stockyard, the executioner with the pick axe, trying to put the pick through the brain.

State v. Jefferson, Tr. at 656-57 (emphasis added).

III

I have sought to show that in State v. Skatzes the Ohio Supreme Court produced a factual narrative that: 1. relies on the testimony of jailhouse informants, with no apparent attempt to assess the truth of the facts asserted by these inherently unreliable witnesses; 2. does not cite to the record; 3. contains **disputed material facts that go to the guilt or innocence of George Skatzes with respect to all three murders for which he was convicted.**

The unpersuasive fact-finding of the Court in this case is equally apparent in its decisions about other Lucasville prisoners sentenced to death (Robb, Sanders, Lamar).

Clearly the deficiencies in these decisions go to the general process by which defendants are sentenced to death in Ohio. The juries in capital cases make no findings of fact. The opinions of trial court judges are cursory and, to be frank, are riddled with errors. The judges of Ohio appellate courts find facts but have no opportunity to witness the demeanor and assess the credibility of witnesses.

This is why, as an historian as well as an attorney, I believe further inquiry is merited. I urge Ohioans of all descriptions to join in **calling for a moratorium on executions in Ohio while the disputed material facts in this and other capital cases are further examined.**

Sincerely,

s/Staughton Lynd