CASE NO. 08-3249
Death Penalty Case

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STANLEY JALOWIEC,
Appellant,

v.

MARGARET BRADSHAW, Warden,
Appellee.

On Appeal From the United State District Court
For the Northern District of Ohio

WARDEN'S APPENDIX
VOLUME 10 of 17, Pages 3708-4290

Respectfully submitted,

RICHARD CORDRAY
Attorney General of Ohio

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Assistant Attorney General
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Capital Crimes Unit
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COUNSEL OF APPELLEE

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MOTION, ENTRY AND CERTIFICATION FOR APPOINTED COUNSEL FEES

COURT OF APPEALS
FILED
LORAIN COUNTY
'98 MAY 8 12 04 PM
CLERK OF COMMON PLEAS
DONALD C. NOTHGERY

In the Ninth District Court of Appeals, Ohio

Plaintiff: State of Ohio

Case No. 95CR 046840

Appellate Case No. (if app.) 96 CA 006445

V. Stanley Jalowiec

☐ Capital Offense Case (*check if Capital Offense case*)

☐ Guardian Ad Litem (*check if appointed as GAL*)

Defendant / Party Represented

In re:

Judge DOSMA GLAVAS

ENTERED

9TH APPELLATE DISTRICT

MOTION FOR APPROVAL OF PAYMENT OF APPOINTED COUNSEL FEES AND EXPENSES

The undersigned having been appointed counsel for the party represented moves this Court for an order approving payment of fees and expenses as indicated in the itemized statement herein. I certify that I have received no compensation in connection with providing representation in this case other than that described in this motion or which has been approved by the Court in a previous motion, nor have any fees and expenses in this motion been duplicated on any other motion. I, or an attorney under my supervision, have performed all legal services itemized in this motion.

☐ Periodic Billing (*check if this is a periodic bill*)

As attorney/guardian ad litem of record, I was appointed on May 24, 1996. This case terminated and/or was disposed of on April 15, 1998. I am submitting ~~this~~ application on May 8, 1998.

Name Patricia J. Smith Signature Patricia J. Smith

Address 4403 St. Clair Ave Cleveland Ohio 44103 SSN/Tax ID [redacted]

No. and Street *City* *State* *Zip*

SUMMARY OF CHARGES, HOURS, EXPENSES, AND BILLING

	OFFENSE/CHARGE/MATTER*	ORC/CITY CODE	DEGREE	DISPOSITION
1)	Aggravated Murder w/spec's	2903.01(A)(I)	Death Penalty	Affirmed
2)				
3)				

*List only the three most serious charges beginning with the one of greatest severity and continuing in descending order.

	1	2	3	4	5	6	HRS: OUT	7	8	9	10	11	12	HRS: IN
GRAND TOTAL HRS.	6.0	4.0	73.9	8.2	2.5	6.3	100.9						1.0	1.0

Enter the grand totals from the Itemized Fee Statement on the reverse side of this form.

☐ Flat Fee Hrs:In 1.0 X Rate 50.00 = $ 50.00 Tot. Fees $ 4086.00

☐ Min. Fee Hrs:Out 100.9 X Rate 40.00 = $ 4036.00 Expenses $ 0 Total $

JUDGMENT ENTRY

ENTERED

The Court finds that counsel performed the legal services set forth on the itemized statement on the reverse hereof, and that the fees and expenses set forth on this statement are reasonable, and are in accordance with the resolution of the Board of County Commissioners of LORAIN County, Ohio relating to payment of appointed counsel, that all rules and standards of the Ohio Public Defender Commission and State Public Defender have been met.

IT IS THEREFORE ORDERED that counsel fees and expenses be, and are hereby approved, in the amount of $ 2,000.00. It is further ordered that the said amount be, and hereby is, certified by the Court to the County Auditor for payment.

☐ *Extraordinary fees granted (copy of journal entry attached)* Judge _____ *Signature* *Date*

COURT OF APPEALS
FILED
LORAIN COUNTY
'98 MAY 8
CLERK OF COMMON PLEAS
DONALD C. NOTHGERY
9th APPELLATE DISTRICT

CERTIFICATION

The County Auditor, in executing this certification, attests to the accuracy of the figures contained herein. A subsequent audit by the Ohio Public Defender Commission and/or Auditor of the State which reveals unallowable or excessive costs may result in future adjustments against reimbursement or repayment of audit exceptions to the Ohio Public Defender Commission.

County Number _____ Warrant Number _____ Warrant Date _____

County Auditor _____ Journal 104 Page 910 (53)

OPD 1026R (4/96)

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 3708

CASE NUMBER 96 CA 006445 ATTORNEY/GAL Patricia J. Smith

IF A CAPITAL OFFENSE CASE, LIST CO-COUNSEL'S NAME HERE: Kreig Brusnahan

I hereby certify that the following time was expended in representation of the defendant/party represented:

ITEMIZED FEE STATEMENT

DATE OF SERVICE	OUT-OF-COURT HOURS							IN-COURT HOURS						
	INTERVIEWING	INVESTIGATION	RESEARCH & WRITING	NEGOTIATION & CONFERENCES	TRAVEL	OUT-OF-COURT OTHER	TOTAL	PRE-TRIAL HEARINGS	TRIAL	PLEA HEARING	DISPOSITIONAL HEARING	POST-TRIAL HEARING	IN-COURT OTHER	TOTAL
	1	2	3	4	5	6		7	8	9	10	11	12	
5/24/96		.5				1.0	1.5							
5/29/96	1.0			.2			1.2							
7/8/96			.2				.2							
7/15/96	.5			.4			.9							
7/19/96			.2				.2							
7/24/96		.5		.2			.7							
8/15/96			.2				.2							
8/27/96			.2				.2							
9/23/96			.2				.2							
10/7/96			.2			.7	.9							
10/15/96				.5			.5							
10/16/96			6.0			.2	6.2							
10/17/96			6.0				4.0							
10/18/96			6.0				6.0							
10/19/96			6.0				6.0							
10/20/96			3.5				3.5							
10/24/96			.7				.7							
11/4/96			.3				.3							
11/7/96			.7				.7							
sub-total TOTAL HOURS	1.5	2.0	30.7	1.3		1.9	36.1							
	1	2	3	4	5	6	HRS: OUT	7	8	9	10	11	12	HRS: IN

Time is to be reported in tenth of an hour (6-minute) increments.

I hereby certify that the following expenses were incurred:*

Use the following categories for type: *(1) Experts (2) Postage/Phone (3) Records/Reports (4) Transcripts (5) Travel (6) Other*

EXPENSE	TYPE	PAID TO	AMOUNT
		TOTAL	

*To obtain reimbursement, the purpose of each expense must be clearly identified, and a receipt must be provided for each expenditure over $1.00.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 3709

CASE NUMBER 96 CA 00[redacted]45 ATTORNEY/GAL Pat[redacted] J. Smith

ITEMIZED FEE STATEMENT CONTINUATION SHEET

DATE OF SERVICE	OUT-OF-COURT HOURS							IN-COURT HOURS						
	INTERVIEWING	INVESTIGATION	RESEARCH & WRITING	NEGOTIATION & CONFERENCES	TRAVEL	OUT-OF-COURT OTHER	TOTAL	PRE-TRIAL HEARINGS	TRIAL	PLEA HEARING	DISPOSITIONAL HEARING	POST-TRIAL HEARING	IN-COURT OTHER	TOTAL
	1	2	3	4	5	6		7	8	9	10	11	12	
11/16/96			.2				.2							
11/29/96				.5			.5							
12/2/96			.3				.3							
12/12/96			.2				.2							
12/23/96			.2				.2							
12/27/96			.7				.7							
1/2/97	2.5				2.5		5.0							
1/9/97				.3			.3							
1/15/97		.5				1.0	1.5							
1/24/97		2.5					2.5							
1/27/97			.2				.2							
2/3/97			.3				.3							
2/4/97				1.0			1.0							
2/8/97			5.0				5.0							
2/9/97			10.0				10.0							
2/12/97			5.0				5.0							
2/13/97			2.0				2.0							
2/14/97			2.0			1.0	3.0							
2/17/97				.2			.2							
2/19/97	.3						.3							
3/9/97				.2			.2							
3/25/97				.3			.3							
4/6/97				.2			.2							
4/8/97				1.0			1.0							
4/15/97			1.0			.5	1.5							
4/18/97			1.5				1.5							
5/7/97				.2			.2							
5/17/97	.3						.3							
Sub-total TOTAL HOURS	3.1	3.0	28.6	3.9	2.5	2.5	43.6							
	1	2	3	4	5	6	HRS: OUT	7	8	9	10	11	12	HRS: IN

Time is to be reported in tenth of an hour (6-minute) increments.

OPD-1027R (9/95)

CASE NUMBER 96 CA 00644 ATTORNEY/GAL Patricia J. Smith

ITEMIZED FEE STATEMENT CONTINUATION SHEET

DATE OF SERVICE	OUT-OF-COURT HOURS							IN-COURT HOURS						
	INTERVIEWING	INVESTIGATION	RESEARCH & WRITING	NEGOTIATION & CONFERENCES	TRAVEL	OUT-OF-COURT OTHER	TOTAL	PRE-TRIAL HEARINGS	TRIAL	PLEA HEARING	DISPOSITIONAL HEARING	POST-TRIAL HEARING	IN-COURT OTHER	TOTAL
	1	2	3	4	5	6		7	8	9	10	11	12	
6/3/97				.2			.2							
6/12/97				.3			.3							
6/13/97	1.2						1.2							
6/14/97			.2				.2							
6/26/97			.1				.1							
8/4/97			.3				.3							
8/25/97			1.2				1.2							
9/5/97						.1	.1							
9/10/97			.2				.2							
9/17/97			.3				.3							
10/13/97						.1	.1							
10/15/97			.2				.2							
11/6/97						.1	.1							
11/17/97			.2			.1	.3							
12/8/97			.2				.2							
12/22/97			.2				.2							
1/13/98			.2			.5	.7							
1/17/98				2.0			2.0							
1/26/98			6.0				6.0							
1/27/98			2.0				2.0							
1/29/98						.5	.5						1.0	1.0
2/6/98			.5	.5			1.0							
2/23/98			.2				.2							
3/16/98			.5				.5							
4/17/98			1.2				1.2							
4/20/98	.2		1.0			.5	1.7							
5/7/98			.2				.2							
sub-total	1.4		14.9	3.0		1.9	21.2						1.0	1.0
TOTAL HOURS	6.0	4.0	73.9	8.2	2.5	6.3	100.9						1.0	1.0
	1	2	3	4	5	6	HRS: OUT	7	8	9	10	11	12	HRS: IN

Time is to be reported in tenth of an hour (6-minute) increments.

OPD-1027R (9/95)

FINANCIAL DISCLOSURE / AFFIDAVIT OF INDIGENCY

I. PERSONAL INFORMATION

Name	SS#	D.O.B.

Mailing Address	City	State	Zip	Phone ( )

Residence (if different from above)	Message Phone (within 48 hours) ( )

II. OTHER PERSONS LIVING IN HOUSEHOLD

Name	Age	Relationship	Name	Age	Relationship
1)			3)		
2)			4)		

III. MONTHLY INCOME / EMPLOYMENT INFORMATION

Type of Income	Self	Spouse	Household Members	Total
Employment (Gross)				
Unemployment				
Workers' Comp.				
Pension				
Social Security				
Child Support				
ADC				
Disability				
Food Stamps				
Other				

Employer's Name (for all household members)	SUBTOTAL A	$

Address	Phone ( )

IV. ALLOWABLE MONTHLY EXPENSES

Type of Expense	Amount
Child Support Paid Out	
Child Care (if working only)	
Transportation for Work	
Insurance	
Medical / Dental	
Medical & Associated Costs of Caring for Infirm Family Members	
SUBTOTAL B	$

V. TOTAL INCOME

Total Monthly Income - Total Allowable Expenses = Total Income

	SUBTOTAL A	$
-	**SUBTOTAL B**	- $
	GRAND TOTAL C	$

VI. ASSET INFORMATION

Type of Asset	Describe / Length of Ownership / Make, Model, Year (where applicable)	Estimated Value
Real Estate / Home		
Stocks / Bonds / CD's		
Automobiles		
Trucks / Boats / Motorcycles		
Other Valuable Property		
Cash on Hand		
Money Owed to Applicant		
Other		
Checking Acct. (Bank / Acct. #)		
Savings Acct. (Bank / Acct. #)		
Credit Union (Name / Acct. #)		
	GRAND TOTAL D	$

VII. MONTHLY LIABILITIES / OTHER EXPENSES

Type of Liability	Amount
Rent / Mortgage	
Food	
Electric	
Gas	
Fuel	
Telephone	
Cable	
Water / Sewer / Trash	
Credit Cards	
Loans	
Taxes Owed	
Other	
GRAND TOTAL E	

VIII. GRAND TOTALS

Total Monthly Income — Grand Total C: _____

Total Assets — Grand Total D: _____

Total Monthly Liabilities and Other Expenses — Grand Total E: _____

IX. AFFIDAVIT OF INDIGENCY

I, _____ being duly sworn, say:

1. I am financially unable to retain private counsel without substantial hardship to me or my family.
2. I understand that I must inform my attorney if my financial situation should change before the disposition of my case.
3. I understand that if it is determined by the county, or by the Court, that legal representation was provided for me to which I was not entitled, I may be required to reimburse the county for the costs of representation provided. Any action filed by the county to collect legal fees hereunder must be brought within two years from the last date legal representation was provided.
4. I understand that I am subject to criminal charges for providing false financial information in connection with the above application for legal representation pursuant to Ohio Revised Code Sections 120.05 and 2921.13(A)(13), (D)(4).
5. I hereby certify that the information I have provided on this financial disclosure form is true to the best of my knowledge.

_____
Client's Signature Date

Notary Public:

Subscribed and duly sworn before me according to law, by the above named applicant this _____ day of _____, 19____ at _____, County of _____ and State of _____.

_____
Notary's Signature

X. JUDGE CERTIFICATION

I hereby certify the above-noted client is unable to fill out and/or unable to sign this financial disclosure/affidavit for the following reason: Refused to sign affidavit.
I have determined that the applicant meets the criteria for receiving court appointed counsel.

_____ 5/4/98
Judge's Signature Date

OPD-206R (4/96)

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 3714

JOURNAL ENTRY

COURT OF COMMON PLEAS

Lorain County, Ohio

Donald J. Rothgery, Clerk

Case. No. 95CR046840

State of Ohio — Plaintiff — Attorney for Plaintiff

vs.

Stanley E. Jalowiec — Defendant — Attorney for Defendant

Date 5-24-96 J.E. Vol. ____ Page ____

Attorney Kreig Brusnahan and Attorney Patricia Smith are hereby appointed as co-counsel to represent the Defendant, Stanley E. Jalowiec for the purpose of appeal. Transcripts to be obtained for said appeal at State's expense.

Judge

COURT OF APPEALS
FILED
LORAIN COUNTY
MAY 21 11 13 AM '98
CLERK OF COMMON PLEAS
DONALD J. ROTHGERY
9th APPELLATE DISTRICT

STATE OF OHIO) IN THE COURT OF APPEALS
) NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN)

STATE OF OHIO) C.A. NO. 96CA006445
)
Appellee)
)
v.)
)
STANLEY E. JALOWIEC)
)
Appellant) JOURNAL ENTRY

ENTERED

The appellant has moved for appointment of counsel for the purpose of appealing his conviction and death sentence to the Ohio Supreme Court. The motion is moot. On April 24, 1998, this court appointed Patricia Millhoff and Nathan Ray as counsel to represent appellant on appeal to the Ohio Supreme Court; all forms required by Rule 21 of the Rules of Superintendence for the Courts of Ohio were timely submitted.

John W. Reece
Judge

cc: Patricia J. Smith, Attorney at Law, 4403 St. Clair Avenue, Cleveland, Ohio 44103.

Kreig Brusnahan, Attorney at Law, 158 Lear Road, Suite A, Avon Lake, Ohio 44012.

Gregory White, Prosecutor, 226 Middle Avenue, Elyria, Ohio 44035.

ks1:p22/5-19

Journal 94 Page 127

(54)

GENERAL INFORMATION

CASE: 98-1074 Death Penalty Case (offense committed prior to 1/1/95)
FILED: 06/01/98

State of Ohio
v. Stanley E. Jalowiec

PARTIES AND ATTORNEYS

Stanley E. Jalowiec; ANT - Appellant
REPRESENTED BY: Patricia Ann Millhoff , ATTORNEY OF RECORD
REPRESENTED BY: Nathan Allan Ray

State of Ohio; AEE - Appellee
REPRESENTED BY: Jonathan Earl Rosenbaum , ATTORNEY OF RECORD
REPRESENTED BY: Gregory Allen White

DOCKET ITEMS

DATE	DESCRIPTION	FILED BY
06/01/98	Notice of appeal by Stanley E. Jalowiec	ANT
06/02/98	Copy of notice of appeal sent to clerk of court of appeals	
06/03/98	Order to clerk of court/custodian to certify record	
06/17/98	Record Clerk's notice of filing of record	
07/22/98	Request for extension of time to file merit brief	ANT
DECISION:	07/23/98 Granted; appellant's merit brief due 8/6/98	
07/30/98	Motion to remand to trial court to complete record	ANT
DECISION:	08/26/98 Denied	
07/30/98	Or motion for stay of Supreme Court proceedings	ANT
DECISION:	08/26/98 Denied	
08/10/98	Memo opposing motion to remand to trial court to complete record	AEE
08/17/98	Motion to withdraw as counsel	ANT
DECISION:	09/23/98 Denied	
08/25/98	Memo opposing motion to withdraw	AEE
09/23/98	Entry: sua sponte, appellant's merit brief due 7 days from the date of this entry	
09/25/98	Motion for leave to proceed pro se	ANT
DECISION:	12/09/98 Denied	
09/30/98	Appellant's merit brief	ANT
11/05/98	Motion to strike appellant's merit brief	AEE
DECISION:	12/23/98 Denied; appellee may file a merit brief within 14 days of the date of this entry	
11/13/98	Memo opposing motion to strike appellant's merit brief	ANT
12/31/98	Appellee's merit brief	AEE

CASE INFORMATION CONTINUED ON NEXT PAGE.

CASE: 98-1074 DOCKET ITEMS (CONTINUED)

08/28/00	Notice of oral argument to be held 11/14/00	
04/04/01	Upon consideration of the merits	
DECISION:	04/04/01 Affirmed; sentence to be carried into execution 7/3/01	
04/11/01	Return receipt received by Jonathan E. Rosenbaum	
04/13/01	Motion for reconsideration	ANT
DECISION:	05/23/01 Denied	
04/20/01	Return receipt received by Nathan A. Ray	
04/30/01	Return receipt returned unclaimed from Patricia A. Millhoff	
05/04/01	Motion for stay of execution pending U.S.S.C. decision on petition for writ of certiorari	ANT
DECISION:	05/31/01 Granted; stay in effect until disposition of USSC appeal	
05/04/01	And motion for stay pending disposition of all available state remedies	ANT
DECISION:	05/31/01 Granted; stay in effect until exhaustion of state post-conviction remedies	
05/23/01	Certified copy of judgment entry sent to clerk	
	Issuance of mandate	
	Copy of rehearing entry sent to clerk	
05/25/01	Return receipt received by Sandra Shaffer	
05/29/01	Return receipt received by Warden Harold Carter	
05/30/01	Return receipt received by Clerk of Courts	
	Return receipt received by Carrie Glaeden	
	Return receipt received by Nathan A. Ray	
	Return receipt received by Jonathan E. Rosenbaum	
05/31/01	Return receipt received by Patricia A. Millhoff	
06/04/01	Return receipt received by Sandra Shaffer	
06/05/01	Return receipt received by Carrie Glaeden	
06/06/01	Motion for stay of execution of death sentence during pendency of state postconviction remedies	ANT
	Return receipt received by Nathan A. Ray	
	Return receipt received by Jonathan E. Rosenbaum	
	Return receipt received by Warden Harold Carter	
	Return receipt received by Clerk of Courts	
06/11/01	Application for attorney fees by Nathan A. Ray	ANT
DECISION:	08/09/01 Granted in the amount of $5,016.90	
06/25/01	Return receipt returned unclaimed from Patricia Millhoff; resent regular mail on 6/25/01	
08/23/01	Notice of filing petition for certiorari in U.S.S.C.	ANT
10/15/01	Notice of U.S.S.C. denial of petition for writ of certiorari	
03/28/02	Return of record to clerk of court/custodian; FedEx Ground	
09/25/02	Return of record to clerk of court/custodian	

*** E N D O F C A S E I N F O R M A T I O N ***

NAF of Stanley E. Jalowiec (ANT)

ORIGINAL

98-1074

IN THE SUPREME COURT OF OHIO

State of Ohio Appellee -vs- Stanley E. Jalowiec Appellant	)	On Appeal from the Lorain County Court of Appeals Ninth Appellate District Court of Appeals Case No. 96 CA 006445 **THIS IS A DEATH PENALTY CASE**

NOTICE ON APPEAL OF APPELLANT STANLEY E. JALOWIEC

THIS CRIME WAS COMMITTED PRIOR TO JANUARY 1, 1995

Patricia A. Millhoff (0013835)
80 West Bowery Street, Ste. 310
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COUNSEL FOR APPELLANT, STANLEY E. JALOWIEC

FILED
JUN 01 1998
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Gregory A. White
Lorain County Prosecutor
226 Middle Avenue
Elyria, OH 44035

COUNSEL FOR STATE OF OHIO

Notice of Appeal of Appellant Stanley E. Jalowiec

Appellant Stanley E. Jalowiec hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lorain County Court of Appeals, Ninth Appellate District, entered in the Court of Appeals Case No. 96 CA 006445 on April 15, 1998.

This is an appeal as of right pursuant to Supreme Court Practice R. II (1) (A) (1).

Respectfully Submitted,

By: Patricia A. Millhoff
Patricia A. Millhoff

By: Nathan A. Ray
Nathan A. Ray

COUNSEL FOR APPELLANT,
STANLEY E. JALOWIEC

Proof of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellee, Gregory A. White, Lorain County Prosecutor, 226 Middle Avenue, Elyria, OH 44035 on May 13, 1998.

Patricia A. Millhoff
Patricia A. Millhoff

COUNSEL FOR APPELLANT,
STANLEY E. JALOWIEC

STATE OF OHIO	)	IN THE COURT OF APPEALS
	) ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO	)	C.A. NO. 96CA006445
	)	
Appellee	)	
	)	
v.	)	APPEAL FROM JUDGMENT
	)	ENTERED IN THE
STANLEY E. JALOWIEC	)	COMMON PLEAS COURT
	)	COUNTY OF LORAIN, OHIO
Appellant	)	CASE NO. 95CR046840

DECISION AND JOURNAL ENTRY

Dated: April 15, 1998

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

REECE, Judge.

Appellant Stanley Jalowiec appeals from his conviction on one count of aggravated murder with specifications and his sentence of death. We affirm.

On June 7, 1993, Ronald Lally, an informant for the Elyria Police Department, purchased crack cocaine from Raymond Smith and Danny Smith, Raymond's son. At the time, Lally was wired by the police, and three officers listened to and taped the drug buy. As a result, both Raymond and Danny were arrested and charged with aggravated drug trafficking. Raymond and Danny

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were to be tried on the drug charges on January 19, 1994.[1]

On September 15, 1993, Patrolman John Homoki of the Elyria Police Department responded to a disturbance call outside a fast-food restaurant. As Patrolman Homoki approached in his vehicle, he saw Jalowiec walking away from the area and Danny Smith in front of the restaurant door. Homoki exited his vehicle, and Ron Lally, who was an acquaintance of Homoki, hurried toward the police car. Lally was very agitated and told Homoki, "John, these guys are going to f*** me up." Lally indicated that Jalowiec and Danny had threatened his life. At that point, Jalowiec was standing across the street from the restaurant.

The night of January 18-19, 1994, was one of the coldest nights on record in northeast Ohio. The evening of January 18, the day before the Smiths' drug trial, Jalowiec and an acquaintance, Brian Howington, went to Lally's apartment and smoked crack cocaine with Lally and Lally's roommate. After an hour or two, Howington, Lally, and Jalowiec drove to the house of Howington's aunt, Joann Fike, who was also known as "Queen Bee." Once there, Howington, Lally and Jalowiec smoked more crack cocaine and played pool. At some point after 1 a.m., Jalowiec told Howington that he was going to borrow Fike's car. Howington testified at trial that he believed Jalowiec said

[1]The record is unclear as to whether there were to be separate trials, or whether Raymond and Danny were to be tried together.

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this after receiving a page on his pager. Howington initially resisted, but later he relented. Lally left with Jalowiec in Fike's car.

That same night, Raymond and Danny were out drinking with several friends and with Michael Smith, another son of Raymond. After the bar where the group was drinking closed at 2:30 a.m., the group went to a restaurant across the street to eat. During the meal, Raymond made a phone call. Thereafter, Raymond indicated to the others that it was time to leave. Raymond, Danny, Michael, and Danny's girlfriend left in Danny's car.

Danny drove the car to South Middle Avenue in Elyria. Raymond got out of the car and told Michael to accompany him. Michael asked what they were waiting for, and Raymond responded, "A ride," and "Just look for Queen Bee's car." A while later, Jalowiec arrived in Fike's car with Lally. Raymond and Michael entered the car, and the four drove off.

Once inside the car Jalowiec was driving, Raymond introduced Michael to Lally, then pulled out a gun and told Lally not to move. Jalowiec drove the car to a Speedway gas station. Raymond exited the car and purchased some beer and cigarettes and put gas in the car. Lally made no attempt to leave. Raymond re-entered the car, and they drove off. At that point, Raymond asked Lally, "Why did you set my son up[?]" Lally denied that he had set up Danny and Raymond. After a while, Raymond told Lally that they were going to put Lally on a bus and send him out of town so that he could not testify at Danny's

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trial. Lally agreed. The four then began drinking the beer and smoking crack cocaine as Jalowiec continued to drive toward Cleveland.

When they arrived in Cleveland, Raymond asked where they could purchase more crack cocaine for Lally to take on his trip. Michael told him to go to East Cleveland. However, as the car headed in that direction, they encountered police and fire trucks, so Jalowiec drove toward downtown Cleveland again. Raymond then directed Jalowiec where to drive. Eventually, they ended up in a cemetery in Woodland.

Raymond got out of the car, put the gun in Lally's face, and ordered Lally to get out of the car. Lally complied. Raymond then said, "You will never snitch on nobody again." Michael testified that he heard a gun shot, followed by Lally saying, "You shot me in my head, you shot me in my head." Raymond then told the others in the car to get out and help him. Jalowiec left the car; Michael dropped his head and remained in the car. Michael testified that he heard "thumps like hitting" and that he heard Lally saying that he would not tell anyone and begging that they not kill him. Raymond asked Jalowiec if he had a knife, and Jalowiec responded that he did not. Jalowiec then returned to the car and removed something. Michael testified that there was silence for a period of two to five minutes, followed by someone opening the trunk. Michael felt the car move as if Raymond and Jalowiec were trying to put something in the trunk and heard them say words to the effect of "He ain't going to fit, he

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ain't going to fit, he is too stiff." Michael then heard something drop to the ground.

Raymond and Jalowiec re-entered the car, with Jalowiec assuming the driver's seat. Jalowiec then put the car into drive, moved forward a short distance, and put the car in reverse. The car's movement was stopped by what Michael surmised to be Lally's body. Jalowiec repeated this two more times. Jalowiec then drove the car away. As they drove, Raymond chastised Michael for not helping with the killing and also took the gun apart, throwing a piece of the gun out the car window about every couple of miles.

When the three returned to Elyria, Jalowiec and Raymond dropped off Michael at Danny's house. Raymond and Jalowiec returned Fike's car at about 5 a.m. It was covered with ice, as if it had been washed on that cold night. When Fike inspected the car, she found blood on it. She asked Jalowiec to explain, and he said that he had been in a fight with someone that night in Elyria.

Lally's body was discovered at approximately 10 a.m. on January 19, 1994. Officers from the Cleveland Police Department investigated the scene, collected evidence (including a large knife), and transported Lally's body to the Cuyahoga County Coroner's Office. Through the testimony of police officers, a forensic pathologist, and a forensic serologist, it was established that Lally's head was struck at least eleven times, that his throat was slashed superficially,

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and that he had been shot in the head, with the bullet splitting his tongue and lodging against Lally's spinal column. Lally had numerous lacerations and scrapes all over his body, and his lips were split. The causes of death were established as the blows Lally received and exposure to the extreme cold of that night. The time of death was placed between 2:30 a.m. and 8:30 a.m. Tests also showed that Lally had traces of crack cocaine in his system, but no signs of alcohol.

After a lengthy investigation, Jalowiec was indicted by the Lorain County Grand Jury on March 8, 1995. Jalowiec was indicted on one count of aggravated murder for the death of Lally. Two specifications accompanied the aggravated murder charge: the first was a firearm specification; the second was a specification that Jalowiec killed Lally to prevent Lally from testifying in a criminal proceeding. Jalowiec pleaded not guilty to the aggravated murder charge and the specifications.

The case was tried before a jury in the Lorain County Court of Common Pleas. Voir dire began on March 12, 1996, and a jury of twelve with two alternates was seated on March 13, 1996. Opening statements in the guilt phase of Jalowiec's trial began March 14, 1996, with the prosecution beginning its case-in-chief that same day. The case was submitted to the jury on March 19, 1996. On March 20, 1996, the jury found Jalowiec guilty of aggravated murder and also found both specifications.

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The penalty phase of Jalowiec's trial was held on April 9 and 10, 1996. The prosecution incorporated its evidence from the guilt phase on the issue of the sole aggravating circumstance: the killing of Lally to prevent him from testifying in a criminal proceeding. Jalowiec presented evidence on the mitigating factors, and the prosecution presented evidence in rebuttal. After deliberating, the jury recommended the death sentence. The trial court confirmed the sentence of death. Jalowiec now appeals to this court.

Jalowiec asserts thirteen assignments of error. We review each in due course.

I. Jury Issues

First Assignment of Error

The trial court abused its discretion by dismissing for cause prospective jurors who could fairly consider the possibility of death and failing to dismiss for cause a juror for death whose views in favor of the death penalty precluded fair consideration of life options.

Jalowiec's first assignment of error deals with three potential jurors, and their exclusion from or retention in the panel by the trial court. The potential jurors involved were Mrs. Porter, Mr. Eubanks, and Mrs. Kulcsar.

Potential jurors Porter and Eubanks were excused by the trial court after voir dire on the issue of the jurors' views on the death penalty. Both expressed some hesitancy in being able to vote for imposition of the death penalty if the law and facts of Jalowiec's case warranted such penalty. Jalowiec argues that

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the trial court erred by excusing them from the panel.

We note that no objection was raised to the trial court's decision. Therefore, we can only take notice of the error if it rises to the level of plain error. Crim.R. 52(B). "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. In order for this court to apply Crim.R. 52(B), it must be clear that the outcome of the trial would have been different but for the alleged error. See *State v. Lane* (1995), 108 Ohio App.3d 477, 482.

We conclude that the exclusion of potential jurors Porter and Eubanks does not rise to the level of plain error. "The proper standard for determining when a prospective juror may be excluded for cause based on his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *State v. Rogers* (1985), 17 Ohio St.3d 174, paragraph three of the syllabus, vacated and remanded on other grounds (1985), 474 U.S. 1002, 88 L.Ed.2d 452. In reviewing the trial court's decision, we view the voir dire in its entirety. *State v. Landrum* (1990), 53 Ohio St.3d 107, 118.

When questioned about her feelings on the death penalty, prospective juror Porter initially stated that she was opposed to the imposition of the death penalty and could not consider it as an option. After Porter was rehabilitated

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by counsel for Jalowiec, she began to state that she could consider the death penalty. However, Porter's comments showed that she could not impose the death penalty if the law required such.[2] Viewing her voir dire as a whole, we

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[2]The following exchange occurred between the prosecutor and Porter after counsel for Jalowiec rehabilitated Porter:

> MR. ROSENBAUM [the prosecutor]: Do you see this fellow [Jalowiec] at the end of the table here? (Indicating)
>
> THE JUROR [Porter]: Yes, I see him.
>
> MR. ROSENBAUM: Look at him.
> Could you sign your name to a piece of paper condemning him to death if you thought the law and the evidence required it?
>
> MR. GRUNDA [co-counsel for Jalowiec]: I would object to that question.
>
> THE COURT: Overruled.
>
> MR. ROSENBAUM: Look at him. That is what you are going to have to do, that is what we are talking about.
> Could you do that if the law and the evidence required it?
>
> THE JUROR: If the law and the evidence required it.
>
> MR. ROSENBAUM: Or are your personal feelings so strong that you can't?
>
> THE JUROR: Yes, my personal feelings are strong.
>
> MR. ROSENBAUM: So, you could not sign your name to a piece of paper condemning him to death?
>
> THE JUROR: No, I could not sign my name to anything that would say that he would have to have death.
>
> MR. ROSENBAUM: So, you cannot vote for the death penalty?
>
> THE JUROR: No, I could not.

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conclude that the trial court did not err by excluding potential juror Porter from the jury.

Potential juror Eubanks also was questioned on the issue of the death penalty and indicated that he could consider it along with the other two possible sentences, life with a minimum thirty year sentence, and life with a minimum twenty year sentence. However, when the prosecutor asked him about whether he could sign his name to a piece of paper that would call for the death penalty to be imposed on Jalowiec, Eubanks vacillated, responding with "I don't know, I better not say yes," and "I thought I could, but I have that little doubt in the back of my mind." His responses to this line of questioning demonstrated that he would be unable to impose the death penalty if required. Again, viewing Eubanks' voir dire as a whole, we find the trial court did not err.

Jalowiec also argues that the trial court improperly refused to dismiss for cause potential juror Kulcsar. At voir dire, Kulcsar's answers to questions regarding her views on capital punishment and law enforcement showed a tendency to favor the State and disfavor criminal defendants.[3] When asked if

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THE COURT: Thank you, Ma'am, you are excused.

[3]The most notable exchange occurred as follows:

> MR. CLEARY [co-counsel for Jalowiec]: Now, you also say in here [the prospective juror questionnaire] when asked what your views are concerning the death penalty, when there is an eyewitness to a murder, execute the person two days after the murder like they do in China.

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her views would influence her individual determination as to guilt or innocence or as to the death penalty, Kulcsar answered, "Maybe yes, maybe no." Counsel for Jalowiec challenged Kulcsar for cause; the trial court denied the request and retained Kulcsar on the panel. Jalowiec eventually exercised his first peremptory challenge to remove Kulcsar from the panel.

Even assuming *arguendo* that potential juror Kulcsar should have been dismissed for cause, Jalowiec's argument lacks merit. Kulcsar never sat on the jury, but was removed by Jalowiec through the use of a peremptory challenge. "So long as the jury that *sits* is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Ross v. Oklahoma* (1988), 487 U.S. 81, 88, 101 L.Ed.2d 80, 90. (Emphasis added.) Accord *State v. Broom* (1988), 40 Ohio St.3d 277, 287-88; *State v. Williams* (Nov. 1, 1995), Summit App. No. 16418, unreported, at 11, affirmed (1997), 79 Ohio St.3d 1. Because Kulcsar did not

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THE JUROR [Kulcsar]: Right. I believe in that.

MR. CLEARY: Is there something lacking like a trial?
Do you believe that perhaps they should try the guy before they execute him two days later?

THE JUROR: If there is an eyewitness, if somebody saw them shoot that person, I think that they should be, eye for eye, tooth for tooth.

MR. CLEARY: And we should do away with some of the procedural rights and stuff?

THE JUROR: Right.

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sit on the jury, and Jalowiec does not contend that any jurors who actually sat were not impartial, Jalowiec was not prejudiced by the trial court's failure to exclude Kulcsar for cause.

The exclusion of potential jurors Porter and Eubanks by the trial court was not error. Jalowiec was not prejudiced by the trial court's refusal to exclude potential juror Kulcsar for cause. Jalowiec's first assignment of error is overruled.

II. Motion for Acquittal

Second Assignment of Error

The trial court erred by failing to grant appellant's motion for judgment of acquittal under Ohio Rule of Criminal Procedure 29, in that the evidence presented by the State of Ohio was insufficient to sustain a conviction for the offense of aggravated murder, in violation of appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 10 & 16 of the Ohio Constitution.

Crim.R. 29(A) provides that a trial court "shall order the entry of a judgment of acquittal *** if the evidence is insufficient to sustain a conviction of such offense or offenses." A trial court may not grant an acquittal by authority of Crim.R. 29(A) if the record demonstrates that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. In making this determination, all evidence must be

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construed in a light most favorable to the prosecution. *State v. Williams* (1996), 74 Ohio St.3d 569, 576.

R.C. 2903.01(A) states: "No person shall purposely, and with prior calculation and design, cause the death of another." Jalowiec argues that two material elements were not proven beyond a reasonable doubt: prior calculation and design, and venue.

A. Prior Calculation and Design

"Prior calculation and design" requires more than instantaneous or momentary deliberation. *State v. Cotton* (1978), 56 Ohio St.2d 8, paragraph two of the syllabus.

> Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified.

Id. at paragraph three of the syllabus. No bright-line test exists to show the presence or lack of "prior calculation and design." *State v. Taylor* (1997), 78 Ohio St.3d 15, 20. Each case must be resolved on its own facts. *Id.*

In the case at bar, the evidence showed that Jalowiec's involvement was more than an instantaneous reaction or an action taken on the spur of the moment. On September 13, 1993, Lally told Patrolman Homoki that Jalowiec and Danny were going to get Lally and that they had threatened his life. On the

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night of the murder, Jalowiec, Lally, and Howington smoked crack cocaine and played pool at the house of Howington's aunt for some time. After he received a page, Jalowiec borrowed the car of Howington's aunt, who was known as "Queen Bee," and took Lally with him. Before Raymond left the restaurant in Danny's car with Danny and Michael, Raymond made a phone call. After making the call, Raymond told Danny and Michael that they were leaving. After arriving at a certain spot outside Elyria, Raymond and Michael stood waiting for the car of "Queen Bee." When the car arrived, Jalowiec was driving, and Lally was a passenger. Raymond and Michael entered the car. Jalowiec then got on the freeway and eventually drove to the cemetery where Lally was killed.

Viewing the evidence in a light most favorable to the prosecution, we conclude that Jalowiec had sufficient time and opportunity to participate in a plan to kill Lally, and that the circumstances showed a scheme to kill Lally. The trial court properly overruled the motion for acquittal on the element of prior calculation and design.

B. Venue

Venue is not a material element of any crime, but is a fact that must be proven beyond a reasonable doubt. *State v. Headley* (1983), 6 Ohio St.3d 475, 477. Venue may be established by all the facts and circumstances in a case. *Id.* Venue is proper in the jurisdiction, *i.e.*, county, where an offense, or any

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element thereof, is committed. *Id.* at paragraph one of the syllabus. "When it appears beyond a reasonable doubt that an offense or any element of an offense was committed in any of two or more jurisdictions, but it cannot reasonably be determined in which jurisdiction the offense or element was committed, the offender may be tried in any such jurisdiction." R.C. 2901.12(G).

Jalowiec argues that venue was not proven beyond a reasonable doubt. He contends that all elements of the crime of aggravated murder took place in Cuyahoga County, where Lally's body was found. Because Raymond stated that they were going to put Lally on a bus, and any deviation from that plan did not occur until the car was in Cleveland, Jalowiec asserts that no element of the crime occurred in Lorain County.

The trial court did not err in overruling Jalowiec's motion for acquittal on the issue of venue. As demonstrated above, the facts from which the jury could have inferred prior calculation and design on the part of Jalowiec occurred in Lorain County. Even if that were not the case, venue would still be proper in Lorain County because it could not be reasonably determined whether the element of prior calculation and design occurred in Lorain County or Cuyahoga County. This is a situation clearly covered by R.C. 2901.12(G). See *State v. Miller* (1989), 63 Ohio App.3d 479, 484-85. Viewing the evidence in a light most favorable to the prosecution, venue was properly established in Lorain County.

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C. Summary

The trial court properly overruled Jalowiec's motion for acquittal. Jalowiec's second assignment of error is overruled.

III. Evidentiary Issues

A. Hearsay Testimony

Third Assignment of Error

> **The allowance of testimony as to out-of-court statements attributed to danny smith [*sic*] over defense counsels' objection was prejudicial error and deprived appellant of his rights under the Fifth, Sixth, Eighth and Fourteenth amendments [*sic*] to the U.S. Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.**

In his third assignment of error, Jalowiec contends that certain testimony containing statements made by Danny were hearsay and were improperly admitted. One of these statements was in Patrolman Homoki's testimony. After Homoki spoke with Lally, he approached Danny, who said, "That snitch will get his." Other statements came from other prosecution witnesses, who testified that Danny had either threatened Lally, solicited someone else's help in killing Lally, or admitted to killing Lally. The State contends that these statements fall within the co-conspirator exception to the hearsay rule, Evid.R. 801(D)(2)(e).

Regardless of whether the alleged hearsay statements were properly admitted under the co-conspirator exception, any error was harmless. "Any

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error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A). Accordingly, "[w]here constitutional error in the admission of evidence is extant, such error is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of defendant's guilt." *State v. Williams* (1983), 6 Ohio St.3d 281, paragraph six of the syllabus. "Error in admitting hearsay does not justify reversal where it is harmless." *State v. Carter* (1995), 72 Ohio St.3d 545, 550. As we noted above, none of the alleged hearsay testimony would have been required to meet the "prior calculation and design" element of aggravated murder. The evidence also showed that Jalowiec drove Fike's car to the cemetery, got out of the car to help Raymond kill Lally, retrieved something from the car to slash Lally's throat, and then attempted to run over Lally's body with the car three times. Thus, overwhelming evidence of Jalowiec's guilt is found without resort to the alleged hearsay statements. Jalowiec's third assignment of error is overruled.

B. Admission of Photographs as Evidence

Eighth Assignment of Error

The gruesome coroner's photographs are unfairly prejudicial where they are solely used to inflame the passion of the jury.

Jalowiec's eighth assignment of error attacks the introduction of gruesome photographs into evidence. The prosecution introduced into evidence

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twenty-eight photographs taken of Lally's body during the autopsy. Jalowiec argues that the photographs were repetitive and cumulative, and that the photographs would have inflamed the jury.

"[T]he mere fact that a photograph is gruesome or horrendous is not sufficient to render it *per se* inadmissible." *State v. Maurer* (1984), 15 Ohio St.3d 239, 265.

> Properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting the trier of fact to determine the issues or are illustrative of testimony and other evidence, as long as the danger of material prejudice to a defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number.

Id. at paragraph seven of the syllabus. So long as the photographs admitted into evidence are not repetitive or cumulative and the probative value of each photograph outweighs its prejudicial impact, the trial court's discretion in admitting the photographs will not be disturbed. *State v. Morales* (1987), 32 Ohio St.3d 252, 258.

We find no error in admitting the photographs of Lally's body. Though several are quite gruesome, each is demonstrative of the testimony of the forensic pathologist who performed Lally's autopsy as to the manner in which Lally died. See *State v. Biros* (1997), 78 Ohio St.3d 426, 444-45. See, also, *State v. Phillips* (1995), 74 Ohio St.3d 72, 77-79. Each photograph displays some feature that is not cumulative of the others. Their probative value

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outweighs any prejudicial effect. Jalowiec's eighth assignment of error is overruled.

IV. Other Guilt Phase Issues

A. Improper Comments by Trial Court

Fourth Assignment of Error

> **The trial court deprived appellant of his right to a fair trial by improperly admonishing, criticizing and/or correcting defense counsel in front of the jury, depriving appellant of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.**

Jalowiec contends in his fourth assignment of error that the trial court made prejudicial remarks. There are five instances that Jalowiec argues deprived him of his right to a fair trial.

The standard for determining whether the trial court's comments were prejudicial was set forth in *State v. Wade* (1978), 53 Ohio St.2d 182, vacated and remanded on other grounds (1978), 438 U.S. 911, 57 L.Ed.2d 1157:

> (1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel.

Id. at 188. In addition, the defendant must object to the comments, in order to give the judge an opportunity to correct the error by curative instruction or

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otherwise. *Id.* The failure to object waives all but plain error. See *id.*

In the case at bar, Jalowiec entered no objection to any of the trial court's comments. Upon reviewing the comments in the context in which they were made, we find no plain error. Furthermore, Jalowiec has not demonstrated how the comments prejudiced his right to a fair trial. Jalowiec's fourth assignment of error is overruled.

B. Prosecutorial Misconduct

Fifth Assignment of Error

The prosecutor improperly commented on the appellant's Fifth Amendment protections.

In his fifth assignment of error, Jalowiec takes issue with comments made by the prosecution in its closing argument. The following occurred during the prosecution's closing argument:

> [Mr. Rosenbaum, the prosecutor]: Well, you have heard evidence put on by the State that is uncontradicted. There was no evidence called refuting what the State said --
>
> MR. GRUNDA [co-counsel for Jalowiec]: Objection.
>
> MR. ROSENBAUM: (Continuing) -- or produced as evidence.
>
> MR. GRUNDA: We don't have to do that.
>
> THE COURT: And you may say that in your closing, Mr. Grunda.
>
> MR. ROSENBAUM: And he doesn't have to. He is right. He chose not to, so you are bound by the evidence the State gave

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> you unless they can persuade you that the State's people should not be believed and I anticipate that that is exactly what is going to happen.

Jalowiec argues that these comments amount to the prosecutor improperly commenting on his Fifth Amendment right not to testify on his own behalf.

Jalowiec's argument lacks merit. "[S]tatements made by the prosecutor to the effect that the evidence against appellant was uncontradicted and unrefuted does not constitute a comment by the prosecutor upon the failure of the defendant to testify, prejudicial to appellant's right to a fair trial." *State v. Lockett* (1976), 49 Ohio St.2d 48, 65, vacated and remanded on other grounds (1978), 438 U.S. 586, 57 L.Ed.2d 973. The prosecutor's statements in the case at bar fall within the ambit of commenting on the State's case being unrefuted and uncontradicted. Viewing the prosecutor's closing argument in its entirety, we find that Jalowiec was not materially prejudiced. See *State v. Hill* (1996), 75 Ohio St.3d 195, 204. Jalowiec's fifth assignment of error is overruled.

C. Guilt Phase Jury Instructions

Seventh Assignment of Error

> **Where the court provides the jury with inaccurate trial phase instructions, a defendant is deprived his protections under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.**

Jalowiec next argues in his seventh assignment of error that "the trial court made numerous errors in its instructions to the jury." However, he refers

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us only to the court's instruction on causation. The pertinent instructions were given as follows:

> "Cause" is an essential element of the offense charged in Count One.
>
> "Cause" is an act, or a failure to act, which in the natural and continuous sequence directly produces the death, and without which it would not have occurred.
>
> "Cause" occurs when the death is the natural and foreseeable result of the act, or the failure to act.
>
> The Defendant's responsibility is not limited to the immediate or most obvious result of the Defendant's act, or failure to act.
>
> The Defendant is also responsible for the natural and foreseeable consequences or results that follow, in the ordinary course of events, from the act or failure to act.
>
> There may be more than one cause for an event. However, if a Defendant's act or failure to act was one cause, the existence of other causes is not a defense.

Jalowiec contends that the fourth and fifth paragraphs of the above quoted instructions are erroneous under *State v. Jacks* (1989), 63 Ohio App.3d 200, 204-05.

Jalowiec did not object to these instructions, as required by Crim.R. 30(A). Therefore, we can only take notice of the error if it rises to the level of plain error. Furthermore, "[a] single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge." *State v. Price* (1979), 60 Ohio St.2d 136, paragraph four of the syllabus.

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The trial court did not err in the case at bar. First, the instructions are not identical to those in *Jacks*. Second, when the particular instructions at issue are used, reversal is not required "where the instructions as a whole make clear that the jury must find purpose to kill in order to convict." *State v. Phillips*, 74 Ohio St.3d at 100. Taking the instructions as a whole, we find that the jury was clearly instructed that it was required to find purpose to kill in order to convict Jalowiec. Jalowiec's seventh assignment of error is overruled.

V. Penalty Phase Issues

A. Prosecutorial Misconduct in Penalty Phase

Sixth Assignment of Error

The trial court erred by allowing the state to adduce evidence of non-statutory aggravating factors during the sentencing phase of trial.

Jalowiec next assigns as error testimony adduced by the prosecution at the penalty phase of Jalowiec's trial. Under R.C. 2929.04(A), the death penalty may be imposed only if one or more of eight statutory aggravating factors is proven beyond a reasonable doubt. In the guilt phase of Jalowiec's trial, the jury found that Jalowiec killed Lally to prevent him from testifying in a criminal proceeding, meeting the aggravating circumstance in R.C. 2929.04(A)(8).[4] During the penalty phase of the trial, Jalowiec made an

[4]R.C. 2929.04(A)(8) permits the imposition of the death penalty if it is proven beyond a reasonable doubt that

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unsworn statement and called several witnesses on his behalf. Jalowiec and the other witnesses testified that Jalowiec suffered from rheumatoid arthritis; that he was unable to maintain jobs because of his arthritic condition; that he was kind and gentle with children; that he never used crack cocaine; and that Jalowiec did not kill Lally.

The prosecution presented seven rebuttal witnesses. Three of these witnesses testified that Jalowiec had been arrested for selling crack cocaine and for possessing a pipe used for smoking crack cocaine. Three other witnesses testified that Jalowiec had beaten and kicked two men during an altercation outside a bar. Jalowiec argues that the trial court improperly allowed these witnesses to testify as to these alleged "other acts" by Jalowiec.

"Subject to applicable Rules of Evidence, *** counsel for the state at the penalty stage of a capital trial may introduce *** evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant ***." *State v. Gumm* (1995), 73 Ohio St.3d 413, syllabus. Evid.R. 404(A) governs the introduction of evidence of a criminal defendant's character traits:

> [t]he victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness ***.

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> (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[.]

The admission or exclusion of evidence is reviewed under an abuse of discretion standard. *State v. Dunlap* (1995), 73 Ohio St.3d 308, 316.

We find no error in the admission of the testimony of the prosecution's rebuttal witnesses. In his unsworn statement, Jalowiec put into issue that he was peaceable, that his arthritis was crippling, and that he did not use crack cocaine. The prosecution was permitted to rebut each of these contentions under Evid.R. 404(A). Jalowiec asserts that the introduction of the rebuttal testimony was tantamount to introducing non-statutory aggravating factors into evidence. However, this is clearly not the case. The trial court did not err by allowing the prosecution to adduce rebuttal testimony. Jalowiec's sixth assignment of error is overruled.

Ninth Assignment of Error

> **Prosecutorial misconduct deprived the appellant a [*sic*] fair penalty determination phase of his capital trial.**

Jalowiec argues in his ninth assignment of error that, in the prosecution's closing argument, the prosecutor improperly referred to non-statutory aggravating factors. At various times during the prosecution's closing

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argument of the penalty phase, the transcript shows that reference was made to "aggravating circumstances."[5] Jalowiec asserts that the prosecutor's use of that phrase was prejudicial, because it allowed the prosecution to argue that aggravating circumstances not delineated in R.C. 2929.04(A) were to be considered by the jury.

We note that Jalowiec did not object to any of the instances of which he complains: Therefore, we will take notice of plain error only.

Jalowiec's argument is not well-taken. A prosecutor may not argue in the penalty phase of a capital trial that the nature and circumstances of a crime are "aggravating circumstances." *State v. Wogenstahl* (1996), 75 Ohio St.3d 344, paragraph two of the syllabus. However, taking the comments in context, the prosecutor clearly referred only to the single statutory aggravating circumstance found in this case: that Lally was killed to prevent him from testifying in a criminal case. Furthermore, the trial court correctly instructed the jury that only one statutory aggravating circumstance was present. See *State v. Hill*, 75 Ohio St.3d at 202. No error prejudicial to Jalowiec occurred. Jalowiec's ninth assignment of error is overruled.

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[5]The State argues that the references to "aggravating circumstances" resulted from a glitch in the court reporter's transcription equipment, and that each reference should read "circumstance." The steps necessary to correct the record were not taken, and we cannot consider the State's argument. However, the various references to "aggravating circumstances" in the record lend credence to the State's argument, because in these instances the rest of the sentence indicates that "circumstance" probably was meant.

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B. Penalty Phase Jury Instructions

In two of his assignments of error, Jalowiec takes issue with the trial court's instructions to the jury during the penalty phase of the trial. Because Jalowiec did not object to any of the allegedly erroneous instructions at trial, he has waived all but plain error. Crim.R. 30(A); *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus. We review the errors assigned accordingly.

Tenth Assignment of Error

> **The trial court's erroneous penalty phase instructions deprived the appellant of a fair and reliable determination of his sentence in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, sections 9, 10 and 16 of the Ohio Constitution.**

Jalowiec asserts in his tenth assignment of error that five different portions of the trial court's instructions to the jury in the penalty phase of the trial were erroneous. Jalowiec first argues that the trial court erred by not defining the term "mitigation." However, Jalowiec did not request that an instruction defining mitigation be given to the jury. The trial court's instructions on the definition of "mitigating factors" were sufficient and in accord with R.C. 2929.04(B). We find no error.

Jalowiec next argues that the trial court erred by stating all seven statutory mitigating factors listed in R.C. 2929.04(B). Jalowiec argues that evidence was only presented relative to the seventh, "catch-all" factor, "[a]ny other factors that are relevant to the issue of whether the offender should be

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sentenced to death." R.C. 2929.04(B)(7). Because no evidence was presented on the other six factors,[6] Jalowiec asserts that the instructions were prejudicial under *State v. DePew* (1988), 38 Ohio St.3d 275, 289-90.

We first note that Jalowiec did in fact present evidence on other mitigating factors. In closing arguments, Jalowiec's counsel made specific mention of Jalowiec's youth (he was twenty-three at the time of Lally's murder), and counsel also argued to the jury that Jalowiec was under duress when he acted, that Jalowiec lacked a significant prior criminal history, that Jalowiec was not the principal offender, and that the jury should consider Jalowiec as not having a great degree of participation in the offense or in the act

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[6]The six other statutory mitigation factors of R.C. 2929.04(B) are:

> (1) Whether the victim of the offense induced or facilitated it;
>
> (2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
>
> (3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;
>
> (4) The youth of the offender;
>
> (5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications; [and]
>
> (6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim[.]

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that led to Lally's death. Jalowiec's counsel further argued:

> [W]e have six mitigating factors that you must consider by law, so we have the six against one [aggravating circumstance] that have to be considered on behalf of Stan and I am asking you to consider those because you are supposed to and I am asking you, after considering them, and I believe they outweigh--in other words, these six mitigating factors outweigh the aggravating factors ***.

Thus, only two mitigating factors were not supported by evidence.

We find no error in the trial court's instruction. As in *DePew*, 38 Ohio St.3d at 289-90, the trial court did not comment on those factors that Jalowiec's counsel did not discuss in closing argument. Furthermore, the inclusion of all statutory mitigating factors does not require reversal. *Id.*; *State v. Keith* (1997), 79 Ohio St.3d 514, 533. Jalowiec's argument is without merit.

Third, Jalowiec contends that the trial court erred by instructing the jury that it could not consider sympathy. We find no error in this instruction. See *State v. Combs* (1991), 62 Ohio St.3d 278, 288-89.

Jalowiec's fourth argument is that the trial court improperly gave the jury an "acquittal first" instruction. The trial court instructed the jury as follows;

> You should recommend the sentence of death if you unanimously, that is, all twelve of you, find by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors.
>
> If you do not so find, you shall unanimously (all twelve) recommend either a life sentence with parole eligibility after serving twenty years of imprisonment, or a life sentence with parole elligibility [*sic*] after serving thirty years of imprisonment.

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Jalowiec argues that this instruction violates *State v. Thomas* (1988), 40 Ohio St.3d 213, 219-20. We disagree. The trial court's instruction was not improper. See *State v. Taylor*, 78 Ohio St.3d at 28-29.

Jalowiec's final contention is that the trial court erred by continuously referring to "aggravated circumstances" when only one statutory aggravated circumstance was present. At times, the plural "circumstances" does appear in the jury charge. However, the trial court clearly delineated that there was only one aggravating circumstance when the court instructed the jury: "The aggravating circumstances which you have already found are the following: (1) That the victim was killed to prevent his testimony in a criminal proceeding." Jalowiec has not overcome the presumption that a jury follows the instructions given to it.

We find no error in the trial court's penalty phase instructions. Jalowiec's tenth assignment of error is overruled.

Twelfth Assignment of Error

The argument to the jury that their decision is a mere recommendation is unacceptable as it diminishes the responsibility of the jury.

In his twelfth assignment of error, Jalowiec contends that the trial court erred by referring to the jury's decision in the penalty phase of the trial as a "recommendation" during voir dire of the potential jurors, the guilt phase of the trial, the penalty phase, and in the court's instructions to the jury during the

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penalty phase.[7] We disagree. "[T]he term 'recommendation' accurately reflects Ohio law and does not diminish the jury's sense of responsibility. There is no error, plain or otherwise." *State v. Moore* (1998), 81 Ohio St.3d 22, 37. (Citation omitted.) Jalowiec's twelfth assignment of error is overruled.

VI. Ineffective Assistance of Trial Counsel

Eleventh Assignment of Error

The failure of trial counsel to make proper objections, constitutes ineffective assistance of counsel.

The standard under which an attorney's performance will be adjudged deficient was set forth in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus:

> 2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance.

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[7]In its instructions to the jury, the trial court told the jury:

> ***It is going to be your responsibility at this point to decide which sentence to recommend to the Court regarding the alternative charges of Aggravated Murder with the specification.
>
> I have used the word recommend many times and the attorneys have used it, and I want to make sure that you understand that you are not to construe that word to diminish your responsibility in this matter. It is an awesome task, and the fact thadt [*sic*] the word recommend is used should not be considered by you to lessen your task.

Additional reference to a recommendation was made in the instructions found in our previous discussion of the "acquittal first" argument in Jalowiec's tenth assignment of error.

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> 3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

The defendant has the burden of proof, and must overcome the strong presumption that counsel's performance was adequate and that counsel's action might be sound trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Furthermore, an attorney properly licensed in Ohio is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56.

Jalowiec argues that he was deprived of a fair trial by virtue of ineffective assistance of trial counsel. He argues that his trial attorneys were ineffective in six respects. He first argues that trial counsel was ineffective for failing to object to the dismissal of potential jurors Porter and Eubanks, and for failing to object to potential juror Kulcsar being retained on the jury panel. In our analysis of Jalowiec's first assignment of error, we determined that the trial court did not err by excluding potential jurors Porter and Eubanks; therefore, Jalowiec was not prejudiced by his attorneys' failure to object. With regard to potential juror Kulcsar, Jalowiec's trial counsel did object to Kulcsar being retained on the panel. Counsel's performance was not deficient in this respect.

Jalowiec next asserts that four instances of ineffective assistance of counsel occurred when his trial attorneys failed to object to or offer penalty phase jury instructions, as discussed in our analysis of Jalowiec's tenth

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assignment of error. He cites four specific instances. The first instance is counsel's failure to request a jury instruction defining "mitigation." However, Jalowiec has failed to demonstrate that but for this error, the result of the penalty phase would have been different. Jalowiec has not shown ineffective assistance of counsel on this issue.

Jalowiec's second, third, and fourth alleged instances of ineffective assistance with regard to penalty phase jury instructions are counsel's failure to object to the instruction listing all of the statutory mitigating factors, failure to object to the "no sympathy" instruction, and failure to object to the "acquittal first" instruction. With respect to each of these objections, we held above that the trial court did not err in giving these instructions; objections on the part of Jalowiec's trial counsel would not have changed the outcome. Jalowiec's trial attorneys were not deficient for failing to object to these instructions.

Jalowiec's final assertion is that trial counsel should have objected to the pervasive use of the term "recommendation" by the trial court and the prosecutor in describing the jury's decision in the penalty phase. Jalowiec also contends that his attorneys were ineffective for frequently using the term themselves. As we stated above in response to Jalowiec's twelfth assignment of error, the use of the word "recommendation" is not error at all. Jalowiec's trial attorneys were not ineffective for failing to object to, or refrain from using, the word "recommendation."

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In sum, Jalowiec was not deprived of effective assistance of counsel. Accordingly, the eleventh assignment of error is overruled.

VII. Constitutionality of Death Penalty

Thirteenth Assignment of Error

Imposition of the death sentence violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I, of the Ohio Constitution.

In his final assignment of error, Jalowiec presents thirteen arguments as to why the imposition of the death penalty is unconstitutional. Each of these arguments has previously been rejected. See *State v. Reynolds* (July 10, 1996), Summit App. No. 16845, unreported, at 14-20, affirmed (1998), 80 Ohio St.3d 670; *State v. Dennis* (May 8, 1996), Summit App. No. 17156, unreported, at 46-49, affirmed (1997), 79 Ohio St.3d 421; *State v. Williams* (Nov. 1, 1995), Summit App. No. 16418, unreported, at 34-38, affirmed (1997), 79 Ohio St.3d 1; *State v. Wilson* (Oct. 12, 1994), Lorain App. No. 92CA005396, unreported, at 21-27, affirmed (1996), 74 Ohio St.3d 381. Jalowiec's thirteenth assignment of error is overruled.

VIII. Independent Review of Sentence

Pursuant to R.C. 2929.05(A), this court is required to conduct an independent review of Jalowiec's sentence, to determine whether the aggravating circumstance he was found to have committed outweighs the

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mitigating factors present in the case, and whether the sentence of death is appropriate.

A. Aggravating Circumstance v. Mitigating Factors

In making a determination that the aggravating circumstance outweighs the mitigating factors, the offender and the offense must be considered. R.C. 2929.05(A). We must also consider the nature and circumstances of the offense; the offender's character, background and history; and the seven statutory mitigating factors listed in R.C. 2929.04(B). The death sentence must be vacated unless we find that the aggravating circumstance outweighs any mitigating factors beyond a reasonable doubt. *State v. Slagle* (1992), 65 Ohio St.3d 597, 613.

The applicable aggravating circumstance found by the jury is that Lally was killed to prevent his testimony against Raymond and Danny. This falls under R.C. 2929.04(A)(8).

We find no mitigating value in the nature and circumstances of the offense. Jalowiec participated fully in the murder of Lally. Jalowiec drove the car to the cemetery, as directed by Raymond. When Raymond told Jalowiec and Michael to help him kill Lally, Jalowiec left the car and assisted Raymond in stomping Lally. Jalowiec returned to the car to retrieve something to slash Lally's throat. Jalowiec attempted to help Raymond put the body in the trunk of the car, and once they determined that the body would not fit, Jalowiec

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attempted to back the car over Lally three times. Lally was then left for dead on one of the coldest nights on record in Cleveland. Jalowiec's full participation in the murder of Lally precludes any mitigating value from being placed on the nature and circumstances of the offense.

We accord some weight to Jalowiec's character, background, and history. Jalowiec was a studious boy who developed rheumatoid arthritis by the time he entered the sixth grade. He attempted to find work, but the arthritis made work difficult. Jalowiec's family was loving and supportive of him. Jalowiec also was kind in his relationships with his family. A former girlfriend of Jalowiec testified that he was kind with her children and caring toward her. We also note that this kindness may have led Jalowiec to the point where he is today: when he met Danny Smith, he allowed Danny to stay at his residence. When it became apparent that Danny was involved in illegal activities, Jalowiec did not disassociate himself from Danny.

We find three statutory mitigating factors applicable. Jalowiec was twenty-three at the time of the offense, see R.C. 2929.04(B)(4) (youth of offender); however, we give little weight to this factor. Jalowiec also lacks a significant prior criminal record, see R.C. 2929.04(B)(5); we give some weight to this factor. With respect to R.C. 2929.04(B)(7), other relevant factors, Jalowiec was under the influence of crack cocaine at the time of Lally's murder. However, we accord this factor no weight. The evidence does not support a

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finding that any of the other statutory factors apply.

We accord some weight to the mitigating factors, as discussed. However, we find that the aggravating circumstance outweighs these mitigating factors beyond a reasonable doubt.

B. Appropriateness of Sentence

In determining the appropriateness of Jalowiec's sentence, our analysis is twofold. First, we must determine whether the evidence supports the aggravating circumstance being found beyond a reasonable doubt. Second, we must determine whether Jalowiec's sentence is excessive or disproportionate in relation to the seventeen other cases in which this court has affirmed the death penalty.[8]

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[8]*State v. Smith* (Mar. 25, 1998), Lorain App. No. 96CA006331, unreported; *State v. Filiaggi* (Dec. 10, 1997), Lorain App. No. 95CA006240, unreported; *State v. McNeill* (Apr. 1, 1997), Lorain App. No. 95CA006158, unreported; *State v. Reynolds* (July 10, 1996), Summit App. No. 16845, unreported, affirmed (1998), 80 Ohio St.3d 670; *State v. Dennis* (May 8, 1996), Summit App. No. 17156, unreported, affirmed (1997), 79 Ohio St.3d 421; *State v. Williams* (Nov. 1, 1995), Summit App. No. 16418, unreported, affirmed (1997) 79 Ohio St.3d 1, certiorari denied (1998), 522 U.S. ----, 139 L.Ed.2d 646; *State v. Wilson* (Oct. 12, 1994), Lorain App. No. 92CA005396, unreported, affirmed (1996), 74 Ohio St.3d 381, certiorari denied (1996), 519 U.S. ---, 136 L.Ed.2d 78; *State v. Phillips* (Aug. 31, 1994), Summit App. No. 16487, unreported, affirmed (1995), 74 Ohio St.3d 72, certiorari denied (1996), 517 U.S. ---, 134 L.Ed.2d 938; *State v. Brooks* (July 13, 1994), Summit App. No. 16192, unreported, affirmed in part and reversed in part (1996), 75 Ohio St.3d 148; *State v. Simko* (Jan. 20, 1993), Lorain App. No. 91CA005214, unreported, affirmed (1994), 71 Ohio St.3d 483, certiorari denied (1995), 516 U.S. 831, 133 L.Ed.2d 57; *State v. Johnson* (Nov. 4, 1992), Summit App. No. 15065, unreported, reversed (1994), 71 Ohio St.3d 332, certiorari denied, (1995) 515 U.S. 1164, 132 L.Ed.2d 864; *State v. Davis* (Apr. 18, 1990), Lorain App. No. 88CA004390, unreported, affirmed (1991), 62 Ohio St.3d 326, certiorari dismissed (1992), 506 U.S. 803, 121 L.Ed.2d 6; *State v. Huertas* (July 6, 1988), Lorain App. No. 4202, unreported, affirmed in

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The evidence showed that Lally was to be a witness in the criminal proceedings against Raymond and Danny Smith, and that Lally was killed to prevent him from testifying in those proceedings. It is irrelevant that Lally was not going to testify against Jalowiec in a criminal proceeding. We find the aggravating circumstance found in R.C. 2929.04(A)(8), that the victim was killed to prevent his testimony in a criminal proceeding, was proven beyond a reasonable doubt.

We also find that the death sentence in the case at bar is proportionate to cases previously decided by this court. This court has previously affirmed the imposition of the death penalty where the victim was murdered to prevent the victim from testifying in a criminal proceeding. See *State v. Smith* and *State v. Filiaggi, supra,* footnote 8. Jalowiec's sentence of death is not disproportionate to other cases decided by this court.

---

part and reversed in part (1990), 51 Ohio St.3d 22, certiorari dismissed (1991), 498 U.S. 336, 112 L.Ed.2d 837; *State v. Cooey* (Dec. 23, 1987), Summit App. No. 12943, unreported, affirmed (1989), 46 Ohio St.3d 20, certiorari denied (1991), 499 U.S. 954, 113 L.Ed.2d 482; *State v. Benner* (July 22, 1987), Summit App. No. 12664, unreported, affirmed (1988), 40 Ohio St.3d 301, certiorari denied (1990), 494 U.S. 1090, 108 L.Ed.2d 962; *State v. Greer* (Mar. 4, 1987), Summit App. No. 12258, unreported, affirmed (1988), 39 Ohio St.3d 236, certiorari denied (1989), 490 U.S. 1028, 104 L.Ed.2d 201-02; *State v. Post* (Jan. 15, 1986), Lorain App. No. 3868, unreported, affirmed (1987), 32 Ohio St.3d 380, certiorari denied (1988), 484 U.S. 1079, 98 L.Ed.2d 1023.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 3757

CONCLUSION

All of Jalowiec's assignments of error are overruled. In conducting our independent review, this court concludes that the aggravating circumstance was proven beyond a reasonable doubt, that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt, and that the sentence of death is not inappropriate or disproportionate. Jalowiec's conviction and sentence of death are affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Lorain Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to appellant.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 3758

Exceptions.

JOHN W. REECE
FOR THE COURT

SLABY, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

PATRICIA J. SMITH, Attorney at Law, 4403 St. Clair Avenue, Cleveland, Ohio 44103, for Appellant.

KREIG J. BRUSNAHAN, Attorney at Law, 158 Lear Road, Suite A, Avon Lake, Ohio 44012, for Appellant.

GREGORY WHITE, Prosecuting Attorney, and JONATHAN E. ROSENBAUM, Chief Counsel, Criminal Division, 226 Middle Avenue, 4th Floor, Elyria, Ohio 44035, for Appellee.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 3759

The Supreme Court of Ohio

To the Clerk of Court of Common Pleas for

Lorain County,

Elyria, Ohio

ORDER TO CERTIFY RECORD

IN DEATH PENALTY CASE

S.C. Case No. 98-1074

C.P. Case No. 96CA006445

State of Ohio

v.

Stanley E. Jalowiec

ON COMPUTER

You are hereby ORDERED, pursuant to Rule XIX, Section 4, of the Rules of Practice of the Supreme Court of Ohio, to prepare and forward the record in the above-captioned case to this office no later than July 31, 1998, unless an extension of time is granted under Rule XIX, Section 4(C)(1).

Pursuant to Rule XIX, Section 3(A), the record shall consist of the following:

1). The original papers and exhibits thereto filed in the trial court;

2). The transcript of proceedings, including exhibits, and computer diskettes of the transcript, if available; and

3). Certified copies of the docket and journal entries prepared by the clerk of the trial court.

You are further ORDERED to certify to the Supreme Court any order issued pursuant to Rule XIX, Section 4(C)(1), that extends the time to prepare and transmit the record.

WITNESS my hand and the seal of the Supreme Court

this 3rd day of June, 19 98.

MARCIA J. MENGEL
Clerk of the Supreme Court of Ohio

By Amy D Cantrell
Deputy Clerk

98-1074

STATE OF OHIO)
) SS
LORAIN COUNTY)

FILED
JUN 17 1998
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

I, the undersigned, Clerk of the Court of Appeals Ninth Appellate District, in and for the said County, do hereby certify that the Transcript of Proceedings has already been sent and includes an index and a certification from the court reporter, Tom Masterson, that these are all the original exhibits filed in the cause of Ohio vs Stanley Jaloweic.

DONALD J. ROTHGERY,
CLERK OF THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

By: Lisa McNary
Deputy Clerk

RECEIVED
JUN 17 1998
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

INDEX FOR EXHIBITS IN THE STANLEY JALOWEIC CASE

EXHIBITS:

STATE'S:

1-A)
thru - Photos at cemetery
1-Q)

2) -Coroner's Verdict

2-A)
thru -Photos of Ron Lally
2-CC)

3) - Trace evidence

3-A)
thru -Photos of LeBaron
3-D)

3-E) - Blood sample

3-F) - Bic lighter, syrup, cigs, metal piece

3-G) - Steak knife

3-H) - Victim's clothes - (in bag)

3-J) - Medium caliber full metal jacket bullet

4) - Indictment, Ray Smith

5) - Indictment, Danny Smith

6) - Arrest report, Raymond Smith 8/19/93

7) - Arrest report, Danny Smith 8/12/93

8) - Piece of paper

8-A) - Incident Concerning Ron Lally

9) - Confidential informant agreement 6/7/93

10) - Tape of buy

11-A) - Note

11-A) - Micro cassette

11-B) - Micro cassette

11-B) - Money/property release

11-C) - Binder w/miranda warning & interview

11-C) - Check

11-D)
thru - Cassette tapes
11-F)

11-G) - Binder w/ conversations

12-A)
thru - Micro cassette
12-B)

13) - Deposition

13-A) - Interview

13-B) - Miranda warning

13-C) - Micro cassette

DEFENDANT'S:
A) - Hartman's Court file

B)
thru - Depositions
G)

S.C. Case No. 98-1074
Date 6/17/98

Item(s) to be Docketed

☑ OPF Record.

☐ APF Supplemental record.

☐ DEP $100 deposit for costs by _____, receipt #_____. (REL)

ON COMPUTER

☐ OBP Original board papers. (BDC)

☐ ARC Attorney registration card. (REP/REA)

☐ CAR Certificate of admission. (REP/REA)

☐ PCP Payment of publication costs in the amount of $_____ by _____; receipt #_____. (REP)

☐ PPC Payment of board costs in the amount of $_____ by _____; receipt #_____. (REP)

☐ DPS $500 deposit for costs by _____, receipt #_____. (REP)

☐ CAG Board costs collected by Attorney General in the amount of $_____, less AG fee of $_____; check total $_____; receipt #_____. (NON)

☐ AAF Application for attorney fees by _____. ( )

☐ OPC Cost of copying record or portions of record; $_____ billed to _____. ( )

☐ OPT Copy of record sent to _____; _____ pages copied at 15¢/page.

☐ CRM Copies of record made in office by _____; total paid $_____; receipt #_____. ( )

☐ XXX _____
_____. ( )

☐ NRJ Notice of recusal of Justice _____, received by _____.

The Supreme Court of Ohio

30 EAST BROAD STREET, COLUMBUS, OHIO 43215-3414

THOMAS J. MOYER, CHIEF JUSTICE
ANDREW DOUGLAS
ALICE ROBIE RESNICK
FRANCIS E. SWEENEY
PAUL E. PFEIFER
DEBORAH L. COOK
EVELYN LUNDBERG STRATTON

June 17, 1998

MARCIA J. MENGEL
CLERK

(614) 466-3931
(614) 466-5201

Gregory Allen White
Lorain County
226 Middle Avenue
4th Floor
Elyria OH 44035-5629

ON COMPUTER

Re: 98-1074

State of Ohio
v.
Stanley E. Jalowiec

Dear Gregory Allen White:

This is to notify you that the record in the above-styled case was filed with the Clerk's Office on June 17, 1998.

If, after reviewing the Supreme Court Rules of Practice, you have any questions about filing deadlines in the case, please feel free to call me at 614/644-9320.

Sincerely,

Rita A. Nash

Rita A. Nash
Deputy Clerk

/ran

The Supreme Court of Ohio

30 EAST BROAD STREET, COLUMBUS, OHIO 43215-3414

THOMAS J. MOYER, CHIEF JUSTICE
ANDREW DOUGLAS
ALICE ROBIE RESNICK
FRANCIS E. SWEENEY
PAUL E. PFEIFER
DEBORAH L. COOK
EVELYN LUNDBERG STRATTON

June 17, 1998

MARCIA J. MENGEL
CLERK

(614) 466-3931
(614) 466-5201

Patricia Ann Millhoff
Suite #106
80 West Bowery Street
Akron OH 44308

ON COMPUTER

Re: 98-1074

State of Ohio
v.
Stanley E. Jalowiec

Dear Patricia Ann Millhoff:

This is to notify you that the record in the above-styled case was filed with the Clerk's Office on June 17, 1998.

If, after reviewing the Supreme Court Rules of Practice, you have any questions about filing deadlines in the case, please feel free to call me at 614/644-9320.

Sincerely,

Rita A. Nash
Deputy Clerk

/ran

98-1074

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO	)	CASE NO. 96 CA 006445
Appellee	)	THIS IS A DEATH PENALTY CASE
-VS-	)	APPEAL FROM THE NINTH DISTRICT COURT OF APPEALS
STANLEY E. JALOWIEC	)	
Appellant	)	

ON COMPUTER-ALC

REQUEST FOR EXTENSION OF TIME
CASE OCCURRED PRIOR TO JANUARY 1, 1995

PATRICIA A. MILLHOFF
0013835
80 West Bowery Street, Ste. 310
Akron, OH 44308
(330) 535-6303

NATHAN RAY
0041570
201 Delaware Bldg.
137 S. Main Street
Akron, OH 44308
(330) 253-7171

ATTORNEYS FOR APPELLANT

GREGORY A. WHITE
PROSECUTING ATTORNEY
LORAIN COUNTY
226 Middle Avenue
4th floor
Elyria, OH 44035

FILED
JUL 22 1998
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	CASE NO. 96 CA 006445
Appellee	)	**THIS IS A DEATH PENALTY CASE**
-VS-	)	APPEAL FROM THE NINTH DISTRICT COURT OF APPEALS
STANLEY E. JALOWIEC	)	
Appellant	)	

Now comes the Appellant by and through counsel and Moves this Court, Pursuant to S. Ct. Prac. R. 14 (3) (B) (2) and moves this Court for a ten day extension of time within which to file his brief in the above listed case.

Said motion is made in that both counsel of record have numerous appellate briefs due within a short period of time. Attorney Ray has a Petition for Writ of Habeas Corpus due in an Ohio death case, and motions due in other pending federal habeas cases.

Attorney Millhoff has a Petition for Writ of Habeas due in a non-death case, and a brief due in the Ninth district Court of Appeals. The transcript in this case is lengthy, and in as much as it is a death case, the stakes for the defendant are high.

No previous extensions have been requested or granted.

Respectfully submitted,

Patricia A Millhoff

PATRICIA A. MILLHOFF
0013835
80 West Bowery Street, Ste. 310
Akron, OH 44308
(330) 535-6303

CERTIFICATE OF SERVICE

I hereby certify that a copy of the following Motion was faxed to Gregory White, Lorain County Prosecutor, (440) 323-1015 this 22nd day of July, 1998.

PATRICIA A. MILLHOFF
0013835
80 West Bowery Street, Ste. 310
Akron, OH 44308
(330) 535-6303

CERTIFICATE OF SERVICE

I hereby certify that a copy of the following Motion was faxed to Gregory White, Lorain County Prosecutor, (440) 323-1015 this 22nd day of July, 1998.

PATRICIA A. MILLHOFF
0013635
80 West Bowery Street, Ste. 310
Akron, OH 44308
(330) 535-6303

FACSIMILE TRANSMISSION COVER PAGE

IN THE SUPREME COURT OF OHIO
FACSIMILE TRANSMISSION COVER SHEET

DATE: July 22, 1998 TIME: 4:11 (A.M./P.M.)

SENDER INFORMATION:
NAME: Patricia A. Millhoff
OFFICE/FIRM: Millhoff and Connolly Attorneys At Law
TELEPHONE NUMBER: (330) 535-6303
FAX NUMBER: (330) 535-5749
RECEIVER INFORMATION:
NAME: Ohio Supreme Court
FAX NUMBER: (614) 752-4418
CASE INFORMATION:
CASE NO: 96 CA 006445
CASE CAPTION: State of Ohio vs.
Stanley E. Jalowiec
TITLE OF DOCUMENT: Request for
Extension of time
TOTAL NUMBER OF PAGES (INCLUDING THIS PAGE):
4

The Supreme Court of Ohio

FILED

JUL 23 1998

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

88-092

1998 TERM

State of Ohio, Appellee,	:	Case No. 98-1074
v.	:	E N T R Y
Stanley E. Jalowiec, Appellant.	:	

On written request of appellant it is ordered that the time for filing appellant's merit brief is hereby extended to August 6, 1998.

THOMAS J. MOYER
Chief Justice

ORIGINAL

ON COMPUTER-FILE

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	*	**CASE NO. 98 1074**
	*	
Plaintiff/Appellee	*	
	*	
-vs-	*	
	*	
STANLEY E. JALOWIEC	*	**MOTION TO REMAND TO TRIAL COURT TO COMPLETE RECORD**
	*	
Defendant/Appellant	*	

Now comes STANLEY E. JALOWIEC, Appellant herein, and moves this Court to remand the current appeal to the Trial Court to obtain a complete and accurate record. In the alternative, Appellant requests that his appeal be remanded to the Court of Appeals to complete the record or, that this Court stay the proceedings to permit Appellant to complete the record in this Court. The reasons for this request are set forth in detail in the attached Memorandum in Support.

Respectfully submitted,

NATHAN A. RAY #0041570
Attorney for Appellant
137 South Main Street, Suite 201
Akron, Ohio 44308
(330) 253-7171

PATRICIA MILLHOFF #0013835
Attorney for Appellant
80 West Bowery Street
Akron, Ohio 44308

FILED
JUL 30 1998
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT

Appellant has been convicted and sentenced to death as a result of a jury trial. On April 24, 1998 the Ninth District Court of Appeals appointed current counsel, Nathan A. Ray and Patricia Millhoff to represent Stanley Jalowiec on his direct appeal to the Ohio Supreme Court. During the course of reviewing the transcripts and record of the proceedings below, counsel for Appellant discovered that the record on appeal is incomplete and insufficient for the purposes of a review in a capital case.

Crim. R. 22 states, "In serious offense case all proceedings shall be recorded." (Emphasis added.) Therefore, capital cases, being the most serious and involving the potential forfeiture of life, require that all proceedings be recorded. This position is reinforced when considered together with App. R. 9(A), which states that "[i]n all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means." This Court has consistently interpreted the terms "all proceedings" literally. See, State v. Grant (1993), 67 Ohio St.3d 465; State v. Jells (1990), 53 Ohio St.3d 22; State v. Tyler (1990), 50 Ohio St.3d 24; State v. Brewer (1990), 48 Ohio St.3d 40; State, ex rel. Spirko v. Court of Appeals (1986), 27 Ohio St.3d 13.

Most recently, this Court addressed the issue of whether a record is complete in State v. Palmer (1997), 80 Ohio St.3d 543. In Palmer, this Court reaffirmed its position in State, ex rel. Spirko v. Court of Appeals (1986), 27 Ohio St.3d 13, 18, "...that a capital defendant is entitled to a 'complete, full, and unabridged transcript of all proceedings against him so that he may prosecute an effective appeal.'" This Court went on to hold "...that the requirement of a complete, full, and unabridged transcript in capital trials does not mean that the trial record must be perfect for purposes of appellate review." Palmer, at 553.

Case No. 08-3249
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In Palmer, the record was inadequate for purposes of appellate review because of unrecorded side bars at the bench and in chamber conferences which were not recorded. In Palmer, defense counsel attempted to recreate that record for appeal, and in so doing submitted an agreed statement of the reconstructed conversations to the appellate court. In the present case, there is not only an incomplete record, but there was no attempt at the appellate level to ensure that a complete transcript was filed. App. R. 9(B) places the responsibility on the appellant for ordering the transcript of proceedings. State v. Drake (1991), 73 Ohio St.3d 640. Thus, appellate counsel has the duty to provide the reviewing court with a complete and accurate picture of what occurred in the trial court below. See generally, State v. Brewer (1990), 48 Ohio St.3d 50; Knapp v. Edwards Laboratories (1980), 61 Ohio St.2d 197; Buckelew v. United States (5th Cir. 1978), 575 F.2d 515; Gray v. Lucas (5th Cir. 1982), 677 F.2d 1086. Because this was not done in the Ninth District Court of Appeals, new counsel is attempting to complete the appellate record before this Court.

Aside from the obvious, such as testimony and evidentiary rulings, other proceedings deemed essential to a complete record include voir dire and counsel's arguments to the jury, Stephen v. United States (5th Cir. 1961), 289 F.2d 66; jury instructions, United States v. Workcuff (D.C. Cir. 1970), 422 F.2d 700; closing arguments, Fowler v. United States (5th Cir. 1962), 310 F.2d 66; side bar conferences, United States v. Smith (3rd Cir. 1986), 787 F.2d 111; and Edwards v. United States (10th Cir. 1966), 374 F.2d 24; as well as anything that happens in open court with the possible exception of reading a deposition, United States v. Piascik (9th Cir. 1977), 559 F.2d 545. Clearly, the theme of these cases is that anything that occurs in the proceedings in a capital case that affects substantive issues must be on the record. This is especially important in capital cases under Ohio law because the statutory

Case No. 08-3249
Jalowiec v. Bradshaw
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death penalty scheme is designed in such a manner that a complete and meaningful de novo appellate review process is mandatory. R.C. 2929.05. Without a complete record on appeal, it is impossible to implement a meaningful appellate review.

In Appellant Jalowiec's case, none of the pre-trial proceedings are part of the record. A review of the trial court's docket sheet indicates that there were several pre-trial proceedings, which should have been recorded. (See Attached Exhibit A). The docket sheet indicates that pre-trials were had on March 20, 1995, April 24, 1995 and September 25, 1995. At two of these pre-trials, the court noted that Mr. Jalowiec waived and continued to waive his constitutional rights to a speedy trial. This should have been made in open court and on the record, and should be part of the record on appeal.

The court docket also indicates that at the pre-trial of April 24, 1995, there was a hearing on defendant's objection to the motion to compel the production of blood samples. Once again, this should have been recorded and made a part of the record for appeal. The court docket further indicates that on May 22, 1995, defendant was in court with his counsel concerning the issue of a conflict of interest. One of Appellant's trial counsel was also representing a co-defendant of Mr. Jalowiec's. Once again, this should have been recorded and made a part of the record for appeal.

R.C. 2929.03(G) and 2929.05 mandate that, in all capital cases, the appellate courts receive and review the entire record on appeal. Clearly a fair and meaningful review is impossible when the court does not have before it a complete record. State, ex rel. Spirko v. Court of Appeals, supra at 16. An accurate transcript is the lynch pin of appellate review. In Spirko, this Court stated that:

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> Just as the right to confer with an attorney "is a right inherent in justice, itself," so too is the right to an unabridged transcript. If consultation with one's lawyer is essential to prepare a case for the appellate courts, we believe the availability of a trial record is indispensable for that very same purpose. Without a transcript, a capital defendant is precluded from obtaining a complete and meaningful appellate review of his case as provided by statute and by Section 16, Article I, of the Ohio Constitution. In brief, with respect to the right to a comprehensive transcript, "Any person who is denied the right is denied justice." [Quoting Thomas v. Mills (1927), 117 Ohio St. 114].

Id. at 28.

In the present case, the record is not complete. Clearly, neither appellate counsel nor the reviewing courts can ensure a thorough and effective review on appeal without a complete record. Mr. Jalowiec is entitled to counsel in an appeal of right, such as this one. Douglas v. California (1963), 372 U.S. 353, and inherent in that right, is the right to effective assistance of counsel. Evitts v. Lucey (1975), 469 U.S. 387. In order to be effective, counsel must present every arguable meritorious issue on appeal. Anders v. California (1968), 386 U.S. 739. This is especially true in a capital case where mistakes or omissions can literally mean death. Therefore, counsel's inability to insure a complete record, and to effectively present all arguable issues for review on appeal would deny Mr. Jalowiec the effective assistance of counsel, due process of law, and equal protection.

While Appellant recognizes that he is not entitled to a "perfect" record for purposes of his appellate review, he is entitled to a "...complete, full, and unabridged transcript of all prcoeedings against him...". Palmer, supra, at 553 quoting State ex rel. Spirko, supra, 18. In Appellant Jalowiec's case, there were substantive issues which were addressed at his pre-trial hearings. The waiver of his right to a speedy trial, the right of the state to compel Appellant to a withdrawal of blood and the conflict of interest of one of Appellant's attorneys

Case No. 08-3249
Jalowiec v. Bradshaw
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representing a co-defendant should have been recorded, and should have been part of the appellate record.

Without a complete record, this Court is unable to perform the statutorily and constitutionally mandated review on appeal in Mr. Jalowiec's case. This Court is now presented with a choice of options: remand this case back to the trial court to complete the record, remand the case to the court of appeals to supplement the record pursuant to App. R. 9, or stay the prcoceedings in this Court and permit Appellant to expand and correct the record with the missing transcripts and fully brief any issues from those transcripts. Finally, this Court could proceed on the incomplete record, which would deny Mr. Jalowiec his constitutional rights to Due Process, Equal Protection, Effective Assistance of Counsel, and against Cruel and Unusual Punishment, or grant a dismissal of the appeal and remand for a new trial. While counsel for Mr. Jalowiec and Mr. Jalowiec himself understand this is a situation most courts wish to avoid at all costs, the facts as they exist leave no alternatives.

In Brewer, supra, this Court cited App. R. 9(A) and Crim. R. 22 for the proposition that all trial proceedings shall be recorded in capital cases. Additionally, the Court cited United States v. Selva (5th Cir. 1977), 559 F.2d 1303, indicating that where trial counsel did not handle the appeal, as in the present case, some courts have presumed prejudice where all proceedings were not so recorded.

In Mr. Jalowiec's case, the prejudice is clear. These are significant substantive issues which deserve review on appeal based upon a full and complete record. Unfortunately, that is now impossible. The issues cannot now be effectively pursued.

Respectfully Submitted,

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 3778

NATHAN A. RAY
Attorney for Appellant

PATRICIA MILLHOFF
Attorney for Appellant

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 3779

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing MOTION TO REMAND TO TRIAL COURT TO COMPLETE THE RECORD was sent by regular U.S. mail to Gregory White, Prosecuting Attorney, Lorain County, 226 Middle Avenue, 4th Floor, Elyria, Ohio 44035 this 29th day of July, 1998.

NATHAN A. RAY #0041570
Attorney for Appellant

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 3780

YUCADD0445

06/09/98 C O M M O N P L E A S C O U R T RUN TIME: 12:31
LORAIN COUNTY - GENERAL DIVISION
COURTHOUSE - ELYRIA, OHIO
DONALD J. ROTHGERY, CLERK
D O C K E T S H E E T PAGE 0001

STYLE: OHIO VS. JALOWIEC CASE NO. 95CR046840
ACTION: CRIMINAL FILED: 3/08/95
JUDGE : KOSMA J. GLAVAS

****

P 001
STATE OF OHIO

ATTORNEY(S):

GREGORY A WHITE
PROSECUTOR'S OFFICE
226 MIDDLE AVENUE
ELYRIA, OHIO 44035

** VS **

D 001
STANLEY E. JALOWIEC

SSN: [redacted]
DOB:
BOND: $200,000.00 CASH

OTHER: 5'11" 170LBS BRN/BLUE

98-1074

FILED
JUN 17 1998
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

ATTORNEY(S):

JOSEPH C GRUNDA
522 BROADWAY
LORAIN, OHIO 44052

EDWARD F CLEARY
20800 CENTER RIDGE ROAD
#217
ROCKYRIVER, OH 44116

KREIG J BRUSNAHAN
1280 WEST 3RD ST, SUITE
100
CLEVELAND, OH 44113

PATRICIA J SMITH
DOUGHTEN AND SMITH
4403 ST. CLAIR
CLEVELAND, OHIO 44103

****

DATE TYPE DESCRIPTION

****

3/08/95 INDICTMENT INDICTMENT FILED. WARRANT TO ARREST W/COPY OF INDICTMENT
(1) ISSUED TO LORAIN COUNTY SHERIFF. INDICTMENT FOR
AGGRAVATED MURDER, 2903.01(A)(1);
SPECIFICATIONS (2)

3/10/95 SERVICE (2) CERTIFICATE OF SERVICE FILED.

DEFENDANT'S EXHIBIT A

STYLE: OHIO VS. JALOWIEC CASE NO. 95CR046840
ACTION: CRIMINAL FILED: 3/08/95
JUDGE : KOSMA J. GLAVAS

****

3/10/95 RETURN (3) SHERIFF'S RETURN - I ARRESTED DEFENDANT ON MARCH 9, 1995 MARTIN J. MAHONY, SHFF

3/10/95 BOND (4) BOND SET AT $200,000.00 CASH. (TWJ) VOLUME 709 PAGE 303

3/14/95 ARRNMENT. (5) DEFENDANT ARRAIGNED. WAIVED READING OF INDICTMENT, ENTERED PLEA OF NOT GUILTY. BOND CONTINUED. CASE ASSIGNED TO JUDGE GLAVAS. PRE-TRIAL SET FOR 3/20/95 AT 8:30 A.M. (EMZ) VOLUME 710 PAGE 139

3/14/95 ATTY APPT IT APPEARING DEFENDANT IS INDIGENT, THE COURT HEREBY APPOINTS AS COUNSEL FOR DEFENDANT ATTORNEY JOSEPH C. GRUNDA AND ATTORNEY EDWARD CLEARY.

3/15/95 FILING (5A) NOTICE OF FILING INDICTMENT SENT TO SUPREME COURT.

3/20/95 PRE-TRIAL (6) (KJG) FIRST PRE-TRIAL HAD. DEFT. DOES NOT REQUEST DISCOVERY AND BILL OF PARTICULARS. ALL MOTIONS SHALL BE FILED ON OR BEFORE --- . CASE IS SET FOR HEARING(S) ON MOTION(S) AND SECOND PRE-TRIAL ON 4/24/95. DEFT. WAIVES STATUTORY TIME PURSUANT TO R.C. 2945.71 ET SEQ. VOLUME 711 PAGE 151

4/07/95 MOTION (7) MOTION FILED BY STATE TO COMPEL THE PRODUCTION OF BLOOD SAMPLES

4/14/95 FILING (8) OBJECTION TO MOTION TO COMPEL THE PRODUCTION OF BLOOD SAMPLES FILED BY DEFT

4/24/95 PRE-TRIAL (9) PRE-TRIAL HAD. JURY TRIAL SET FOR 9-12-95 AT 8:30 A.M. (KJG) VOL 716 PAGE 43

5/01/95 (KJG) (10) DEFENDANT'S OBJECTION TO MOTION TO COMPEL THE PRODUCTION OF BLOOD SAMPLES IS GRANTED, PER AUTHORITY GRANTED IN SCHMERBER V. CALIFORNIA (1966) 384 U.S. 757; STATE V. BLAIR (1990), 70 OHIO APP. 3D 774.; ST. V. MARUT (1989) 63 OHIO APP. 3D 487. VOL 717 PAGE 81 (SEE ENTRY DATED 5/4/95)

5/04/95 (KJG) (11) COURT'S ENTRY OF MAY 1, 1995 IS HEREBY AMENDED TO READ AS FOLLOWS: DEFT.'S OBJECTION TO MOTION TO COMPEL THE PRODUCTION OF BLOOD SAMPLES IS OVERRULED AND MOTION BY THE STATE TO COMPEL THE PRODUCTION OF BLOOD SAMPLES IS HEREBY GRANTED PER AUTHORITY GRANTED IN SCHMERBER V. CALIFORNIA (1966) 384 U.S. 757; STATE V. BLAIR (1-90),

70 OHIO APP. 3D 774.; STATE V. MARUT (1989)
63 OHIO APP. 3D 487. NUNC PRO TUNC.
VOLUME 717 PAGE 609

5/16/95 (KJG) (12) CASE SET FOR HEARING MAY 22, 1995 AT 8:30 A.M.
VOL 718 PAGE 386

5/18/95 FILING (13) SUGGESTION OF CONFLICT OF INTEREST FILED BY STATE

5/22/95 (KJG) DEFENDANT IN COURT WITH BOTH COUNSEL. DEFT. ADVISED OF A POTENTIAL CONFLICT BECAUSE ATTORNEY CLEARY REPRESENTED CO-DEFENDANT DAN SMITH IN CASE NO. 94CR046295.
(14) DEFT. WAIVED ANY CONFLICT IN OPEN COURT. SAID WAVIER IS ACCEPTED BY THE COURT AFTER INQUIRY AND FOUND THE WAIVER KNOWINGLY AND INTELLIGENTLY MADE.
(94CR046386/94CR045350/95CR046840/94CR045018/95CR046875)
VOLUME 718 PAGE 959

5/25/95 FILING (15) DISCOVERY FILED BY STATE OF OHIO.

5/25/95 FILING DISCOVERY FILED BY STATE OF OHIO.

6/01/95 MOTION (16) MOTION FILED
BY STATE TO TAKE A DEPOSITION

6/01/95 (KJG) (17) IT IS HEREBY ORDERED, PURSUANT TO CRIMINAL RULE 15, THAT THE DEPOSITION OF MICHAEL SMITH WILL TAKE PLACE ON THURSDAY, JUNE 15, 1995 AT 2:00 P.M. IN THE LORAIN COUNTY COURTHOUSE.
VOL 719 PAGE 61

6/06/95 MOTION (18) MOTION FILED
BY DEFT FOR CONTINUANCE OF DEPOSITION

6/07/95 FILING (19) STATE'S OBJECTION TO DEFT'S MOTION FOR CONTINUANCE OF DEPOSITION FILED

6/07/95 (KJG) (20) MOTION FOR CONTINUANCE OF DEPOSITION FILED BY MICHAEL J. DUFF, ATTORNEY FOR DEFENDANT, DANNY SMITH, IS HEREBY SET FOR HEARING ON JUNE 12,1995 AT 8:30 A.M.
VOL 719 PAGE 809

6/13/95 (KJG) (21) BY ORDER OF THE COURT, THE DEPOSITION OF MICHAEL SMITH WILL TAKE PLACE AT 2:00 P.M. ON 6-16-95 IN THE LORAIN COUNTY COURTHOUSE.
VOL 719 PAGE 1448

6/29/95 MOTION (22) MOTION FILED
BY DEFENDANT IN REGARDS TO WHEREABOUTS OF INDIVIDUAL.

STYLE: OHIO VS. JALOWIEC CASE NO. 95CR046840
ACTION: CRIMINAL FILED: 3/08/95
JUDGE : KOSMA J. GLAVAS

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7/03/95 (TWJ)	23	DEFENDANT'S REQUEST FOR THE STATE TO INFORM COURT ON A WEEKLY BASIS AS TO MICHAEL A. SMITH'S WHEREABOUTS IS HEREBY DENIED. VOL 721 PAGE 46
7/10/95 MOTION	24	MOTION TO DISMISS FILED BY DEFENDNAT, STANLEY JALOWIEC.
7/10/95 MOTION	25	MOTION FOR RELEASE OF RECORDS FILED BY DEFENDANT, STANLEY JALOWIEC.
7/10/95 MOTION	26	MOTION TO RECORD ALL TRIAL PROCEEDINGS FILED BY STANLEY JALOWIEC.
7/10/95 MOTION	27	MOTION TO PROHIBIT LAW ENFORCEMENET OFFICERS FROM WEARING UNIFORMS WHILE IN COURTROOM FILED BY DEFENDANT, STANLEY JALOWIEC.
7/10/95 MOTION	28	MOTION TO PROVIDE ACCUSED NOTICE OF SELECTION OF THE SPECIAL VENIRE FILED BY DEFENDANT, STANLEY JALOWIEC.
7/10/95 MOTION	29	MOTION TO PROVIDE COUNSEL WITH A LIST OF PROSPECTIVE JURORS AS EARLY AS POSSIBLE BEFORE TRIAL FILED BY DEFENDANT, STANLEY JALOWIEC.
7/10/95 FILING	30	PROPOSED VOIR DIRE PROCEDURES AND INSTRUCTIONS TO JURY FILED BY DEFENDANT, STANLEY JALOWIEC.
7/10/95 MOTION	31	MOTION TO SUBMIT QUESTIONNAIRE TO PROSPECTIVE JURORS FILED BY DEFENDANT, STANLEY JALOWIEC.
7/10/95 MOTION	32	MOTION FOR COMMPREHENSIVE VOIR DIRE FILED BY DEFENDANT, STANLEY JALOWIEC.
7/10/95 MOTION	33	MOTION FOR INDIVIDUAL SEQUESTERED DIRE WITH ORAL HEARING REQUESTED FILED BY DEFENDANT, STANLEY JALOWIEC.
7/10/95 MOTION	34	MOTION FOR RULING ON NUMBER OF PEREMPTORY CHALLENGES WITH ORAL HEARING REQUESTED FILED BY DEFENDANT, STANLEY JALOWIEC.
7/10/95 MOTION	35	MOTION TO PROHIBIT DEATH-QUALIFICATION OF JURY IN THE ALTERNATIVE, IF NECESSARY, TO SEAT A SEPARATE JURY DURINNG PENALTY PHASE OF TRIAL WITH ORAL HEARING REQUETED FILED BY DEFENDANT, STANLEY JALOWIEC.
7/10/95 MOTION	36	MOTION TO PROHIBIT DEATH-QUALIFICATIONS UNLESS AND UNTIL THE PROSECUTION HAS SHOWN PROBABLE CAUSE THAT THE CASE WILL PROCEED TO MITIGATION WITH ORAL HEARING REQUESTED FILED BY DEFENDANT, STANLEY JALOWIEC.

STYLE: OHIO VS. JALOWIEC CASE NO. 95CR046840
ACTION: CRIMINAL FILED: 3/08/95
JUDGE : KOSMA J. GLAVAS

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7/10/95 MOTION (37) MOTION TO REQUIRE PROSECUTOR TO STATE REASONS FOR EXERCISING PEREMPTORY CHALLENGES FILED BY DEFENDANT, STANLEY JALOWIEC.

7/10/95 MOTION (38) MOTION TO PROHIBIT THE USE OF PEREMPTORY CHALLENGES TO EXCLUDE JURORS WHO EXPRESS CONCERNS ABOUT CAPITAL PUNISHMENT WITH ORAL HEARING REQUESTED FILED BY DEFENDANT, STANLEY JALOWIEC.

7/10/95 FILING (39) VOIR DIRE MEMORANDUM: VENIREPERSONS WHO CANNOT FAIRLY CONSIDER MITIGATING EVIDENCE AND WHO WOULD AUTOMATICALLY VOTE FOR DEATH UPON A SHOWING OF GUILT MUST BE EXCUSED FILED BY DEFENDANT, STANLEY JALOWIEC.

7/10/95 MOTION (40) VOIR DIRE MEMORANDUM: THE DEFENSE MUST BE ALLOWED TO EXAMINE PROSPECTIVE JURORS REGARDING THEIR VIEWS ON CAPITAL PUNISHMENT PRIOR TO THEIR EXCUSAL FILED BY DEFENDANT, STANLEY JALOWIEC.

7/10/95 MOTION (41) MOTION TO PROHIBIT REFERENCES TO THE JURY, AT ANY POINT IN THESE PROCEEDINGS, THAT A VERDICT AS TO DEATH IS ONLY A RECOMMENDATION, IN THE ALTERNATIVE, MOTION TO PROHIBIT REFERENCES TO THE BINDING OR NON-BINDING NATURE OF THE JURY'S DETERMINATION WITH ORAL HEARING REQUESTED FILED BY DEFENDANT, STANLEY JALOWIEC.

7/10/95 MOTION (42) MOTION FOR SECOND VOIR DIRE OF JURY WITH ORAL HEARING REQUESTED FILED BY DEFENDANT, STANLEY JALOWIEC.

7/10/95 MOTION (43) MOTION TO PROHIBIT DISPLAY OF EVIDENTIARY EXHIBITS UNTIL ADMITTED WITH ORAL HEARING FILED BY DEFENDANT, STANLEY JALOWIEC.

7/10/95 MOTION (44) MOTION TO PROHIBIT ANY EVIDENCE BEARING ON THE CHARACTER OF THE VICTIM OR VICTIM IMPACT WITH ORAL HEARING REQUESTED FILED BY DEFENDANT, STANLEY JALOWIEC.

7/10/95 MOTION (45) MOTION TO EXCLUDE ANY EVIDENCE RELATING TO OTHER CRIMES, WRONGS OR ACTS WITH ORAL HEARING REQUESTED FILED BY DEFENDANT, STANLEY JALOWIEC.

7/28/95 MOTION (46) MOTION FOR APPROPRIATIONS OF FUNDS FOR EXPERT ASSISTANCE FILED BY DEFT.

7/28/95 (KJG) (47) DEFENDANT'S MOTION FOR APPROPRIATIONS OF FUNDS FOR EXPERT ASSISTANCE IS HEREBY GRANTED, NOT TO EXCEED $1500.00 WITHOUT FURTHER ORDER OF COURT.
VOL 722 PAGE 1530

7/31/95 FILING (48) SUPPLEMENTAL DISCOVERY FILED BY STATE

STYLE: OHIO VS. JALOWIEC CASE NO. 95CR046840
ACTION: CRIMINAL FILED: 3/08/95
JUDGE : KOSMA J. GLAVAS

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8/01/95 FILING (49) NOTICE OF RETURN OF PROPERTY FILED BY STATE

9/08/95 MOTION (50) MOTION FILED
BY DEFT FOR CONTINUANCE

9/08/95 (KJG) (51) UPON THE COURT'S MOTION, CASE SET FOR PRE-TRIAL ON 9/25/95 AT 8:30 A.M.
VOLUME 725 PAGE 532

9/25/95 PRE-TRIAL PRE-TRIAL HAD.
(52) JURY TRIAL SET FOR 11-28-95 AT 8:30 A.M. DEFT. CONTINUES TO WAIVE ALL STATUTORY TIME PERIODS.
(KJG)
VOL 726 PAGE 720

9/26/95 FILING (53) SUPPLEMENTAL DISCOVERY FILED BY STATE

11/22/95 FILING (54) SUPPLEMENTAL DISCOVERY FILED BY STATE

11/28/95 (KJG) (55) DEFENDANT'S MOTION FOR A CONTINUANCE IS GRANTED. JURY TRIAL RESET FOR 3-12-96 AT 8:30 A.M.
VOL 730 PAGE 1228

11/30/95 MOTION (56) MOTION FILED
BY DEFT FOR ADDITIONAL QUESTIONS TO BE PLACED ON QUESTIONNAIRE TO PROSPECTIVE JURORS

12/07/95 (KJG) (57) DEFT'S MOTION FOR ADDITIONAL QUESTIONS TO BE PLACED ON QUESTIONNAIRE TO PROSPECTIVE JURORS IS DENIED. VOL.731 PAGE.885

12/13/95 MOTION (58) MOTION FOR COPY OF TRANSCRIPT FILED BY DEFENDANT, STANLEY JALOWIEC.

12/21/95 FILING (59) STATE'S RESPONSE TO DEFENDANT'S MOTION FOR TRANSCRIPT

12/26/95 (KJG) THE COURT HAVING CONSIDERED THE STATE'S MOTION TO CONSOLIDATE AND HAVING READ THE AUTHORTIES CITED,
(60) THE COURT IS OF THE OPINION THAT EVEN THOUGH CONSOLIDATION IS POSSIBLE IN THESE MATTERS; NEVER-THE-LESS THIS COURT DENIES SAID MOTION IN THE INTEREST OF JUSTICE AND OVER ABUNDANCE OF CAUTION. (95CR046839-SMITH, 95CR046840-JALOWIEC) VOLUME 732 PAGE 847

12/26/95 (KJG) DEFT.'S MOTION FOR COPY OF TRANSCRIPT OF TRIAL OF STATE OF OHIO VS. RAYMOND SMITH, CASE NO. 94CR046838 IS HEREBY
(61) GRANTED.
VOLUME 732 PAGE 848

STYLE: OHIO VS. JALOWIEC CASE NO. 95CR046840
ACTION: CRIMINAL FILED: 3/08/95
JUDGE : KOSMA J. GLAVAS
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12/26/95 (KJG) 62 DEFT.'S MOTION FOR TRANSCRIPT AS REQUESTED IS HEREBY GRANTED.
VOLUME 732 PAGE 849

1/31/96 MOTION 63 MOTION FILED
BY DEFENDANT FOR CHANGE OF VENUE

2/05/96 FILING 64 STATE'S RESPONSE TO DEFENDANT'S MOTION FOR CHANGE OF VENUE

2/07/96 (KJG) 65 MOTION FOR CHANGE OF VENUE FILED BY DEFT. IS DENIED.
VOLUME 735 PAGE 810

3/04/96 MOTION 66 MOTION FILED
BY DEFENDANT TO DISQUALIFY.

3/07/96 (KJG) 67 DEFT.'S MOTION TO DISQUALIFY IS DENIED FOR NOT PROPER VENUE.
VOLUME 737 PAGE 774-A

3/11/96 ENTRY (THOMAS J. MOYER, CHIEF JUSTICE)
68 THE AFFIDAVIT OF DISQUALIFICATION IS FOUND NOT WELL-TAKEN AND IS DENIED. THE CAUSE SHALL PROCEED BEFORE JUDGE GLAVAS. SEE JOURNAL.
VOLUME 737 PAGE 913

3/11/96 (KJG) 69 MOTIONS (21) FILED BY DEFENDANT, STANLEY JALOWIEC, RULED ON. SEE JOURNAL ENTRY.
VOLUME 737 PAGE 924

3/11/96 FILING 70 SUPPLEMENTAL DISCOVERY FILED BY STATE

3/11/96 MOTION 71 MOTION FILED
BY STATE TO QUASH SUBPOENA

3/11/96 MOTION 72 MOTION FILED
BY DEFENDANT FOR CONTINUANCE

3/11/96 (EMZ) 73 UPON A HEARING BEFORE THE ADMINISTRATIVE JUDGE ZALESKI ON A MOTION TO QUASH SUBPEONA ISSUED TO JUDGE GLAVAS. TESTIMONY WAS PRESENTED BY BOTH SIDES. THE COURT RULES THAT THE SUBPEONA ISSUED TO JUDGE GLAVAS IS QUASHED AS THE DEFT HAS FAILED TO SHOW THAT SUCH TESTIMONY OF THE JUDGE IS REASONABLY RELEVANT TO THE ISSUES AT HAND.
JOURNAL 737 PAGE 972

3/15/96 (KJG) 74 THE LORAIN COUNTY SHERIFF OR HIS AUTHORIZED DEPUTY IS ORDERED TO TRANSPORT RAYMOND A SMITH, INMATE #314-607 FROM MANSFIELD CORRECTIONAL INSTITUTION

TO THE LCCF ON OR BEFORE 3/18/96. RAYMOND A SMITH TO BE TRANSPORTED FROM THE LCCF TO THE LORAIN COUNTY COURTHOUSE, COURTROOM #3 ON 3/18/96 AT 9:00 AM. FOR TESTIMONY. JOURNAL 737 PAGE 1562

3/15/96 WARRANT (74A) WARRANT TO CONVEY TO LORAIN COUNTY CORRECTIONAL FACILITY. (RAYMOND A. SMITH)

3/18/96 RETURN SHERIFF'S RETURN - I CONVEYED THE DEFENDANT TO PLACE DESIGNATED ON MARCH 18, 1996,(RAYMOND A. SMITH) MARTIN J MAHONY SHERIFF

3/19/96 FILING (75) PROPOSED JURY INSTRUCTIONS FILED BY DEFENDANT

3/20/96 (KJG) (76) THE COURT HEREBY GRANTS PERMISSION TO CHRONICLE-TELEGRAM TO: BROADCAST/TELEVISE/RECORD OR PHOTOGRAPH IN THE COURTROOM DURING THE TRIAL OF THE WITHIN MATTER, SUBJECT TO ANY LIMITATIONS WHICH THE COURT MAY LATER IMPOSE. (MEDIA REQUEST ATTACHED, 3/13/96) VOLUME 738 PAGE 447

3/20/96 (KJG) (77) (3/12/96) FIRST DAY OF JURY TRIAL. VOIR DIRE OF JURY COMMENCED. ADJOURNED UNTIL MARCH 13, 1996 AT 8:30 A.M. VOLUME 738 PAGE 423

3/20/96 (KJG) (78) (3/13/96) SECOND DAY OF JURY TRIAL. FURHTER VOIR DIRE CONDUCTED OF THE JURY. JURY OF 14 IMPANELED. ADJOURNED UNTIL MARCH 14, 1996 AT 8:30 A.M. VOLUME 738 PAGE 424

3/20/96 (KJG) (79) (3/14/96) THIRD DAY OF JURY TRIAL. OPENING STATEMENTS PRESENTED. STATE'S CASE IN CHIEF PARTIALLY PRESENTED. ADJOURNED UNTIL 9:00 A.M. ON MARCH 15, 1996. VOLUME 738 PAGE 425

3/20/96 (KJG) (80) (3/15/96) FOURTH DAY OF JURY TRIAL. STATE'S CASE PARTIALLY PRESENTED. ADJOURNED UNTIL 8:15 A.M. ON MARCH 18, 1996. VOLUME 738 PAGE 426

3/20/96 (KJG) (81) (3/18/96) FIFTH DAY OF JURY TRIAL. STATE'S CASE IN CHIEF PRESENTED. RULE 29 MOTION MADE BY DEFENSE AND OVERRULED. NO EVIDENCE PRESENTED BY THE DEFENDANT. DEFENSE RESTS. ADJOURNED UNTIL MARCH 19, 1996 AT 8:45 A.M. VOLUME 738 PAGE 427

3/20/96 (KJG) (82) (3/19/96) SIXTH DAY OF JURY TRIAL. CLOSING ARGUMENTS

PRESENTED. JURY CHARGED. ALTERNATES EXCUSED.
DELIBERATIONS COMMENCED. ADJOURNED UNTIL 3/20/96 AT
9:00 A.M.
VOLUME 738 PAGE 428

3/20/96 (KJG) (3/20/96) FURTHER DELIBERATIONS COMMENCED.
(83) VERDICT: DEFENDANT FOUND GUILTY. MITIGATION HEARING
SET FOR APRIL 9, 1996. SEE VERDICT.
VOLUME 738 PAGE 429

3/27/96 (KJG) DR. DEBORAH KORICKE IS HEREBY GRANTED VISITATION PRIVILEGES
(84) WITH DEFENDANT, STANLEY JALOWIEC AT THE LORAIN COUNTY
CORRECTIONAL FACILITY.
JOURNAL 738, PAGE 1259
(1 CC SENT TO SHERIFF)

3/27/96 (KJG) DR. DEBORAH KORICKE IS HEREBY APPOINTED AS AN EXPERT
(85) PSYCHOLOGIST ON BEHALF OF THE DEFENDANT AT A COST TO THE
STATE NOT TO EXCEED $1,000.00.
JOURNAL 738, PAGE 1260

3/29/96 MOTION MOTION FILED
(86) BY DEFENDANT TO REQUIRE THE JURY TO ARTICULATE THE METHOD
BY WHICH IT WEIGHS THE AGGRAVATING CIRCUMSTANCES AGAINST
THE MITIGATING FACTORS WITH ORAL HEARING REQUESTED.

3/29/96 MOTION MOTION FILED
(87) BE DEFENDANT TO ALLOW THE DEFENSE TO ARGUE LAST AT THE
PENALTY PHASE WITH ORAL HEARING REQUESTED

3/29/96 MOTION MOTION FILED
(88) BY DEFENDANT TO PRECLUDE READMISSION OF TRIAL PHASE EVIDENCE
AND EXHIBITS IN PENALTY PHASE, AND RELATED PROSECUTORIAL
COMMENT WITH ORAL HEARING REQUESTED.

3/29/96 MOTION MOTION FILED
(89) BY DEFENDANT TO PERMIT DEFENSE TO ADMIT ALL MITIGATING
EVIDENCE AT SENTENCING PHASE WITH ORAL HEARING REQUESTED.

3/29/96 MOTION MOTION FILED
(90) BY DEFENDANT TO PROHIBIT THE PROSECUTOR FROM ARGUING AND
THE COURT FROM GIVING INSTRUCTIONS REGARDING STATUTORY
MITIGATING FACTORS NOT RAISED BY THE DEFENSE WITH ORAL
HEARING REQUESTED

3/29/96 MOTION MOTION FILED
(91) BY DEFENDANT TO LIMIT STATE'S EVIDENCE TO REBUTTAL WITH
ORAL HEARING REQUESTED

STYLE: OHIO VS. JALOWIEC CASE NO. 95CR046840
ACTION: CRIMINAL FILED: 3/08/95
JUDGE : KOSMA J. GLAVAS

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3/29/96	MOTION	(92) MOTION FILED BY DEFENDANT TO LIMIT REBUTTAL EVIDENCE AND ARGUMENT RESPECTING THE DECEDENT WITH ORAL HEARING REQUESTED
3/29/96	MOTION	(93) MOTION FILED BY DEFENDANT TO LIMIT PROSECUTOR'S ARGUMENT TO THE AGGRAVATING CIRCUMSTANCES PROVEN AT THE FIRST PHASE OF THE TRIAL, AND TOLIMIT THE PROSECUTOR'S PRESENTATION OF EVIDENCE AND ARGUMENT TO PROPER REBUTTAL OF THE DEFENSE PRESENTATION WITH ORAL HEARING REQUESTED
3/29/96	FILING	(94) MOTION IN LIMINE FILED BY DEFENDANT TO PROHIBIT PREJUDICIAL ARGUMENTS AND THEMES AT THE CLOSING ARGUMENT OF THE PENALTY PHASE WITH ORAL HEARING REQUESTED
3/29/96	MOTION	(95) MOTION FILED BY DEFENDANT TO PROHIBIT REFERENCE TO NATURE AND CIRCUMSTANCES OF THE OFFENSE AS A FACTOR TO BE CONSIDERED IN MITIGATION OR IN INTRODUCTORY LANGUAGE RESPECTING MITIGATION WITH ORAL HEARING REQUESTED
3/29/96	MOTION	(96) MOTION FILED BY DEFENDANT FOR INSTRUCTION THAT THE STATE BEARS THE BURDEN OF PROVING THE ABSENCE OF ANY MITIGATING FACTORS OFFERED BY THE DEFFENSE WITH ORAL HEARING REQUESTED
3/29/96	MOTION	(97) MOTION FILED BY DEFENDANT TO REPHRASE THE INSTRUCTION REFLECTING THE R.C. 2929.04(B)(7) "CATCH ALL" MITIGATING CIRCUMSTANCE TO REFLECT THAT SUCH FACTORS ARE ANY OTHER FACTORS THAT CALL FOR A PENALTY LESS DEATH, OR LESSEN THE APPROPRIATENESS OF A SENTENCE OF DEATH WITH ORAL HEARING REQUESTED
3/29/96	MOTION	(98) MOTION FILED BY DEFENDANT TO ALTER DEFINITION OF MITIGATING CIRCUMSTANCES TO REMOVE REFERENCE TO "REDUCING THE DEGREE OF BLAME" AND REPLACE THIS WITH OTHER LANGUAGE, AND TO SO LIMIT THE PROSECUTOR IN ARGUMENT WITH ORAL HEARING REQUESTED
3/29/96	MOTION	(99) MOTION FILED BY DEFENDANT TO INSTRUCT THE JURY TO CONSIDER MERCY IN ITS MITIGATION PHASE DELIBERATIONS, AND TO PROHIBIT THE PROSECUTOR FROM ARGUING THAT THE JURY SHOULD NOT CONSIDER MERCY WITH ORAL HEARING REQUESTED
3/29/96	MOTION	(100) MOTION FILED BY DEFENDANT FOR PENALTY PHASE PHASE JURY INSTRUCTION RESPECTING ORDER OF DELIBERATIONS AND LACK OF NECESSITY TO FIRST AGREE UNANIMOUSLY ON A RECOMMENDATION OF DEATH

STYLE: OHIO VS. JALOWIEC CASE NO. 95CR046840
ACTION: CRIMINAL FILED: 3/08/95
JUDGE : KOSMA J. GLAVAS
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3/29/96	MOTION	MOTION FILED BY DEFENDANT TO INSTRUCT THE JURY THAT IT IS TO RECOMMEND A SENTENCE OF DEATH ONLY AFTER THE PROPER WEIGHING, AND DETERMINING THAT DEATH IS THE APPROPRIATE PUNISHMENT; ORAL HEARING REQUESTED (101)
3/29/96	MOTION	MOTION FILED BY DEFENDANT TO INSTRUCT ON SPECIFIC MITIGATING FACTORS RAISED BY DEFENSE WITH ORAL HEARING REQUESTED (102)
3/29/96	MOTION	MOTION FILED BY DEFENDANT TO INCLUDE RESIDUAL DOUBT ABOUT GUILT, OR SIMILAR LANGUAGE. AMONG LIST OF MITIGATING FACTORS IN PENALTY PHASE JURY INSTRUCTIONS WITH ORAL HEARING REQUESTED. (103)
4/05/96	FILING	STATE'S RESPONSE TO DEFENDANT'S MOTION NUMBER: M-16 (104)
4/05/96	FILING	STATE'S RESPONSE TO DEFENDANT'S MOTIONS NUMBER: M-12, M-13, M-15, M-17 AND M-18 (105)
4/05/96	FILING	STATE'S RESPONSE TO DEFENDANT'S MOTION NUMBER: M-9 (106)
4/05/96	FILING	STATE'S RESPONSE TO DEFENDANT'S MOTION M-2 (107)
4/05/96	FILING	STATE'S RESPONSE TO DEFENDANT'S MOTION NUMBERS: M-1, M-4, M-5, M-6 AND M-8 (108)
4/05/96	FILING	STATE'S RESPONSE TO DEFENDANT'S MOTION NUMBERS: M-3, M-7, M-10,M-11, M-14 (109)
4/08/96	(KJG)	RULING UPON (19) MOTIONS OF THE DEFENDANT. SEE JOURNAL ENTRY. VOLUME 739 PAGE 898 (110)
4/11/96	(KJG)	(4/9/96) MITIGATION HEARING COMMENCED. ALL JURORS, INCLUDING THE TWO ALTERNATES, ARE PRESENT. STATE INCORPORATES BY REFERENCE ALL TESTIMONY FROM GUILT OR INNOCENCE PHASE OF TRIAL. TESTIMONY PARTIALLY PRESENTED BY DEFENSE COUNSEL ON MITIGATION. REBUTTAL BY STATE. ADJOURNED UNTIL 4/10/96 AT 8:15 A.M. JURY NOT SEQUESTERED FOR THE NIGHT. VOLUME 739 PAGE 1349 (111)
4/11/96	(KJG)	(4/10/6) SECOND DAY OF MITIGATION HEARING. STATE COMPLETES REBUTTAL TESTIMONY. REQUEST FOR LIMITING INSTRUCTION BY THE DEFENSE. REQUEST GRANTED. CLOSING ARGUMENTS. JURY CHARGED. ALTERNATE EXCUSED. JURY DELIBERATIONS COMMENCED. VERDICT: RECOMMENDATION FOR DEATH PENALTY. SEE VERDICT. (112)

COURT ACCEPTS THE RECOMMENDATION AND ORDERS EXECUTION ON APRIL 10, 1997. DEFENDANT ADVISED OF HIS APPELLATE RIGHTS. COURT TO APPOINT COUNSEL FOR APPEAL.
VOLUME 739 PAGE 1350, 1352

4/11/96 SENTENCING (KJG) THE COURT HEREBY ACCEPTS THE RECOMMENDATION OF THE JURY AND IMPOSES A SENTENCE OF DEATH AFTER AN INDEPENDENT WEIGHING AS REQUIRED BY STATUTE. SENTENCE TO BE CARRIED OUT ON APRIL 10, 1997.
(113) DEFT.'S THREE YEAR SENTENCE OF ACTUAL INCARCERATION IS IMPOSED CONSECUTIVELY FOR THE GUN SPECIFICATION.
DEFT. APPRISED OF HIS RIGHTS UPON APPEAL. OPINION AS REQUIRED BY STATUTE TO FOLLOW.
VOLUME 739 PAGE 1351

4/12/96 SENT/CONV C/C OF INDICTMENT, JOURNAL ENTRY, AND SENTENCE ISSUED TO LORAIN COUNTY SHERIFF ALONG WITH WARRANT TO CONVEY TO: LORAIN CORRECTIONAL INSTITUTION
(ALONG WITH DEATH WARRANT)

4/17/96 RETURN (114) SHERIFF'S RETURN - I CONVEYED THE DEFENDANT TO PLACE DESIGNATED ON
APRIL 12, 1996. MARTIN J. MAHONY, SHERIFF.

4/29/96 (KJG) OPINION, R.C. 2920.03(F).
(115) THIS COURT FINDS BY PROOF BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCE OUTWEIGHS ALL MITIGATING FACTORS. ACCORDINGLY, THE DEATH PENALTY WAS IMPOSED BY THIS COURT ON APRIL 10, 1996.
SEE JOURNAL ENTRY.
VOLUME 740 PAGE 1518

5/08/96 AFFIDAVIT AFFIDAVIT OF INDIGENCY FILED.

5/08/96 MOTION (116) MOTION FILED
BY DEFENDANT PRO SE FOR PUBLIC RECORDS

5/09/96 MOTION (117) MOTION FILED
BY DEFENDANT PRO SE FOR PUBLIC RECORDS.

5/09/96 FILING (118) NOTICE OF APPEAL FILED.
(#96CA006445)

5/13/96 FILING (119) STATE'S RESPONSE TO DEFENDANT'S MOTION FOR PUBLIC RECORDS

5/21/96 (KJG) DEFT'S MOTION FOR PUBLIC RECORDS IS DENIED.
(120) VOL. 742 PAGE 469

5/21/96 (KJG) (121) THE COURT REPORTER IS HEREBY INSTRUCTED TO PREPARE THE

TRANSCRIPT IN THE ABOVE MATTER AT STATE'S EXPENSE FOR THE PURPOSE OF APPEAL.
VOL. 742 PAGE 470

5/24/96 (KJG) (122) ATTORNEY KREIG BRUSNAHAN AND ATTORNEY PATRICIA SMITH ARE HEREBY APPOINTED AS CO-COUNSEL TO REPRESENT THE DEFENDANT, STANLEY E. JALOWIEC FOR THE PURPOSE OF APPEAL TRANSCRIPTS TO BE OBTAINED FOR SAID APPEAL AT STATE'S EXPENSE.
JOURNAL 742, PAGE 824

5/30/96 (KJG) (123) DEFT JALOWIEC'S MOTION FOR PUBLIC RECORDS FILED ON 5/8/96, IS DENIED. SEE JOURNAL
JOURNAL 742 PAGE 1437

7/16/96 FILING TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES TOGETHER W/ALL ORIGINAL PAPERS FILED IN C/A CASE #96CA006445.

12/23/96 MOTION (124) MOTION FILED
BY PETITIONER STANLEY JALOWIEC FOR CO-DEFENDANT DANIEL SMITH'S TRIAL TRANSCRIPTS

1/02/97 (KJG) (125) MOTION FOR CO-DEFT'S TRIAL TRANSCRIPTS FILED BY DEFT'S ATTNY IS GRANTED. SAID TRANSCRIPT TO BE PROVIDED AT THE COST OF SECOND COPY. VOL 757 PAGE 12

2/25/97 MOTION (126) MOTION FILED
BY DEFT FOR EXPERT ASSISTANCE AND DISCOVERY

3/17/97 FILING (127) POST-CONVICTION PETITION TO VACATE OR SET ASIDE SENTENCE FILED BY DEFENDANT-PETITIONER - EVIDENTIARY HEARING REQUESTED

3/25/97 (KJG) (128) COURT HAS TAKEN MOTION FOR EXPERT ASSISTANCE UNDER ADVISEMENT. COURT REQUESTS FROM COUNSEL AN APPROXIMATE AMOUNT OF MONEY NEEDED FOR SAID EXPERTS BEFORE MAKING ITS RULING. VOL 762 PAGE 1259

4/15/97 MOTION (129) MOTION FILED
BY DEFT TO AMEND THE RECORD PURSUANT TO APP.R. 9(C)

4/17/97 FILING (130) FIRST AMENDED POST CONVICTION PETITION, EVIDENTIARY HEARING REQUESTED, PETITION TO VACATE OR SET ASIDE SENTENCE PURSUANT TO OHIO REVISED CODE 2953.21 FILED BY DEFT

6/13/97 (KJG) (131) THIS CAUSE WAS CONSIDERED UPON DEFT-APPELLANT'S MOTION TO AMEND THE RECORD PURSUANT TO APPELLATE RULE 9(C). THE MOTION IS GRANTED & THE RECORD SHOULD RELECT THAT THE FOLLOWING JURORS, ALTHOUGH NOT NOTED ON THE "JUROR STRIKE OFF LIST" WERE EXCUSED BY THE DEFENSE & BY THE

STYLE: OHIO VS. JALOWIEC CASE NO. 95CR046840
ACTION: CRIMINAL FILED: 3/08/95
JUDGE : KOSMA J. GLAVAS
****

PROSECUTION. THE RECORD IS AMENDED TO REFLECT THAT THE ABOVE JURORS WERE CHALLENGED & EXCUSED BY THE PARTIES AS NOTED AS ABOVE. SEE JOURNAL.
VOL 767 PAGE 1814

6/23/97 MOTION (132) MOTION FILED
BY STATE TO CORRECT THE RECORD

6/24/97 (KJG) (133) STATE'S MOTION TO CORRECT THE RECORD IS GRANTED.
VOL 768 PAGE 1311

8/06/97 FILING (134) SECOND AMENDED POST-CONVICTION PETITION FILED BY DEFENDANT (EVIDENTIARY HEARING REQUESTED)

3/19/98 MOTION (135) MOTION FILED
BY ATTORNEY PATRICIA J. SMITH, TO WITHDRAW AS COUNSEL AND FOR APPOINTMENT OF SUBSTITUTE COUNSEL.

3/24/98 (KJG) (136) MOTION TO WITHDRAW AS COUNSEL AND FOR APPOINTMENT OF SUBSTITUTE COUNSEL IS DENIED. THIS MATTER IS NOW IN THE COURT OF APPEALS AND THE JURISDICTION REGARDING COUNSEL IS UP TO COURT OF APPEALS. SHOULD IT BE THAT THIS COURT DOES HAVE JURISDICTION, THEN MOTION TO WITHDRAW IS DENIED UNTIL NEW COUNSEL ENTERS APPEARANCE OF RECORD.
OF RECORD. VOLUME # 786 PAGE # 1339

3/30/98 MOTION (137) MOTION FILED
BY DEFENDANT PRO SE REQUESTING THIS COURT TO STRIKE THE COUNSELOR'S PETITION FOR POST-CONVICTION AND ITS AMENDMENTS AND ALLOW PETITIONER TIME TO REFILE HIS OWN PRO SE PETITION FOR THE RECORD.

3/30/98 MOTION (138) MOTION FILED
BY DEFENDANT PRO SE FOR DISCOVERY
(HEARING REQUESTED)

4/15/98 FILING (139) (96CA006445) JUDGMENT AFFIRMED. SEE JOURNAL.
VOL 787, PAGE 1805

COMPUTER-SMW

The Supreme Court of Ohio

FILED

AUG 26 1998

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

88-148

1998 TERM

State of Ohio, Appellee,	:	Case No. 98-1074
v.	:	
Stanley E. Jalowiec, Appellant.	:	E N T R Y

This cause is pending before the Court as an appeal from the Court of Appeals for Lorain County. Upon consideration of appellant's motion to remand to trial court to complete record or, in the alternative to stay proceedings,

It is ordered by the Court that the motion to remand or, in the alternative to stay proceedings be, and hereby is, denied.

THOMAS J. MOYER
Chief Justice

0035r082698

ORIGINAL
ON COMPUTER-ALC

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	CASE NO: 98-1074
Plaintiff-Appellee,	)	
vs.	)	
STANLEY E. JALOWIEC,	)	
Defendant-Appellant.	)	

FILED
AUG 10 1998
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

STATE'S OBJECTION TO APPELLANT'S MOTION TO REMAND TO THE TRIAL COURT FOR COMPLETION OF THE RECORD

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(216) 329-5393
BY:
JONATHAN E. ROSENBAUM
Chief Counsel, Criminal Division

COUNSEL FOR APPELLEE

NATHAN A. RAY, #0041570
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(33) 253-7171

And

PATRICIA MILLHOFF, #0013835
Attorney at Law
80 West Bowery Street
Akron, Ohio 44308

COUNSEL FOR APPELLANT

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 3796

BRIEF IN SUPPORT

Now comes the State of Ohio, Appellee, and objects to the appellant's motion to remand this case to the trial court to complete the record for the following reasons:

(1) This court has made it clear in ***State v. Williams*** (1995), 75 Ohio St.3d 153 at 160, that a defendant who makes no effort to complete the record pursuant to Ohio App.R. 9(B), prior to the case reaching the Supreme Court of Ohio, has waived any right he has pursuant to ***State, ex rel. Spirko v. Court of Appeals*** (1986), 27 Ohio St.3d 13. The appellant in this case has made no effort whatsoever to supplement the record and cannot properly do so in the Supreme Court of Ohio. It is respectfully suggested that the defense "du jour," in capital litigation, both on direct appeal and in post conviction relief, is to delay the progression of the case by asserting deficiencies in the record and/or availability of the record for courts to do their requisite duty.

The appellant in this case therefore has waived his right to assign as error any deficiencies in the record. This necessarily includes the ability to delay the prosecution or appeal of this lawsuit because of deficiencies in the record; and

(2) As the appellant acknowledges, this court has re-affirmed its holdings concerning the rights of a capital litigant to have a complete record in ***State v. Palmer*** (1997), 80 Ohio St.3d 543. As the appellant acknowledges, this court has held "however, we have never held that "complete, full, and unabridged" is synonymous with "perfect."" ***Palmer, supra*** at 552. Likewise, the appellant acknowledges on pages five and six of his brief that effective counsel must be able to present "every arguable meritorious issue" and that "all trial proceedings shall be recorded in capital cases."

The appellant, in his motion, has not presented a factual basis to lead this court to even suspect that any alleged deficiencies in the record might preclude the arguing of a meritorious trial issue. Appellant claims that the docket sheet indicates that "pretrials were had on March 20, 1995, April 24, 1995, and September 25, 1995." Appellant's Brief at 4. Appellant claims that Mr. Jalowiec waived and continued to waive his rights to speedy trial at two of these pre-trials and that this should have been done in open court on the record. He cites no authority for this proposition. To claim that a lawyer cannot sign an entry after meeting privately with his client concerning his right to speedy trial not only defies common sense, but may interfere with the attorney's right to confer with his client without having a court reporter present.

The appellant also claims "the court docket also indicates that at the pretrial of April 24, 1995, there was a hearing on defendant's objection to the motion to compel the production of blood samples." Appellant's Brief at 4. A reading of the docket sheet, attached as Exhibit A to the Appellant's Motion, belies that claim. The entry pertaining to the date of April 24, 1995 does not even refer to the motion to compel blood samples. This motion was filed on April 7, 1995, there was an objection filed by the appellant on April 14, 1995, and the motion was subsequently granted upon on May 4, 1995 without hearing after submission to the court, according to the docket sheet. Therefore, there would be no hearing to record and the evidentiary basis for appellant's claim appears to not exist.

Lastly, appellant claims that the docket reflects that on May 22, 1995 he was in court with counsel concerning the issue of conflict of interest. The docket also reflects that the State of Ohio raised this potential conflict on behalf of the defendant so that this would not be an issue on appeal. The court's docket reflects, through its entry, that the defendant appeared

in open court and knowingly and intelligently waived any potential conflict. Again, without citing authority, appellant claims that this hearing should have been recorded and made a part of the record on appeal. For the reasons set forth in ***State v. Palmer, supra***, at 555, this alleged failure should not be heard by this court because the appellant has failed to demonstrate that:

> (1) a request was made at trial that the conferences be recorded or that objections were made to the failures to record, (2) an effort was made on appeal to comply with App.R. 9 and to reconstruct what occurred or to establish its importance, and (3) material prejudice resulted from the failure to record the proceedings at issue.

Since the appellant has failed to demonstrate that trial counsel ever requested the recording of these matters and that appellant has failed to affirmatively demonstrate any material prejudice resulting from the unrecorded matters, he should not be heard to delay justice in this case through a remand.

Respectfully submitted,

GREGORY A. WHITE
Prosecuting Attorney
Lorain County, Ohio

JONATHAN E. ROSENBAUM
Supreme Ct. No. 21698
Chief Counsel, Criminal Division
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PROOF OF SERVICE

A copy of the foregoing ***STATE'S OBJECTION TO APPELLANT'S MOTION TO REMAND TO THE TRIAL COURT FOR COMPLETION OF THE RECORD*** was sent by regular U.S. Mail to Nathan A. Ray, Counsel for Appellant, at 137 South Main Street, Suite 201, Akron, Ohio 44308 and Patricia Millhoff, Counsel for Appellant, at 80 West Bowery Street, Akron, Ohio 44308, on this 7 day of August, 1998.

JONATHAN E. ROSENBAUM
Chief Counsel, Criminal Division

ORIGINAL

ON COMPUTER-AFD

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	*	**CASE NO. 98 1074**
Appellee	*	
-vs-	*	
STANLEY E. JALOWIEC	*	
Appellant	*	

APPEAL FROM THE NINTH DISTRICT COURT OF APPEALS
SUMMIT COUNTY, OHIO
CASE NO. 96 CA 006445

CONDITIONAL MOTION TO WITHDRAW AS COUNSEL FOR THE APPELLANT

GREGORY WHITE
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FILED
AUG 17 1998
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT OF MOTION

I. FACTUAL BACKGROUND

The undersigned were appointed to represent the Appellant in his direct appeal of right before this Court by the Court of Appeals for Summit County, Ninth Appellate District. The appeal below was prosecuted and on April 15, 1998 the Court of Appeals for Summit County, Ninth Appellate District, overruled Appellant's Assignments of Error. A Notice of Appeal was filed with this Court. On June 17, 1998, the record was filed in this Court. The Brief on the Merits was due July 27, 1998. Appellant obtained an extension of ten days pursuant to S. Ct. Prac. R. XIV (3)(B)(2)(b), until August 6, 1998, to file his merit brief.

Counsel for Appellant were appointed by the Ninth District Court of Appeals on April 24, 1998. With the extension of time, Appellate counsel had only one hundred and four days within which to review the file, the transcript and prepare a brief in a death penalty case. The transcript in this case is one thousand three hundred and seventy three pages. There were also hearings at the trial court which were not recorded or made a part of the transcript for purposes of appeal. These unrecorded hearing involved substantial rights of the Appellant. Appellate counsel in the Ninth District did not attempt to correct or complete the record in the court below. Appellate counsel has attempted to complete the record in this Court.

While working diligently on this case, Appellate counsel have also maintained their other case load. This included a Writ of Habeas Corpus in the Federal District Court for the Northern District of Ohio prepared by Attorney Ray in another death penalty case.[1] The petition had to be filed in order to obtain a stay of execution.[2]

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[1] Adremy Dennis v. Warden, Betty Mitchell, 1:98CV 1155, File June 30, 1998

[2] Execution was scheduled for July 6, 1998.

Appellate counsel drove to Columbus on August 6, 1998 and attempted to file the merit brief. However, counsel did not arrive until approximately 5:30. Appellate counsel's secretary called the clerks office to inform them that counsel was on their way to file the brief. However, they were informed that the clerks office would close at 5:00 p.m. Appellate counsel then attempted to file with this Court on August 12, 1998 a Motion To Hold Briefing Schedule In Abeyance. This would have permitted Appellate counsel to correct and complete the record from the trial court. This motion was not accepted by the clerks office.

II. ARGUMENT

This case is an appeal as of right as it is a case involving the affirmance of the death penalty.[1] OHIO REV. CODE ANN. §2929.05 provides in relevant part:

> (A) Whenever sentence [six] of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. the court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal case * * *
> (B) The court of appeals and the supreme court shall give priority over all other case to the review of judgments in which the sentence of death is imposed, and except as otherwise provided in this section, shall conduct the review in accordance with the Appellate Rules.[2]

Appellant has the right to the effective assistance of counsel in this direct appeal, an appeal as of right. [3] In Goforth v. Dutton (5th Cir. 1969), 409 F.2d 651, the defendant's lawyer told the defendant not long after the verdict that there were good grounds for a new trial. In a letter a few days later, the lawyer said that he had filed for a new trial and that a hearing date for that motion had been set. The letter did not make clear that the lawyer would not proceed with an appeal unless first paid. The lawyer never filed the appeal and never told the defendant that the appeal was being abandoned.

In issuing the writ of habeas corpus, the federal court of appeals held:

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[1] See S.Ct.Prac.R. II(A)(1)

[2] OHIO REV. CODE ANN. §2929.05. Copyright Anderson Publishing Co. 1993. The statute has of course been amended effective September 21, 1995, but the amendments are not material to issues herein.

[3] See, e.g., Strickland v. Washington (1984), 466 U.S. 668; State v. Bradley (1989), 42 Ohio St.3d 136; State v. Miller (1988), 44 Ohio App.3d 42. Cf. State v. Buell 91994), 70 Ohio St.3d 1211, holding that "[T]he right to appointed counsel extends to the first appeal as of right, and no further." (Emphasis in original.) citing Pennsylvania v. Finley (1987), 481 U.S. 551, 555. See also, State v. Gillard (1997), 78 Ohio St.3d 548.

> The Petitioner Goforth's conviction cannot stand in its present posture as he was deprived of adequate representation of counsel on appeal in violation of the Fourteenth Amendment. It is difficult to conceive of a case more extreme prejudice than one where, as here, an accused is, through no fault of his own, precluded from challenging a conviction which his attorney has advised to be invalid. Well aware that the Federal Court should proceed with caution and due respect for state processes, we believe we cannot disregard the apparent fact the appellant's fundamental right to assistance of counsel concerning the appeal was not adequately safeguarded.

Id., at 653. That case relied upon another federal case, Wainwright v. Simpson (5th Cir. 1966), 360 F.2d 307. In that case, the petitioner was convicted of murder. His trial counsel deliberately failed to move for a new trial or to file a notice of appeal, although he thought there were grounds to do so. The federal district court found, *inter alia*, that the petitioner has an absolute right to a state appeal and an absolute right to adequate representation upon that appeal.[4] The Court held:

> * * * One appealing from conviction for crime must be represented by counsel if his appeal is to be meaningful. However laudable his motive, court-appointed counsel for Simpson had no authority, without consulting with or obtaining the consent of his client, deliberately to forego Simpson's right to move for a new trial or to appeal. When he did so, counsel proved himself ineffective. More, he completely abdicated his function and deprived Simpson of the aid of any counsel at a critical stage of the criminal proceeding.

Id., at 309-310. [Footnotes omitted.][5] That is clear is that the courts recognize a capital defendant's right to have a death sentence meaningfully reviewed through the appellate

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[4] Id., at 308, The district court relied upon, *inter alia*, Griffin v. Illinois (1956), 351 U.S. 12, Douglas v. California (1963), 372 U.S. 353, and Johnson v. Zerbst 91938), 304 U.S. 458.

[5] Although admittedly in a different context, the United States Supreme court has held that:

- * n unreasoning and arbitrary "insistence upon expeditiousness in the fact of a justifiable request for delay" violates the right to the assistance of counsel. Morris v. Slappy (1983), 461 U.S. 1, 11-12, quoting Ungar v. Sarafite (1964), 376 U.S. 575, 589.

process. That process, by constitutional as well as statutory mandate, includes meaningful review in the state's supreme court.

The Appellant has an absolute right to a state appeal in this Court[6] and an absolute right to the effective assistance of counsel in the prosecution of that appeal. Counsel cannot be effective if they cannot file the Appellant's Merits Brief.

The effective assistance of counsel is denied when counsel's performance is proved to have fallen below an objective standard of reasonable representation; and, in addition thereof, prejudice arises from counsel's performance or lack of performance. State v. Bradley (1989), 42 Ohio St.3d 136.[7] Clearly, the performance of counsel in this case has fallen below that objective standard and the prejudice to Appellant is obvious. That objective standard as it relates to an appeal of right was perhaps most succinctly set forth by the court in State v. Miller (1988), 44 Ohio App.3d 42, where the court held at Syllabus 1:

> 1. On a first appeal as of right, if a timely notice of appeal has been filed and appellant's counsel fails to file a brief pursuant to App.R. 18(C) and Loc.App.R.5 and his appeal is dismissed, appellant has not had the effective assistance of an attorney.

Here, this Court has not yet dismissed the Appellant's appeal. If the court dismisses the appeal, the Appellant undoubtedly will have been deprived of an effective appeal and the

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[6] OHIO REV. CODE ANN. §2929.05.

[7] Syl. 2 held:

> Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (State v. Lytle [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; Strickland v. Washington [1984], 466 U.S. 668, followed.)

That objective standard is set out, e.g., in the case of State v. Miller (1988), 44 Ohio App.3d 42 syl. 1, quoted *infra*; and in ABA, STANDARDS FOR CRIMINAL JUSTICE (1980), Standard 4-8.4(a), which provides:

> (a) Appellate counsel should be diligent in perfecting an appeal and expediting its prompt submission to the appellate court.

effective assistance of counsel for that appeal. The efforts of Appellant's counsel were to file a brief in a timely manner in this case. Counsel were unable to do so by approximately thirty minutes. Within six (6) days, counsel sought to have this Court stay the briefing schedule and permit Appellant's counsel to correct the trial court record. In the alternative, appellate counsel request that they be permitted to file their brief instantor, and had the Merits Brief ready to file again. The Court's Clerk would not even accept the motion for filing. Appellant, sentenced to death, cannot receive with the case in its "present posture"[8] an effective review of his death sentence. That failure is directly attributable to the conduct of this appellate counsel, and under the standard set forth above, appellate counsel have been ineffective.

In State v. Dougherty (1995), 73 Ohio St.3d 1417, this Court found how important it is to have capital cases decided on the merits rather than on procedural technicalities. In that case, the Court of Appeals for Hancock County dismissed the Appellant's appeal due to failure to timely file his assignments of error and brief in support thereof. The Appellant appealed to this Court. This Court unanimously reversed the decision of the Court of Appeals, and established an amended briefing schedule to be followed in the Court of Appeals.[9] In that case, the appellant would have been denied the effective assistance of counsel had his appeal been

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[8] See, Goforth v. Dutton (5th Cir. 1969), 409 F>2d 651, 653.

[9] The entry, dated Thursday, July 27, 1995, reads:

94-2494. State v. Dougherty, Hancock County, No. 5-94-2. This cause, here on appeal from the Court of Appeals for Hancock County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed, the appeal of appellant is reinstated for consideration on the merits, and the parties are ordered to comply with the following briefing schedule in the court of appeals.

Appellant's brief shall be due within thirty days from the date of this entry; appellee's brief shall be due within ninety days after the filing of appellant's brief; and appellant's reply brief shall be due within thirty days after the filing of appellee's brief.

It is further ordered that the appellant recover from the appellee its costs herein expended; and that a mandate be sent to the Court of Appeals for Hancock County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hancock County for Entry.

MOYER, C.J., DOUGLAS, WRIGHT, TYACK, F.E. SWEENEY, PFEIFER AND COOK, JJ., concur.

G. GARY TYACK, J., of the Tenth Appellate District, sitting for RESNICK, J.

dismissed without the filing of assignments of error and a brief in support thereof.[10] In State v. Williams (1997), 79 Ohio St.3d 1, this Court was presented with the same procedural problem as is presented here. In that case, appellate counsel missed the filing deadline by minutes. This Court, sua sponte, granted appellate counsel additional time to file their brief.[11] Most recently in State v. Jackson (1998), 82 Ohio St.3d 1479, appellate counsel failed to timely file a motion for extension of time to transmit the record. This court, sua sponte, granted appellate counsel additional time to transmit the record.[12]

This Court should be guided by the very same principles in this case as were used in Dougherty, Williams and Jackson. Indeed, in light of the Court's decision in these cases, Appellant submits that failure to allow relief which will enable Appellant to file his merits Brief

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[10] State v. Miller, supra.

[11] The entry, dated May 29, 1996, reads:

This cause is pending before the Court as an appeal from the Court of Appeals for Summit County. Upon consideration of the motion of Mary Jane Stephens and John B. Juhasz to withdraw as counsel and appellee's motion for leave to file merit brief and to designate due date,

IT IS ORDERED by the Court that the motion to withdraw as counsel be, and hereby is, denied.

IT IS FURTHER ORDERED by the Court, sua sponte, that appellate shall file his brief on or before June 28, 1996.

IT IS FURTHER ORDERED by the Court that the motion for leave to file merit brief be, and hereby is, granted, and appellee's merit brief shall be due in accordance with the provisions of S.Ct. Prac. R.VI, Sec.2.

[12] The entry, dated July 20, 1998, reads:

This cause is a death penalty appeal from the Court of Common Pleas of Franklin county. On June 24, 1998, appellant filed a motion for an extension of time to transmit the record. Pursuant to S.Ct.Prac.R. XIX(4)(C) prohibits the filing of a pleading that is not timely.

IT IS ORDERED by the Court, sua sponte, that appellant's motion for an extension of time to transmit the record be, and hereby is, stricken.

IT IS FURTHER ORDERED by the Court, sua sponte, pursuant to S.Ct.Prac.R. XIX (4)(C)(1), that the Clerk of the Court of Common Pleas of Franklin County shall transmit the record on or before August 14, 1998.

will deprive him of equal protection of the laws under U.S. CONST., AMEND. XIV and the equal protection and benefits of the laws under OHIO CONST., ART. I, §2.[13] Further, U.S. CONST., AMEND. VI AND XIV guarantee all criminal defendants the right to counsel.[14] The right to counsel is premised on the ability of counsel to ac as an advocate for the accused. To deny Appellant the right to file a Merits Brief presenting Appellant's perspective of errors at trial and in the court of appeals deprives him of the right to counsel as well as the right to the effective assistance of counsel.

Appellant's counsel had a Merits Brief ready to be filed on August 6, 1998. A more refined product was ready for filing as of August 10, 1998, and that Brief has ben and is ready for filing. However Appellant's present counsel have no way under the rules and rulings of this Court to file the brief and give Appellant the review demanded by the state and federal constitutions. Counsel therefore have been ineffective as a matter of law. They respectfully request an Order that they be withdrawn from the case and that substitute counsel be

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[13] In terms of the effective assistance of counsel and equal protection and benefit of the laws, there can be no rational distinction between this case and State v. Dougherty, supra. It might be argued that in Dougherty there could be no effective review because there were no assignments of error and brief for the court to consider, whereas here the Court has available to it the trial record and the assignments of error and brief filed in the court of appeals. However, the statute, OHIO REV. CODE ANN. §2929.05, provides in part:

> (A) Whenever sentence [sic] of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases * * * .
>
> (B) The court of appeals and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed, and, except as otherwise provided in this section, shall conduct the review in accordance with the Appellate Rules.

Certainly, the statutory review is not accomplished if Appellant cannot file his Merits Brief. The rulings of this Court have precluded present counsel from doing so, thus denying Appellant his right to counsel. Appellant should therefore be assigned new counsel who will timely file a Merits Brief.

[14] The Due Process Clause of U.S. CONST., AMEND. XIV made the counsel provisions of U.S. CONST., AMEND. VI applicable to state prosecutions. See, Gideon v. Wainwright 91963), 372 U.S. 335.

appointed so that Appellant may enjoy the benefit from the effective assistance of counsel to which he is constitutionally entitled.

Since this Court has denied counsel the filing of the Merits Brief, and forbid the filing of the Motion to Hold the Briefing in Abeyance or in the Alternative to File the Brief Instantor, counsel respectfully requests that this Court permit the undersigned to withdraw and assign new counsel so that the Appellant will be afforded due process of law, equal protection of the law, the right to counsel, and the effective assistance of counsel at a critical state of the proceedings. The United States Supreme Court long ago held that:

> * * * constitutional provisions for the security of person and property should be liberally construed * * *. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd v. United States (1886), 116 U.S. 616, 636. The only way with this case in its present posture to guard against stealthy encroachments upon Appellant's rights to counsel, the effective assistance of counsel, due process of law, and equal protection of the law is to permit the undersigned to withdraw as counsel of record.

Respectfully Submitted,

NATHAN A. RAY
Attorney for Appellant

PATRICIA MILLHOFF
Attorney for Appellant

PROOF OF SERVICE

I hereby certify that a copy of the foregoing has been mailed by regular U.S. Mail this 17th day of August, 1998, to Gregory White, Prosecuting Attorney, Lorain County, 226 Middle Avenue, Elyria, Ohio 44035.

NATHAN A. RAY
PATRICIA MILLHOFF
Attorneys for Appellant

The Supreme Court of Ohio

FILED

SEP 23 1998

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

1998 TERM

State of Ohio, Appellee,	:	Case No. 98-1074
v.	:	
Stanley E. Jalowiec, Appellant.	:	E N T R Y

This cause is pending before the Court as an appeal from the Court of Appeals for Lorain County. Upon consideration of appellant's motion to withdraw as counsel,

IT IS ORDERED by the Court that the motion to withdraw as counsel be, and hereby is, denied.

IT IS FURTHER ORDERED by the Court, sua sponte, that appellant's merit brief shall be filed within 7 days of the date of this entry.

THOMAS J. MOYER
Chief Justice

0070r092398

ORIGINAL

ON COMPUTER-AFD

IN THE SUPREME COURT OF OHIO

FILED
AUG 25 1998
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

STATE OF OHIO,	:	CASE NO. **98 1074**
Plaintiff,	:	
vs.	:	
STANLEY E. JALOWIEC,	:	**STATE'S RESPONSE TO THE APPELLANT'S CONDITIONAL MOTION TO WITHDRAW AS COUNSEL**
Defendant.	:	
	:	

Now comes the State of Ohio and responds to the defendant's Conditional Motion to Withdraw as Counsel for the Appellant as follows: The Supreme Court has enacted a rigid set of rules and policies in order to enable it to keep its docket current. The State of Ohio, through the Lorain County Prosecutor's Office, has been unable to perfect an appeal in which jurisdiction was accepted because Federal Express was a day late in its overnight delivery. A fair application of the rules regarding the time period in which to file has had adverse consequences to both sides. However, if the application of the rules are going to be fair and just, they must apply equally to all parties even in capital litigation.

It is also clear from the appellant's motion that he has attempted to subvert the application of these rules because his brief was late when counsel filed the Motion to Hold the Briefing Schedule in Abeyance. When this attempt to subvert the rules failed, counsel

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now attempts to accomplish this improper goal by withdrawing as counsel feeling that a new lawyer would somehow be entitled to a new time period in which to file a new brief or the already written brief. This tactic should not be sanctioned.

The State of Ohio respectfully suggests that at this juncture it would be totally unjust to bend the rules solely for the appellant because he is a capital litigant when no such flexibility has been extended the State of Ohio. The State of Ohio suggests to this Court that it consider the record as it exists and all arguments raised on appeal and the responses thereto at the court of appeals. The State respectfully suggests that if this court affirms the court of appeals on these merits, then it should go on to complete the independent weighing process and determine whether the death penalty is appropriate.

Neither the Constitution of the State of Ohio nor the United States Constitution requires that briefs be filed at both the court of appeals and the supreme court for this process to take place. This is underscored by the elimination of the court of appeals in the mandatory appeal process. Likewise, it is also clear that it would be improper for counsel to raise new arguments in this court that were not raised at the court of appeals. ***State v. Hill*** (1995), 73 Ohio St. 3d 433 at 438, citing ***State v. Williams*** (1977), 50 Ohio St. 2d 112, syllabus 2.

Wherefore, the State of Ohio moves this Court for an order denying counsel's motion to withdraw and respectfully suggests that this Court continue on with its duty to review this conviction without the benefit of briefs and render a decision based upon the record as it exists. Otherwise, capital litigants would receive a benefit that has not been previously extended to other litigants solely as a result of the penalty that was imposed. Such a variation

in the application of the rules would make a mockery of our criminal justice system and this court's efforts to perform its duties expediently.

Respectfully submitted,

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By:
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PROOF OF SERVICE

A copy of the foregoing State's Response to Appellant's Conditional Motion to Withdraw as Counsel was sent by regular U.S. Mail this 20 day of August, 1998, to:

Nathan A. Ray, Attorney for Appellant, Suite 201, 137 S. Main Street, Akron, Ohio 44308

Patricia Millhoff, Attorney for Appellant, 80 West Bowery Street, Akron, Ohio 44308

JONATHAN E. ROSENBAUM, #0021698
Chief Counsel, Criminal Division

ORIGINAL

ON COMPUTER-ALC

IN THE SUPREME COURT OF OHIO
CASE NO. 98-1074

STATE OF OHIO,	:	ON APPEAL FROM THE LORAIN COUNTY COURT OF APPEALS NINTH JUDICIAL DISTRICT
Plaintiff-Appellee,	:	
-vs-	:	
STANLEY E. JALOWIEC	:	COURT OF APPEALS CASE NO. 96 CA 006445
Defendant-Appellant,	:	

MOTION FOR LEAVE FROM THIS HONORABLE COURT TO PROCEED PRO SE IN THE FILING OF MERIT BRIEF IN DIRECT APPEAL OF RIGHT OF STANLEY E. JALOWIEC

FILED
SEP 25 1998
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

STANLEY E. JALOWIEC
MAN.C.I. #321-712
Post Office Box 788
Mansfield, Ohio 44901

APPELLANT PRO SE,

GREGRORY A. WHITE
Lorain County Prosecutor
226 Middle Avenue
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COUNSEL FOR STATE OF OHIO,

MEMORANDUM IN SUPPORT

Now comes the defendant-appellant, Stanley E. Jalowiec, Pro Se, and humbly prays that the court reconsider the decision made on August 11, 1998, to deny this defendant his direct appeal of right in this death penalty appeal of defendant's conviction and sentence of death, and grant leave to proceed Pro se.

Defendant Jalowiec prays this Supreme Court reverse its decision not to accept the pro se brief of Jalowiec in his appeal of right to the Supreme Court. Defendant will show this Honorable Court that there were mitigating factors above and beyond the control of this defendant and as such, Jalowiec should not and must not be denied his rights of appeal simply because court appointed counsel deliberately and unconscionably failed to do their mandated duties with respect to this defendant.

Counsel for appellant were appointed by the Ninth District Court of Appeals on April 24, 1998. Yet, counsel did not bother to file the official notice of appeal to this Supreme Court until June 1, 1998 as the Court's Docket shows. Counsel then filed once for an extension of time to file their merit brief on behalf of defendant on July 22, 1998. This Court then granted said request on July 23, 1998, moving the due date back to August 6, 1998 for the filing of defendant's merit brief.

Throughout this time frame, defendant Jalowiec had used his knowledge as a paralegal student to locate and make note of perceived claims by citing these examples from defendant's trial record. Jalowiec then applied this knowledge to the search for case law which supports these claims through his limited

access to reported case decisions.

On August 17, 1998, appointed, appellant counsel decided to file a motion to withdraw. This act on their part very clearly demonstrates both to this Honorable Court and this defendant that counsels' attitude from the very start has always been unconscionable, arbitrary and unethical with respect to their claimed obligations and representation of Jalowiec on this appeal of right.

Counsel attempts to deceive this Court by claiming in their motion to withdraw that they were working diligently on this case while also maintaining their other case load. This simply is not true. As this Supreme Court is personally aware, the Court is extremely liberal in granting requests for time extensions to file merit briefs. This liberal attitude is especially noted in direct appeal requests for additional time and even more so in appeals of right for capital cases. Pursuant to S. Ct. Prac. R. XIV (3) (B) (2) (b), counsel for defendant Jalowiec could have easily filed additional requests for extensions of time. However, counsel saw no reason to do so, nor did they give timely notice to defendant of their intents to dishonor their respective duties to Jalowiec as their client.

There is also the noteworthy claim by counsel to have driven down to the Offices of the Clerk on the due date, arriving approximately one half hour after closing. This spurious claim would appear comical if not for the fact that this is a man's life we are talking about and an appeal of right in a death penalty case. The fact is, Columbus is no more than a two hour

drive from the furthest points of this State. And not to mention the numerous delivery services available in appointed counsels' City of Akron, which also happens to be considerably less than two hours from Columbus.

This Court has even upheld this appeal of right when lower courts have abused their discretion. In State v. Dougherty, 73 Ohio St.3d 1417 (1995), the district court dismissed the appellant's direct appeal of right of his death penalty appeal due to counsel's failure to timely file his assignments of error and brief in support. In its order, this Court ruled in part, "This cause, here on appeal from the Court of Appeals for Hancock County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed, the appeal of appellant is reinstated for consideration on the merits, and the parties are ordered to comply with the following briefing schedule in the court of appeals. 94-2494. State v. Dougherty, Hancock County, No. 5-94-2 (Decided July 27, 1995).

Defendant has the Constitutional and Statutory right to file his pro se brief in this direct appeal. This is an appeal as of right as it is a case involving the merits of conviction and the affirmance of the death penalty.

The Ohio Constitution under Article IV §2 Organization and jurisdiction of Supreme Court states in part that:

(B)(1) The Supreme Court shall have original jurisdiction in the following:

******
******
******
******

******
(f) In any cause on review as may be necessary to its complete determination;
******

(B)(2) of the Ohio Constitution, Article IV §2 clearly states as follows:

(B)(2) The Supreme Court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeal as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases involving questions arising under the Constitution of the United States or of this State.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained,

(c) In direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in which the death penalty has been imposed; .....(Emphasis added.)

The Ohio Revised Code also quite unmistakenly requires the Supreme Court to accept the merit brief of defendant-appellant Jalowiec Pro se on the strength that his pro se brief was and is the only merit brief to be received by the Supreme Court in this death penalty appeal.

O.R.C. Statute 2953.02, Review of Judgments and final orders requires that:

> In a criminal case, including a conviction for the violation of an ordinance of a municipal corporation, the judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals. A final order of an administrative officer or agency may be reviewed in the court of common pleas. A judgment or final order of the court of appeals involving a question arising under the Constitution of the United States or of this state may be appealed to the supreme court as a matter of right. The right of appeal from judgments and final orders of the court of appeals shall extend to cases in which the death penalty has been affirmed, felony cases in which the supreme court has directed the court of appeals to certify its record, and in all other criminal cases of public or

> general interest wherein the supreme court has granted on motion to certify the record of the court of appeals. The supreme court in criminal cases shall not be required to determine as to the weight of the evidence, except as provided in section 2929.05 of the Revised Code. (Emphasis added.)

And O.R.C. §2929.05 [Appellate review of death sentence] requires that the following be done:

> (A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case and whether the sentence of death is appropriate. ....
> (Emphasis added.)
>
> (B) The court of appeals and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed, and, except as otherwise provided in this section, shall conduct the review in accordance with the Appellate Rules. (Emphasis added.)

In Wainwright v. Simpson, the petitioner had been convicted of murder although his trial counsel deliberately failed to move for a new trial or bothered to file a notice of appeal. The Federal District Court found, inter alia, that the petitioner has an absolute right to a state appeal. Wainwright v. Simpson, 360 F.2d 307 (5th Cir. 1966).

Defendant-appellant Jalowiec does have an absolute right to a direct appeal in this Court. The statutes of the Revised Code and the Ohio Constitution warrant it and the interest of justice demand it. It is not defendant's fault that his court appointed appellate counsel completely abdricated their legal, moral and ethical responsibilities to perform their duties effectively in assisting defendant in his direct appeal of a death penalty case.

There is no question that appellate counsel were deliberately negligent in this case and this Court should sanction both Nathan Ray and Patricia Millhoff if not initiate disbarment proceedings against them.

Be that as it may, counsels' deliberate ineffective assistance should in no way prejudice this Honorable Court against the defendant Jalowiec personally. This Court should take into its consideration that the defendant immediately put together a merit brief upon realizing that appointed counsel were not fulfilling their duty to him.

This Court should not be above adhering to moral and ethical rulings in the interests of justice. In State v. Miller, 44 Ohio App.3d 42 (1988), the court ruled at syllabus 1:

> On a first appeal as of right, if timely notice of appeal has been filed and appellant's counsel fails to file a brief pursuant to App. R. 18(c) and Loc. App. R. 5 and his appeal is dismissed, appellant has not had the effective assistance of an attorney.

This Court should follow its same principles as were its basis used in deciding Dougherty and the dictates of the Ohio

Constitution and O.R.C. statutes 2929.05 and 2953.02.

Defendant has submitted his merit brief pro se on two occasions thusfar and is prepared to resubmit it again. This defendant requests of this Honorable Court that said motion of counsel to withdraw be granted and that this Court allow defendant Jalowiec to proceed pro se, granting him leave to do so.

Wherefore, defendant prays this Honorable Court grant defendant's motion for leave to proceed Pro se in the filing of Merit Brief and that this Court issue an Order for defendant's Pro se merit brief to be accepted and reviewed on its merits in the case, as this direct appeal is an appeal of right of a death penalty case.

Respectfully Submitted,

Stanley E. Jalowiec

SERVICE

A true and accurate copy of the forgoing Motion Requesting Leave to Proceed Pro se in Death Penalty Direct Appeal of Right Merit Brief of Stanley E. Jalowiec, Pro Se, was forwarded by U.S. mail to Gregrory A. White, Attorney for Plaintiff-Appellee, Lorain County Prosecutors Office, 226 Middle Avenue, Elyria, Ohio 44903, on this 21st day of September 1998.

STANLEY E. JALOWIEC
APPELLANT PRO SE

STATE OF OHIO)
) :SS AFFIDAVIT OF INDIGENCY
COUNTY OF RICHLAND)

I Stanley E. Jalowiec, a citizen of the United States and affiant herein, after being first dully Sworn and Cautioned on my oath as is required by law, does hereby depose and say: That I am without the necessary funds with which to pay for the costs of this action and that I am without possessions, real or personal of sufficient value in with which to offer as security for such costs, and that I am a true indigent and pauper within the meaning of the law.

Further, affiant sayeth naught.

Signature or Affiant

SWORN to before me and SUBSCRIBED in my presence, a Notary Public in and for the County of Richland, State of Ohio, this 6 day of August 1998.

NOTARY PUBLIC'S Signature

Comission Expires: 1-1-2003

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The Supreme Court of Ohio

FILED
DEC 09 1998
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

CM COMPUTER-SMW

98-3249

1998 TERM

State of Ohio, Appellee,	:	Case No. 98-1074
v.	:	
Stanley E. Jalowiec, Appellant.	:	E N T R Y

This cause is pending as an appeal from the Court of Appeals for Lorain County. Upon consideration of appellant's motion to proceed pro se,

IT IS ORDERED by the Court that the motion be, and hereby is, denied.

THOMAS J. MOYER
Chief Justice

0023r120998

ON COMPUTER-RAN

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	CASE NO. 98-1074
Appellee	)	**THIS IS A DEATH PENALTY CASE**
VS.	)	On appeal from the Lorain County Court of Appeals Ninth Appellate District
STANLEY E. JALOWIEC	)	
Appellant	)	

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SUPREME COURT OF OHIO

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STATEMENT OF THE FACTS

On June 7, 1993 Ronald Lally, an informant for the Elyria Police Department, purchased crack cocaine from Raymond Smith and Danny Smith. At the time, Lally was wired by the police, and three officers listened to and taped the buy. (T. p. 493-496) As a result, both Raymond and Danny were arrested and charged with aggravated drug trafficking. The Smith's trial was to commence on January 19, 1994.

The evening before the Smith trial was to begin, Appellant and an acquaintance, Brian Howington, went to Lally's apartment and smoked crack with Lally. (T. p. 715-716) Sometime thereafter, appellant borrowed an automobile belonging to Howington's aunt. (T. p.718-719) At about the same time, the Smith's were out drinking with friend's and Raymond's other son, Michael. After drinking, and a meal at a nearby restaurant, Raymond, Danny, Michael and Danny's girlfriend left. (T. p. 776-778).

The two groups met up later when Jalowiec arrived in the car with Lally. Raymond and Michael entered the car, and the four drove off. (T. p. 777-779). The individuals traveled from Lorain County to Cleveland for the purpose of putting Lally on a Greyhound bus. (T. p. 783) Eventually, they drove around East Cleveland and ended up in a cemetery in

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Woodland. (T. p. 783-784).

Raymond got out of the car, put a gun in Lally's face, and ordered Lally out of the car. Raymond then said, "You will never snitch on nobody again." (T. p. 784). At this time, Appellant was still in the car. Appellant then leaves the car; Michael does not look to see what is going on but testified that he heard thumps. Michael then testified someone opened the trunk. (T. p. 784-785). He then saw Appellate put the car in reverse and back up three time. (T. p. 785).

While several officers testified, and a pathologist and other members of the coroner's office also offered testimony, none linked Appellant to the murder of Lally. Other witnesses implicated Raymond Smith but none mentioned Appellant.

Appellant was indicted by the Lorain County Grand Jury on March 8, 1995 for the aggravated murder of Lally. Two specifications were added to the indictment, a firearm specification and a death specification stating that Appellant killed Lally to prevent Lally from testifying in a criminal proceeding. Appellant enter a plea of not guilty and the matter was set for trial.

Jury selection began on March 12, 1996 and was seated the next day. Opening statements were given on March 14, 1996 and the prosecution began its case. On March 19, 1996 the case was sent to the jury which returned guilty verdicts on the count of aggravated murder and both specifications.

The penalty phase of Appellant's trial took place on April 9th and 10th,

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1996. The state incorporated the evidence from the fact finding phase to evidence the aggravating circumstance.

Appellant presented evidence regarding his life, and the prosecution presented rebuttal witnesses. The jury, following deliberation, recommendment he death sentence, which the trial court confirmed.

It is from those verdicts that appellant appeals.

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PROPOSITION OF LAW I

Appellant Jalowiec's sixth, eighth, and fourteenth amendment rights as guaranteed by the U.S. CONST. were violated by the admission at trial of a co-defendant's confession inculpating the appellant.

In Pointer v. Texas (1965), 300 U.S. 400, 85 S.Ct. 1065, a preliminary hearing was had in the Defendant's case. At the preliminary hearing the Defendant was not represented by counsel. At trial, the witness who had identified the Defendant at the preliminary hearing was not available. The State then introduced a copy of the transcript from the preliminary earing. The Supreme Court reversed the Defendant's conviction holding that the Sixth Amendment right of an accused to confront the witnesses against him was violated by the introduction of the transcript. The Court stated that "[w]e hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment." Id. at 1068.

The Court went on to state:

> "there are few subjects, perhaps, upon which this Court and other Courts have been more nearly unanimous than in there expressions of belief that the right of confrontation and cross-examination is essential and fundamental requirement for the kind of fair trial which is this countries constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendments guarantee of due process of law." Id. In Bruton v. United States (1968), 391 U.S. 123, 88 S. Ct. 1620, the United States Supreme Court observed and reaffirmed its finding in Pointer v. Texas. In Bruton, the Court addressed the issue of whether a co-defendants incriminating extra judicial statement which indicates the defendants involvement, denies a defendant the right of cross-examination, as guaranteed by the Sixth

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Amendment. In Bruton, co-defendant Evans did not testify. However, the postal inspector did testify as to Evans oral confession that both he and Bruton had committed the robbery. In Bruton, the trial court gave a limiting instruction to the jury that Evans' confession was inadmissible hearsay against Bruton.

In Petitioner Jaloweic's case there were two (2) separate occasions in which the rule as set forth in Bruton was violated.

A. In his opening statement the State introduced a co-defendant's confession and in so doing inculpated the Defendant through incriminating extra judicial statements. The prosecutor stated as follows:

> "It is obvious to Detective Leiby that Danny Smith does not have real first hand knowledge as to what went on in Cleveland, says he has to deal with the people involved. On July 5, 1994, Raymond Smith comes in an makes a statement. Now Raymond Smith is in a precarious position. He wants to help his son who is a leader of this little drug world. Raymond Smith is a crack addict himself. His life has fallen apart and he cannot exist without Danny or having crack cocaine. However, he wants to preserve the son's freedom, but he doesn't want to take away his own, so he tells Detective Leiby a story which reverses the roll of Ron Lally and himself as to who had the gun, placed them all there together and finally gives up the name of Stan Jalowiec as the person that was there with him" (Tr. pps. 481-482).

The introduction of this statement clearly violated the rule set forth in Bruton, as well as a duly prejudiced defendant. It is recognized, that trial counsel failed to object to the introduction of this inadmissible hearsay statement. However, even if defense counsel had objected, and requested a limiting instruction on the admission of the statement by the prosecutor, it would still be reversible error. In Bruton, the trial court judge instructed the jury that the co-defendant's confession was inadmissible hearsay against Bruton and had to be disregarded in determining Bruton's guilt or innocence. Despite this instruction, the United States SupremeCourt reversed the trial court. In Bruton, the Court

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acknowledged that " [n]ot every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur almost in every trial where inadmissible evidence creeps in usually inadvertently." Id. at 135.

The Court went on to find though that "...there are some contexts in which the risk that the jury will not, or cannot, follow instructions are so great, and the consequences of failure is so vital to the Defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully and incriminating extra judicial statements of a co-defendant, who stands accused side by side with a defendant, are deliberately spread before the jury in a joint trial." Id.

Thus, the harm caused to the Defendant by the extra judicial confession of a co-defendant inculpating Appellant Jalowiec could not have been cured either by objection or a jury instruction. There was no opportunity whatsoever by Appellant Jalowiec to cross-examine the extra judicial statement of co-defendant, or to question its reliability. As the Bruton Court acknowledged, "[w]e cannot accept limiting instructions as an adequate substitution for Petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all."

Id. at 137. (citations omitted).

B. At the sentencing phase of Appellant Jalowiec's trial, the state once again introduced the statements of co-defendant Raymond Smith in violation of Bruton v. United States. At the sentencing phase, the State called Detective Alan Leiby as a witness. Detective Leiby, as an investigator in this case, took a taped statement from the co-defendant Raymond Smith. During his testimony Detective Leiby testified as

follows:

> "Danny wanted some kind of deal on his drug charges and at that point I told him I wasn't going to deal with anybody anymore, I wasn't going to talk to anybody anymore until somebody said something truthful and that I would talk to Raymond anymore until he gave me the name of the person that was in the cemetery with him when Ron Lally was killed.
>
> I received a phone call – I believe it was 2 days later – I may be off a little on the time frame which Raymond told me it was Stan.

Question: Stan being?

Answer: Stan Jalowiec.

Question: And that would be the third person there?

Answer: That is correct.

Question: Did you tape that conversation?

Answer: I did." (Sentencing Tr. p. 268)

The two (2) taped confessions of co-defendant Raymond Smith were marked as State's Exhibit 11A and 11B. They were marked and admitted into evidence at Appellant's Jalowiec's trial. (Sentencing Tr. p. 291).

The admission of the co-defendant's inculpating statements at the sentencing phase of appellant Jalowiec's trial was just as prejudicial as in the guilt phase.

Here, once again, the jury was hearing that the co-defendant had Specifically stated to the police that appellant Jalowiec was involved in the killing. Once again appellant Jalowiec was denied the opportunity to cross-examine the witness. The jury in this case could have looked to the co-defendant's statement in reaching its decision that death was the appropriate sentence in this case.

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guilt phase.

Here, once again, the jury was hearing that the co-defendant had Specifically stated to the police that appellant Jalowiec was involved in the killing.

Once again appellant Jalowiec was denied the opportunity to cross-examine the witness. The jury in this case could have looked to the co-defendant's statement in reaching its decision that death was the appropriate sentence in this case.

Appellant Jalowiec was prejudiced by the introduction of his co-defendant's statements, and his conviction and death sentence must be Reversed.

PROPOSITION OF LAW II

Appellant Jalowiec was denied his fifth, sixth, eigth and fourteenth amend. rights as guaranteed by the U.S. CONST. and the OHIO CON. by the admission of statements of a co-conspirator which did not meet the requirements of Evid. R. 801 (D)(2)(e).

The Ohio Rules of Evidence have created exceptions to hearsay. Included within these exceptions is 801(D)(2)(e) which states in pertinent part as follows: (D) statements which are not hearsay; (2) the statement is offered against a part; and (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy. (emphasis added).

In State v. Milo (1982), 6 Ohio App.3d 19, 22, the Appellate Court recognized, "[t]hat plain language of Evidence Rule (D)(2)(e) indicates that the co-conspirator rule applies if five conditions are established: (1) the existence of a conspiracy; (2) the Defendant's participation in the conspiracy; (3) the declarants participation in the conspiracy; (4) if the statement was made in the course of the conspiracy; and (5) the statement was in furtherance of the conspiracy." See Giannelli, Ohio Evidence Manual (1982), Section 801.15.

Ohio Courts have further recognized that in order to admit the testimony of a co-conspirator there are certain safeguards which must be met. As the court in State v. Martin (1983), 9 Ohio App.2d, 150, 151 recognized ". . . the obvious rational for such a rule is to avoid allowing hearsay to lift itself by its own bootstraps to the level of competent evidence". The safeguards which the Ohio Appellate Courts have recognized are as follows:

> 1) "[t]hat, as to the order of proof concerning the existence of a conspiracy, and of the defendant's and declarant's participation in it, the evidence must have

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been received prior to the proffer of the co-conspirators out of court declaration. See State v. Milo (1982), 6 Ohio App.3d 19, at 22; State v. Thomas (1980), 61 Ohio St.2d 223 at 232; State v. Osborne (1976), 49 Ohio St.2d 135 at 143;

2)[t]hat, the standard of proof to be met in showing the existence of a participation in the conspiracy by independent evidence is that of marking out a prima facie case."" See State v. Milo, supra; State v. Thomas, supra, at 323; State v. Weind (1977), 50 Ohio St.2d 224 at 2401-241.

The purpose of the safeguards set forth above is a fear by the Ohio Courts that a defendant might be convicted solely on the basis of evidence which he has had no opportunity to impeach or refute. "Before statements of co-conspirators can be used against an alleged co-conspirator, there must be evidence aliunde to prove the co-conspiracy, i.e. besides the declaration of conspirators, there must be evidence that a conspiracy existed." State v. Martin, supra, See Tatu v. State (1932), 43 Ohio App. 68.

Appellant Jalowiec contends that the co-conspirator testimony which came in at his trial was improper in that the State completely failed to make any kind of a prima facie case that there was a conspiracy with regards to the aggravated murder of the victim. For this reason, the statements of the co-conspirator should have not been admitted in Appellant's case.

The first such statement occurred during the direct examination of Sandra Williams, as follows: (Trial Tr. 511):

Q. Will you tell the Court and jury what happened?

A. A man came into my yard and was threatening Ron and his family. (identified by witness as Danny Smith) . . .

Q. And what did he have to say to you?

A. He said that he knew where Ron was at.

Mr. Grunda: Objection.

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At this point, the State argued that this statement was offered as being in furtherance of a conspiracy that it claims was established through previous testimony. The following dialogue occurred (Trial Tr. 513):

"THE COURT: Develop the conspiracy a little bit.

MR. ROSENBAUM: All I have to do is show a prima facie case.

THE COURT: I don't know that you did with Ashley.

MR. ROSENBAUM: I have this person buying drugs from Danny Smith. Now, Danny Smith is there. Danny is involved with the Conspiracy at this point.

MR. GRUNDA: There is nothing to show that Stan was involved. That is what I am trying to say.

MR. ROSENBAUM: I don't have to show Stan was involved for this to not be hearsay.

THE COURT: Okay. Thank you. I am going to overrule your objection.

You can have your exceptions, Mr. Grunda.

During the direct exam of Lynn Alpeter (Trial Tr. 537-538):

Q. Did he (Danny Smith) ask you for something else?

A. Poison.

Q. Did he say why he needed these things?

MR. GRUNDA: Objection.

THE COURT: Overruled.

A. Yes.

Q. Why was that?

A. Because he said he needed it to take care of somebody.

During the direct exam of Carl Hartman (Trial Tr. 542-543):

Q. Did Danny Smith ever have a request – make a request of you to perform an

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illegal act for him?

MR. GRUNDA: Objection.

THE COURT: Overruled.

A. Yes.

.....

Q. Tell the Court and jury what transpired at your sister's home?

A. When he came to my sister's house he found out that I was interested in buying a BMW and he offered to buy the car for me and give me $5,000.00 cash to make sure that Stanley – not Stanley – Ron didn't make it to the stand.

Then during the testimony of Terry Hopkins (T.568-569):

Q. Did Danny Smith ever speak to you about injuring someone or hurting someone?

A. Yes.

Q. Can you tell the Court and jury when that was?

A. That was in a bar, Razzle's. I don't know what day it was.

Q. Was it before Ron was killed?

A. Yes.

Q. How much before?

A. I don't remember.

Q. Could you tell the Court and jury as best you recall the conversation, how it went?

A. Yes. He was telling me – he didn't even really approach me about –

MR. CLEARY: Objection.

THE COURT: Overruled.

A. He didn't approach me about doing nothing to nobody. He said he was having trouble getting money and I told him if he needed help, I would help him.

Q. Now, did Danny even talk to you about doing more than beating someone up

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on some occasion?

A. Yes.

Q. Can you tell the Court and jury when that was?

A. It was a few months after he approached me, when I told him about beating somebody up to collect some money.

Q. What did he say to you?

A. He wanted somebody killed.

Finally, during the testimony of Sharon Hopkins (T.687):

Q. Did Danny Smith say why he was going that at the time he ducked down?

MR. CLEARY: Objection.

A. No.

THE COURT: Overruled and again, this is under 801(D)(2)(e) of the rules.

Q. So who asked you to do something?

A. Danny Smith.

Q. What did he ask you to do?

MR. CLEARY: Objection.

THE COURT: Overruled. Same reason.

MR. CLEARY: Can we register a continuing objection, your Honor?

THE COURT: You may.

A. I was asked to ask if his brother was picked up.

Q. His brother would be –

A. Michael Smith.

Q. And did you do that?. Yes.

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In Ohio, it is clear that in order for Evid. R. 801(D)(2)(e) to apply, rendering what would otherwise be inadmissible hearsay admissible, independent proof of a conspiracy must be established. Statements themselves may not be used to establish the existence of the conspiracy. State v. Carter (1995), 72 Ohio St.3d 545. The staff notes to Evid. Rule 801 make it clear that before a statement of a co-conspirator may be introduced against an accused, the Court must first find some independent evidence of a conspiracy. (emphasis added). Here, it is clear that there was no independent evidence of a conspiracy involving the Appellant. The statements themselves are attributed to only one person, Danny Smith. A conspiracy cannot be created by allowing these statements into evidence. If there is no independent proof, the statements may not be admitted. Appellant was never mentioned in any of these statements, nor was any evidence introduced as to any overt act in furtherance of this alleged conspiracy. The prejudice to appellant is even greater when considered together with the statement's of the co-defendant in this case. Appellant Jalowiec was not convicted based upon credible evidence and testimony, but rather hearsay testimony which he had no opportunity to rebut.

In summary, the allowance of the testimony as to out-of-court statements made by Danny Smith in Appellant's trial was highly prejudicial and deprived Appellant of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution.

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PROPOSITION OF LAW III

U.S. CONST. amend. 5,6,8, and 14 and Article I, Sections 10 and 16 of the Ohio Constitution require that a court grant a motion for judgment of acquittal when the evidence is insufficient to sustain a conviction.

Rule 29 of the Ohio Rules of Criminal Procedure provide as follows:

> (A) Motion for judgment of acquittal
>
> The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry Of a judgment of acquittal of one or more offenses charged in the Indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses.

The term sufficiency of the evidence has been explained by the U.S. Supreme Court in Jackson v. Virginia, (1979), 443 U.S. 307, as follows:

> In reviewing the sufficiency of the evidence, we must consider the record in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the state proved beyond a reasonable doubt the essential elements of the crime.

Accord, State v. Jenks, (1991), 61 Ohio St. 3d 259.

The essential elements of the offense of Aggravated Murder, as they pertain to this case, are as follows:

(1) On or about January 19, 1994;
(2) The Defendant, Stanley Jaloweic;
(3) Did purposely, and with prior calculation and design;
(4) Cause the death of another person, Ronald Lally, and
(5) Venue: In Lorain County, Ohio.

Sub-Proposition of Law III(A)

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> Article I, Section 10 of the Ohio Constitution guarantees an accused a speedy trial by an impartial jury of the county where the offense is alleged to have been committed.

Although it is not a material element of the offense charged, venue is a fact which must be proved in criminal prosecutions unless waived by the defendant. State v. Draggo (1981), 65 Ohio St. 2d 88, 90. The standard of proof is proof beyond reasonable doubt, although venue need not be proved in express terms so long as it is established by all the facts and circumstances in the case. State v. Dickerson (1907), 77 Ohio St. 34, paragraph one of the syllabus.

Section 10, Article I of the Ohio Constitution fixes venue, or the proper place to t try a criminal matter, as follows:..." In any trial, in any court, the party accused shall be allowed... a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed".

This rule is preserved in R.C. 2901.12, Ohio's venue statute, although the Committee Comment to that statute notes that provision is also made for the mobile offender whose course of criminal conduct affects a number of jurisdictions. Accordingly, that statute provides, in material part, as follows:

> (A) The trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter, and in the territory of which the offense or any element thereof was committed.
>
> (G) When it appears beyond reasonable doubt than an offense or any element thereof was committed in any of two or more jurisdictions, but it cannot be reasonably be determined in which jurisdiction the offense or element was committed, the offender may be tried in any such jurisdiction.

R.C. 2901.12(G) vest venue in the jurisdiction where the defendant's offense, or

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any element thereof, was committed. While State v. Draggo, supra, 65 Ohio St. 2d at 92 allowed for a significant nexus to a jurisdiction, venue questions must still be resolved by determining whether "any element" of the offense was committed within the jurisdiction where the trial is to take place. Id. at 91.

The rationale behind venue is also important. Defendants and prosecutors may not forum shop. Here, a murder was committed in Cuyahoga County. The victim at some point on the evening of his death been in Lorain County. However, there is simply no evidence to prove beyond a reasonable doubt that any element was committed in Lorain County.

Michael Smith, a key state witness, testified that Ronald Lally was still alive when the vehicle in which he was a passenger entered the cemetery in Cleveland, Cuyahoga County, Ohio. (T.p.784) Detective Beaman from the Cleveland Police Department testified that he was present at the scene in Cleveland where Lally's body was discovered. He collected evidence from the scene and turned it over to the Cuyahoga County Coroner's Office. (T. p. 612-614.) It is uncontroverted that the murder occurred in Cuyahoga County. The question then becomes under what theory of law can the case be moved to Lorain County. There is no count of kidnaping in the indictment and appellant was not convicted of kidnaping. There simply is no element of the crime committed in Lorain County.

The state engaged in mental gymnastics to try to establish that there was a plan or conspiracy conceived in Lorain County and that the victim was taken into Cuyahoga County to complete the plan. There is, again, no evidence to support this theory. While testimony was given that Danny Smith had threatened Lally prior to his death, there

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was no testimony that appellant was aware of the threats or had made any of his own. There was no evidence that appellant ever discussed with anyone a plan to harm Lally. Michael Smith's testimony, taken in a manner most favorable to the state, makes it clear that if there was a plan, it was to get Lally out of town.

The court then permitted statements made by Danny Smith some four months prior to Lally's death under the mistaken ruling that such statement was an excited utterance. Officer Homocki testified that Danny Smith told him that "he (Lally) is going to get his. The officer's repeating Danny Smith's comment can in no way, shape or form constitute an excited utterance. The entire philosophy behind the hearsay exception of excited utterance, pursuant to Evid. R. 803(2), is that the individual making the statement is still under the "spell" of the startling event which gave rise to the excited utterance. Further, the trustworthiness of the statement is supposedly guaranteed by the fact that the individual does not have time to fabricate because of the continued effect of the startling event.

This rule of evidence simply had no application in this case. It was again an attempt by the state to imply that in some fashion there was some plan to injure Lally. Even if that were true, there is nothing in the statement of Danny Smith that would render it admissible against Appellant. While it may have been admissible hearsay against Smith, for example, as to why the police considered him a suspect, there is no theory of law that can bring it into the realm of admissible hearsay against Appellant.

While the above statements were impermissibly admitted in an effort to show plan or conspiracy to establish venue, they were likewise impermissibly permitted to show prior calculation and design. In State v. Jenkins, (1976) 48 Ohio App. 2d 99 at 101-102, prior calculation and design was determined to require "some kind of studied analysis with the

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object being the means by which to kill." This "studied analysis" is required as opposed to a momentary deliberation. State v. D'Ambrosiso, (1993), 67 Ohio St. 3d 185, State v. Richardson (1995), 103 Ohio App. 3d 21.

There is absolutely no evidence in this case to demonstrate the essential element of prior calculation and design. Appellant was not a defendant in a case in which Lally was a witness. As a matter of fact, Appellant and Ron Lally were together "partying" for several hours on the evening preceding Lally's death. (T.p. 719). There is no evidence that Appellant threatened Lally; there is no evidence that Appellant had a weapon. The only evidence against Appellant came from Michael Smith. His testimony indicated that Raymond Smith gave the orders and had the gun. It was Raymond Smith who told Lally that they would put him on bus to get out of town. Once at the murder scene, Michael Smith testifies that Appellant is still in the automobile when the shots are fired. Later, a thumping noise was heard. (T. P. 781-784).

For purposes of a Rule 29 motion, applying the evidence most favorably to the State, the evidence presented simply does not meet the legal test of sufficiency as to the element of prior calculation and design. In addition, as indicated above, venue simply was not proper in Lorain county. As a result, Appellant's conviction must be reversed.

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PROPOSITION OF LAW IV

Jurors viewing a defendant in shackles is a violation of the U.S. CONST. amend 6, 8, 14, and Article I, Section 10 of the OHIO CONST.

During vore dire the following discussion was had outside the presence of the jury.

THE COURT: We are now back in session.

Mr. Grunda, you indicated to the Court when we were across the hall that you needed to put something on the records.

Proceed, sir.

MR. GUNDA : That is correct, your honor.

As we had the jury pool over in the Commissioner's Hearing Room, when the deputies were taking the Defendant out one door and into the other, there were several potential jurors standing in the hall going to and out of the restroom and they did see Mr. Jalowiec handcuffed.

THE COURT: Okay, And unfortunately that is unfortunate, but at times unavoidable and you are on record for that right now.

Anything further, sir?

MR GUNDA: Well, I am not sure how to rectify the prejudicial effect that it might have.

THE COURT: Do you want to call for a mistrial?

MR GUNDA: Well, at this point– I have to at this point, your Honor.

THE COURT: No, you don't have to.

MR. GUNDA: Well, there are people that saw him with the handcuffs.

THE COURT: Let me finish if you would, please. You don't have to. I have given you the opportunity to and you are?

MR. GUNDA: Yes, I am asking for the mistrial because there were several male, female potential jurors in the hall that were there that did see him with the deputies in handcuffs, and it might have a prejudicial effect on them.

MR. ROSENBAUM: Only, your honor, at this point I can't say that I am aware whether any potential jurors saw Mr. Jalowiec or not and if that would prejudice them in any way. I would suggest before the Court entertain the granting of a mistrial, some sort of voir dire should be done to see if that happened. I think the mechanics that this Court provided, it exists. The opportunity is there.

THE COURT: At this point, Mr. Gunda, your motion for a mistrial is overruled. (T. p.34-36.)

The process chosen by the court in this case is prejudicial to appellant. Handcuffing, shackling or restraining a defendant before conviction in such a manner that a juror can see the restraint violates due process absent some "essential state interest." Holbrook v. Flynn, (1986) U.S. 560, 568-69 Jurors would naturally presume guilt and dangerousness, and that other persons in authority have already determined these facts, from such measures. See, Elledge v. Dugger, 823 F. 2d 1439, amended, 833F. 2d 250 (11th Cir. 1987), cert. denied, 485 U.S. 1014 (1988) (unconstitutional shackling after conviction and during capital sentencing proceeding.)

Shackling is permissible only when the defendant has become "so insulting,

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abusive and disruptive than an orderly trial is made impossible," and, even then, "it is an abuse of discretion precipitously to employ shackles when less drastic security measures will adequately and reasonably suffice." Kennedy v. Cardwell, 487 F. 2d 101, 107, 111 (6th Cir. 1973), cert denied, 416 U.S. 959 (1974); Illinois v. Allen, 397 U.S. 337, 342-44 (1970). Improper shackling requires automatic reversal.

In this case several options were available. Since the jury had not been seated, the court, not defense counsel, could have conducted a voir dire to determine if any jurors in fact had seen the appellant in shackles. If so, each juror could have been individually questioned on the issue of prejudice. Since the incident occurred so early in the proceedings, the court could merely have excused the jury and proceeded to obtain another jury.

Possibly the most disturbing thing about this occurrence is the cavalier attitude of both the court and the prosecutor, sort of a "too bad, so sad" response to defense counsel's concern.

Based on the above law and facts, this court must reverse defendant's convictions.

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PROPOSITION OF LAW V

The ineffective assistance of counsel provided to appellant Jalowiec violated his rights to a fair and impartial jury trial and sentence, as guaranteed by the fifth, sixth, eight, and fourteenth amendments to the U.S. CONST. and Section 5, 9, 10 and 16 of the OHIO CONST.

The constitutional right to assistance of counsel has long been upheld as a fundamental right by the Supreme Court of the United States. Scott v. Illinois (1979), 440 U.S. 367; Argersinger v. Hamlin (1972), 407 U.S. 25; Kirby v. Illinois (1972), 406 U.S. 682; United States v. Wade (1967), 388 U.S. 218; Gideon v. Wainwright (1963), 372 U.S. 335; Powell v. Alabama (1932), 287 U.S. 45. In Powell, the Court recognized that a layman defendant "requires the guiding hand of counsel at every step in the proceedings against him" Id. at 69. More recently the Court stated, "of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." United States v. Cronic (1984), 466 U.S. 648, 654, quoting Schaefer, Federalism and State Criminal Procedure (1956), 70 Harv. L. Rev. 1, 8. The Sixth Amendment right to counsel together with the due process protections of the Fourteenth Amendment establish a right of effective assistance of counsel. Gideon, supra.

Failure to provide effective assistance of counsel is a fundamental constitutional error which undermines the entire adversarial process. Strickland v. Washington (1984), 466 U.S. 668, 688. In Strickland, the Supreme Court of the United States

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decided that ineffectiveness should be determined by asking whether incompetence and prejudice were established.

> "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."

Strickland, supra at 687. A claim for ineffective assistance of counsel must also "*** identify the acts or omissions of counsel" and show that the acts are not "the result of reasonable professional judgment." Id. at 690. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694 (emphasis added). Ohio has adopted the Strickland test. State v. Thompson (1987), 33 Ohio St. 3d 1; State v. Post (1987), 32 Ohio St. 3d 380.

Examination should be made as to the totality of the representation. House v. Balcom (C.A.11, 1984), 725 F.2d 608, 615, cert. denied (1984), 469 U.S. 870. This case, as a capital case, involves two trials and two results. Capital sentencing proceedings are subject to the same standards as the guilt phase, with regard to ineffective assistance claims. Strickland, supra at 686.

In both the guilt phase and sentencing phase of Appellant's trial, there were acts or omissions by defense counsel which were not the result of reasonable professional

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judgment.

During voir dire, counsel failed to rehabilitate favorable jurors, and failed to timely object to unfounded challenges by the State. General opposition to the death penalty is not grounds for accusal as long as the potential juror is able to follow the law. Witherspoon v. Illinois (1968), 391 U.S. 510; O.R.C. 2945.25(C). It is incumbent upon defense counsel to attempt to prevent accusal of favorable jurors. Even if rehabilitation is not possible, counsel should, at a minimum, ascertain whether the juror's views would prevent or seriously impair his/her ability to follow the law. Defense counsel failed to timely object to the accusal for cause of the jurors in this case. All of the jurors were excused by the court because of their views on the death penalty. However, at the time these jurors were excused, defense counsel failed to object.

2 Defense counsel also failed to object to the introduction of the co-defendant's statement which stated that appellant was directly involved in the killing in this case. The United States Supreme Court has held that the admission of a co-defendant's extrajudicial statement violates the defendant's Sixth Amendment right of cross examination. Bruton v. United States(1968), 391 U.S. 123, 88 S.Ct. 1620. The introduction of the co-defendants statement prejudiced Appellant Jalowiec, and should have been objected to by defense counsel.

3 Defense counsel failed to request the assistance of an expert to assist them in determining the cause of death. Dr. Heather Raaf, a deputy coroner with the Cuyahoga County Coroners Office testified that the injuries sustained by the victim are consistent with being stomped and or struck by a vehicle several times. Trial Tr. 655. However,

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on cross-examination Dr. Raaf testified that there were no markings on the body, either boot or automobile, that supported this finding. Trial Tr. 657. Whether the victim was kicked or rammed into with an automobile was the focal point in the states case. In its opening statement, the state argued as follows:

> The only thing he (Appellant Jalowiec) did not do was the gunshot and perhaps he didn't cut his throat, but those two things did not kill Ron Lally. He contributed to the beating and the stomping and he rammed his body repeatedly with the car that he was driving, then he engaged in the coverup. Trial Tr. 483.

Trial counsel should have obtained the assistance of experts in this case. The failure to do prejudiced Appellant Jalowiec.

4 In the jury instructions, defense counsel failed to object to the instruction of all statutory mitigating factors being given to the jury. Defense counsel also failed to object to the no sympathy instruction or the acquittal first instruction being given during the penalty phase. Defense counsel failed to request a definition for the term mitigation at the penalty phase. Further, defense counsel failed to object to the instruction at the guilt phase that "...the defendant is charged as a Principal Offender." Trial Tr. p. 990.

At the mitigation phase of the trial, appellant made an unsworn statement. At the conclusion of the statement the court ruled that the state would have the right to rebut the statement. Mitigation Tr. pp.44-47. Defense counsel was ineffective in permitting the appellant to make a statement to the jury which resulted in the trial court's ruling that the state could rebut it. Defense counsel's ineffectiveness permitted all of appellant's other acts to come before the jury.

The Supreme Court has enunciated the standard for determining whether

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prejudice has resulted from counsel's deficiencies:

> "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results."

Strickland v. Washington, supra at 696.

Mr. Jalowiec was prejudiced by the errors and omissions of his counsel. These errors undermined the reliability of the results in this case.

For all of the above reasons, Appellant Jalowiec was denied the effective assistance of counsel at each critical stage of his capital trial. His convictions and sentences must be reversed as they were obtained in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 5, 9, 10 and 16, Article I of the Ohio Constitution.

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PROPOSITION OF LAW VI

The Sixth and fourteenth amendments to the U.S. CONT. Sections 10 and 16, Article 1 of the OHIO CONST. guarantee an accused a fair trial and an impartial jury. The improper exclusion for cause of potential jurors because of their views on the death penalty denied appellant Jalowiec these constitutional guarantees.

During the individual voir dire in Mr. Jalowiec's case, a number of prospective jurors were excused for cause due to their views as to the death penalty. A total of fifteen jurors were excused for cause due to their views on the death penalty. Of those fifteen, only one was excused because he would automatically vote to impose the death penalty. (Voir Dire Tr. 326) Defense counsel failed to object to the improper removal of the jurors. A review of the entire record indicates that some of the accusal's in this case were improper.

In Witherspoon v. Illinois (1968), 391 U.S. 510, the United States Supreme Court held that "...a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Id., at 522. As the Court noted several years later in Davis v. Georgia (1976) 429 U.S. 122, "[u]nless a venireman is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings,' he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand. Id., at 400 (citations omitted).

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In Wainwright v. Witt (1985), 469 U.S. 412, the United States Supreme Court again addressed the issue of when a venire person could be removed from the panel due to their views on the death penalty. In Wainwright, the Court clarified the standard to be followed in excluding jurors for their views on capital punishment: "[a] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as juror in accordance with his instructions and his oath." Witt, supra, at 420. (Citing Adams v. Texas (1980) 448 U.S. 38, at 44.)

Mere opposition to the death penalty is not sufficient to disqualify an individual from sitting on a jury in a capital case. The opposition or viewpoint must prevent the prospective juror from following the law regarding the death penalty.

The Court was quick to caution trial judges that the decision was not meant "to denigrate the importance of an impartial jury...The trial court has a serious duty to determine the question of actual bias...In exercising its discretion, the trial court must be zealous to protect the rights of an accused." 469 U.S. at 429-30.(Emphasis added.) (Quoting United States v. Dennis (1950), 339 U.S. 162, 168.)

The Court further stated that "...it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." 469 U.S. at 423. The State thus has the burden of proving the juror is biased.

The accusal of Juror Porter in the present case violated the standard set forth in Wainwright. During her initial questioning, Juror Porter indicated she would have difficulty with the death penalty. Voir DireTr. 43-50. Upon further questioning by the

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court as to whether or not she could impose the death penalty, Ms. Porter said that if the facts were there, she would vote for the death penalty. Voir Dire Tr. 51. Upon further questioning by defense counsel, Ms. Porter specifically stated that "yes, I guess, yes, not I guess, yes, I would" impose the death penalty. Voir Dire Tr. 54. Upon questioning by the prosecutor, Ms. Porter once again stated that she could vote for the death penalty. Voir Dire Tr. 55-56. Not being satisfied with this answer, the prosecutor questioned Ms. Porter as follows:

Mr. Rosenbaum: Look at him. Could you sign your name to a piece of paper condemning him to death if you thought the law and the evidence required it?

Mr. Grunda: I would object to that question.

The Court: Overruled.

Mr. Rosenbaum: Look at him. That is what you are going to have to do, that is what we are talking about. Could you do that if the law and the evidence required it?

The Juror: If the law and the evidence required it.

Voir Dire Tr. 56-57.

Upon further questioning by the prosecutor, Ms. Porter stated that she could not impose the death penalty. The court then excused her from the panel.

The accusal of Juror Kowalski also violated the standard set forth in Wainwright. During his initial questioning by defense counsel, Juror Kowalski stated that he could fairly consider all three sentencing options. Voir Dire Tr. 211-212. During his initial questioning by the court, as well as the prosecutor, Mr. Kowalski was not sure if he could impose the death sentence. Voir Dire Tr. 218-221. Juror Kowalski finally stated

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that "but I don't think at this time I could consider it, (the death penalty)." The court then excused the juror from the panel. Voir Dire Tr. 225.

Neither the court or defense counsel inquired of Juror Fobell, only the prosecutor did. Juror Fobell was not sure if he could impose the death penalty. The following responses indicated that Juror Fobell was not irrevocably committed to the death penalty.

Mr. Rosenbaum: Look at this young man here. If you get selected as a juror, I want you to promise that if the law and the evidence requires a verdict of guilty and the death penalty, could you sign your name to a piece of paper that might kill him?

The Juror: I Am not so sure I would.

Mr. Rosenbaum: I said could you or do your views substantially impair you from doing that?

The Juror: I may not sign.

Mr. Rosenbaum: Is it fair to say your views substantially impair you from signing?

The Juror: Yes. Yes, because I don't feel that decision should be laid upon me because I don't think I could do that.

Voir Dire Tr. 243-244.

The court then excused Juror Fobell from the panel.

During initial questioning by defense counsel, Juror Eubanks indicated that his views on the death penalty equaled out, and that he could consider all three sentencing options. Voir Dire Tr. 334-335. When questioned by the court, Mr. Eubanks stated that

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"yes" he could sign his name condemning the defendant to death. Voir Dire Tr. 339-340. Defense counsel finally questioned Mr. Eubanks as follows:

Mr. Grunda: That is what we need because, as I said, and the Judge told you what the test is here, are your views such that they substantially impair you, because you have three choices and we have to know that you can consider all three equally and fairly.

The Juror: I thought I could, but I have that little doubt in the back of my mind.

Voir Dire Tr. 340.

The court then excused the juror from the panel.

Throughout the questioning of Juror Buck, he did not state that he could not consider the death penalty. When questioned as to whether he could sign his name to a piece of paper which called for the defendant to die, Juror Buck stated "I don's think so." Voir Dire Tr. 382. When questioned as to whether his views would substantially impair his ability to pick the death penalty, Juror Buck stated "Yes, I think so." Voir Dire Tr. 383. Finally, when asked if he could consider all three sentencing options, with death being the last option, Juror Buck stated "It is hard to say. I don't think I could do the last one." Voir Dire Tr. 385.

However, having a problem in deciding whether or not to impose the death penalty does not meet the standard set forth in Wainwright. In Wainwright the Supreme Court re-examined its decision in Adams v. Texas (supra). In Adams, the Court found that certain jurors had been improperly excused because:

"... their acknowledgement that the possible

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Witherspoon is eligible to serve, has been erroneously excluded for cause." Gray, 107 S.Ct. at 2052. The Gray Court went on to find that the improper exclusion of jurors for cause due to their views on the death penalty was not subject to the harmless error analysis. The Court stated that "[b]ecause the Withespoon-Witt standard is rooted in the constitutional right to an impartial jury... and because the impartiality of the adjudicator goes to the very integrity of the legal system, the Chapman harmless-error analysis cannot apply." Id., at 2057 (citations omitted).

The same principal applies to the plain-error analysis. Defense counsel failed to object to the accusal for cause of any of the jurors at trial. This Court has held that where there is no objection at trial, the court will only review an issue for plain-error. State v. Slagel (1992), 65 Ohio St.3d 597, State v. Long (1978), 53 Ohio St. 2d 91. However, if the "impartiality of the adjudicator goes to the very integrity of the legal system", then any error in excusing jurors for their views on the death penalty requires a reversal of the death sentence. If this Court determines that the trial court improperly excused jurors due to their views on the death penalty, it must reverse the death sentence.

Accordingly, Mr. Jalowiec's death sentence must be reversed due to the wrongful exclusion of these jurors.

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> year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in specific case."

A review of the mitigation phase of Appellant Jalowiec's trial establishes that the sentence of death is not appropriate in his case.

The appropriateness of the death sentence in Appellant Jalowiec's case was undermined by the admission of other acts and the introduction of an extrajudicial statement of the co-defendant which directly involved Appellant Jalowiec in the killing.

At the mitigation phase of the trial, Appellant Jalowiec gave an unsworn statement. Mitigation Tr. pp. 21-44. At the conclusion, the trial court ruled that the state could rebut what the appellant had said. Mitigation Tr. pp. 44-47. Defense counsel then put the appellant back on the stand to tell the jury about all of his criminal charges, none of which the appellant had been convicted of. Mitigation Tr. pp. 59-74.

In rebuttal of the defendant's unsworn statement, the state proceeded to call all of the victims from the cases where appellant had been charged but not convicted. This testimony effectively destroyed any testimony that the appellant produced through his family members.

The state also called in rebuttal Detective Leiby. Through this witness the state introduced the statement of the co-defendant who said that appellant was present and assisted in the killing.

This testimony completely destroyed the mitigation phase for the appellant.

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PROPOSITION OF LAW VII

The death sentence in appellant Jalowiec's case is unreliable and inappropriate under the eight and fourteen amendments to the U.S. CONT. and Section 9, 10, and 16, article I of the OHIO CONST., and Ohio Revised Code §2929.05.

O.R.C. 2929.05(A) requires this Court to review all death sentences in this state to determine:

(1) Whether the sentence of death in the particular case is appropriate and;

(2) Whether the sentence of death in the particular case is excessive or disproportionate to the penalty imposed in similar cases. O.R.C. 2929.05(A) directs the appellate courts to "affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case." The record in the case sub judice merits the independent conclusion by this Court that the sentence of death is not appropriate for Appellant Jalowiec.

Under the Eighth and Fourteenth Amendments to the United States Constitution, the sentence of death is not appropriate in any case where there is not the highest degree of reliability to support it. As the United States Supreme Court held in Woodson v. North Carolina (1976), 428 U.S. 280, 305:

> "This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-

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What should have been an opportunity to establish why the appellant did not deserve the death penalty turned into an opportunity for the state to present any and every bad act or misdeed of the appellant. Clearly, this is not the purpose of the mitigation phase of the trial.

The introduction of the other acts testimony and the introduction of the co-defendant's statement involving appellant in the killing completely undermines the death penalty in this case.

A death sentence is not appropriate under the Eighth and Fourteenth Amendments if there is not the highest of confidence in its reliability. For the reasons stated above, this Court should reverse Stanley Jalowiec's death sentences on and remand the matter for resentencing.

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PROPOSITION OF LAW NUMBER VIII

THE PROPORTIONALITY REVIEW THAT THIS COURT MUST CONDUCT IN THE PRESENT CAPITAL CASE PURSUANT TO OHIO REVISED CODE SECTION 2929.05 IS FATALLY FLAWED AND THEREFORE THE PRESENT DEATH SENTENCE MUST BE VACATED PURSUANT TO THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SECTIONS 5 AND 10, ARTICLE I OF THE OHIO CONSTITUTION AND OHIO REVISED CODE 2929.05.

When the Ohio Legislature re-enacted the death penalty it required the appellate courts of Ohio to conduct a proportionality review of any death sentence that it reviews. Ohio Revised Code §2929.05. To insure that the courts had a sufficient body of data by which to conduct a proportionality review, the legislature created an information gathering system as to capital cases. Ohio Revised Code Sections §2929.03(G), §2929.021, and §2929.05(A).

Like any other informational resource, the capital tracking system is only as valuable as the completeness of its information. Information as to cases in which life imprisonment was imposed after a capital sentencing hearing is essential for the reviewing courts to fulfill their responsibility of assuring that excessive, disproportionate sentences of death are not imposed. Baldus, Pulaski, Woodworth and Kyle, "Identifying Comparatively Excessive Sentences of Death: A Quantative Approach", 33 Stan. L. Rev. 1, 7 n.15 (1980); Woodson v. North Carolina (1976), 428 U.S. 280, 316; McCaskill v. State (Fla. 1977), 344 So. 2d 1276, 1280.

Common sense dictates that life sentences should be included in the informational tracking system. When the individual judges have to determine if a death

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sentence is appropriate, they will surely wish to know when a death sentence was previously found to be inappropriate by juries and judges, as well as when one was found to be appropriate. There is no other manner in which a knowledgeable, intelligent decision can be made.

The trial courts in Ohio have repeatedly failed to file sentencing opinions in those cases in which a jury has returned a life verdict in a capital case. The result has been an information tracking system that contains only death verdicts.

Failure to conduct the required proportionality review with an adequate informational base violates Appellant Jalowiec's statutory right to a meaningful proportionality review and Mr. Jalowiec's constitutional rights to due process and to not be subject to cruel and unusual punishment.

FAILURE TO CONDUCT A PROPORTIONALITY REVIEW IN A MEANINGFUL MANNER VIOLATES APPELLANT'S RIGHT TO DUE PROCESS

A state need not require a proportionality review with respect to a capital case. Pulley v. Harris (1984), 465 U.S. 37, certiorari denied (1990), 110 S. Ct. 854.

However the United States Supreme Court has further held that State law "may create ... interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." Vitek v. Jones (1980), 445 U.S. 480, 488. Through its statutory provisions for mandatory appellate review of death sentences, the State of Ohio has created an "interest" entitled to Fourteenth Amendment protection. That "interest" is a defendant's rightful expectation that each appellate court which reviews his death sentence compare it to other death sentences to insure that it is not

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be arbitrarily abrogated without violating the Due Process Clause. Vitek v. Jones, supra at 488-89; Wolff v. McDonald (1974), 418 U.S. 539, 558; Hicks v. Oklahoma (1980), 447 U.S. 343, 346. Cf. Evitts v. Lucy (1985), 469 U.S. 387, 401; Griffin v. Illinois (1956), 351 U.S. 12, 18. The defendant has a substantial and legitimate expectation that he will be deprived of his life only in accordance with the procedures prescribed by state law.

In the present case, due process procedures cannot be followed in conducting the required proportionality review. The trial courts have not filed opinions in which life sentences were imposed. These may be the only decisions that support a capitally convicted Appellant's argument that his sentence was disproportionate. A hearing cannot be termed "fair" if the only evidence that supports a party's claim is excluded.

FAILURE TO CONDUCT A PROPORTIONALITY REVIEW IN A MEANINGFUL MANNER RESULTS IN A DEATH SENTENCE WHICH IS ARBITRARY AND CAPRICIOUSLY IMPOSED

Although death penalty statutes may be constitutional on their face, discrimination in the administration of an otherwise facially valid statute is unconstitutional.

> **"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."**

Yick Wo v. Hopkins (1885), 118 U.S. 356, 373-374.

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Notwithstanding the divergent views expressed by the majority Justices in Furman v. Georgia (1972), 408 U.S. 238, rehearing denied (1972), 409 U.S. 902, the opinions contain a vital common denominator, expressed in the two following formulations:

> **"***[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be *** wantonly and *** freakishly imposed. Furman, supra at 310 (concurring opinion of Justice Stewart).***[The Eighth and Fourteenth Amendments are violated if]the death penalty is exacted with great infrequency even for the most atrocious crimes and *** there is not meaningful basis for distinguishing the few cases in which it is not."**

Id. at 313 (concurring opinion of Justice White).

Furman therefore stands for the proposition that the arbitrary and capricious application of the death penalty violates the Eighth and Fourteenth Amendments.

The prevailing opinions in Gregg v. Georgia (1976), 428 U.S. 153, rehearing denied (1976), 429 U.S. 875, explicitly reasserted that "the basic concern of Furman centered on those defendants who were being condemned to death capriciously and arbitrarily" and that Furman's basic requirement of regularity in the capital sentencing process was designed to eliminate "a substantial risk that uncontrolled procedures would result in juries acting wantonly and freakishly to impose the death sentence." Gregg, supra at 206.

When the Ohio Legislature rewrote the Ohio death penalty, it attempted to avoid the arbitrary and capricious application of the death penalty by imposing a statutorily mandated duty upon the Courts of Appeals and the Ohio Supreme Court to review each death sentence to determine whether a particular sentence is excessive or disproportionate to the penalty imposed in similar cases. Ohio Revised Code Section §2929.05(A).

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In an effort to insure meaningful proportionality review, the Ohio Legislature adopted several comprehensive procedures:

> 1) If an indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances, the clerk of the court in which the indictment is filed shall file a notice with the supreme court indicating that the indictment was filed.

Revised Code Section §2929.021.

> 2) The trial court is required to prepare a written opinion identifying the aggravating and mitigating factors and the resulting balance when it imposes a life or death sentence.

Revised Code Section §2929.03(F).

> 3) The appellate court is required to prepare its own written opinion when it reviews a death sentence.

Revised Code Section §2929.05(A).

> 4) The above opinions are required to be filed with the Ohio Supreme Court.

Revised Code Sections §2929.03(G) and §2929.05(A).

The purpose of the information collecting system of 0.R.C. §2929.03(G), §2929.021 and §2929.05(A) is obvious: It provides the Ohio appellate courts with a body of information based on Ohio cases from which to determine whether a particular death sentence is excessive or disproportionate when compared to other cases. An appellate court may request information at any time on the outcome of a particular factual pattern or type of capital case. The value of such a detailed and accessible body of case law cannot be over-emphasized.

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No proper legal determination is made in the abstract. One can only decide that death is the appropriate punishment in a particular case by comparing it to those cases in which the ultimate punishment has been found to be inappropriate.

The Ohio Legislature reached the same conclusion when enacting the Ohio death penalty. For this reason, the Ohio Legislature required the court or panel to write a decision when a life sentence was imposed:

> **"(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section §2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of Section §2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.**

(Emphasis added). O.R.C. §2929.03(F).

The statute is quite clear and concise: When the court imposes a life sentence, it shall make specific findings and file its opinion.

Ohio courts have consistently refused to file these opinions in life verdicts. There exists no rational reason to have a trial judge make findings of fact when he rejects a jury's

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death recommendation and not make such findings when he accepts a life recommendation. In both cases, findings of fact are needed to have a complete data bank for the purposes of O.R.C. §2929.03(G), §2929.021, and §2929.05(A).

The Ohio Legislature created proportionality review as a safeguard to insure that the death penalty was not wrongly imposed. The system has failed miserably. With its biased data base, the proportionality review has ceased to be a safeguard and become a justification for imposing death sentences. The creation of the biased data bank not only ignores the plain language of the statute, but denies Mr. Jalowiec the right to a fair proportionality review and results in the arbitrary and capricious imposition of the death penalty in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

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PROPOSITION OF LAW IX

Improper penalty phase jury instructions violate an individuals rights as guaranteed by the US. CONST. amend. 5,6,8,14, and OHIO CONST..., Article I, Section 10.

During Appellant's penalty phase instruction of the jury the court gave the following charge:

> You shall recommend the sentence of death if you unanimously, that is, all twelve of you find proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors. If you do not so find, you shall unanimously (all twelve) recommend either a life sentence with parole eligibility after serving twenty years of imprisonment, or a life sentence with parole eligibility after serving thirty years of imprisonment. (T. M. p. 340).

These instructions contain reversible, constitutional error. They specially are violative of this Court's ruling in State v. Brooks, (1996) 75 Ohio St. 3d 148, 160 where the court stated:

> R.C. 2929.03(D)(2) contains no limiting language as to when a jury may contemplate a life sentence. The jury instruction given by the trial court would require unanimity that the death penalty was inappropriate before the jury could even consider a life sentence. Instead of requiring the unanimity of a death sentence, this instruction required the jury to issue a death sentence unless each juror was convinced that the death penalty was inappropriate.

As discussed in Brooks, this instruction leaves jurors with the impression that they, individually, cannot affect the imposition of the death penalty. This is simply not the law, and leaves erroneous imposition of the death sentence.

The jury also was no doubt confused by the court's repeated use of the plural

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circumstances. While the court did instruct the jury, "The aggravating circumstances which you have already found are the following: (1) That the victim was killed to prevent his testimony in a criminal proceeding" that charge is misleading in an of itself. The use of the plural circumstances with the reading of one aggravating circumstance left the jury with the impression that there was more than one such circumstance.

As stated above, at other times during the charge the court used the plural circumstances. It becomes impossible to determine which charge the jury relied upon in the deliberations, to wit: circumstances or circumstances.

It is interesting to note that the state in the brief on direct appeal to the Ninth District Court of Appeals, argues that the court reporter incorrectly transcribed the record. Much like Brooks, when no order is made pursuant to the Rules of Appellate procedure to correct the record, prior to the appellate court having jurisdiction, the record must stand as transcribed. It is likewise interesting to note, that while the Ninth District indicated that the record was not properly corrected, they rely on the state's contention that it was improperly transcribed, when indicating that taken in context, the state is in all likelihood correct. When dealing with death, rules are not made to be broken.

The penalty phase instruction in this case could be described as flimsy at best. Aside from improperly reading all the mitigating factors, and improperly and repeatedly using aggravated circumstances, the jury was provide no guidance as to how to proceed. The court appears to have created its own garden variety charge when advising the jury of things such as "To outweigh" means to weigh more than, to be more

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important than. In the face of that instruction how could any jury ever find that a life sentence was appropriate. In this case, to outweigh means proof beyond a reasonable doubt, something this jury could never have figured out from the charge.

The charge as given offered no guidance whatsoever. Much like State v. Johnson, (1986),24 Ohio St. 3d 87 and State v. Penix (1987), 32 Ohio St. 3d 369 this error requires reversal. In essence, the jury was left with the impression that it could consider any evidence it decided was relevant.

In addition, the court instructed the jury on all statutory mitigating factors. As indicated elsewhere in the brief, this results in a deliberation based on quantity not quality, and leave the jury with the impression that this defendant did not have all the possible factors necessary for the factors to outweigh the circumstances.

Jury instructions must be viewed in the context of the overall charge. State v. Price, (1979), 60 Ohio St. 2d 136, paragraph four of the syllabus. Here, examining the entire charge, one can only image the confusion experienced by the jury.

Based on the erroneous charge given by the trial court, Appellant submits that the sentence of death imposed upon him must be vacated and the case remanded for sentencing in accordance with this Court's opinion.

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PROPOSITION OF LAW X

Ohio's death penalty law, OHIO REV. CODE ANN. 2903.01 2929.02, 2929.021, 2929.022, 2929.023, 2929.04, and 2929.05 violate U.S. CONST. Amend. V. VI, VIII, and XIV and the immunities specified in OHIO CONST., art. I, Section 1,2,5,9,10 and 16.

OHIO REV. CODE. ANN. 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05[1], as read together and as applied in this case violate liberties specified in U.S. CONST. Amend. V, IV, VIII, XIV; and, the immunities specified in OHIO CONST., art. I, Sections XIV, and 16. Ohio's death penalty violates both the state and federal constitutions.

Proposition of Law XI(A)

Ohio's death penalty law violates U.S. CONST. amend. VIII and XIV and Ohio CONST. Art. I, Sections 1,2,9, 10, and 16 because the effective appellate review required by those constitutional provision is lacking.

The Ohio death penalty violates both the state and federal constitutions because it has not been uniformly applied. The courts of Ohio, rather than providing effective appellate review, have become in essence a second legislature, reflecting the popular demand for death sentences and ignoring constitutional requirements. Courts

[1]The statutes and other materials discussed herein are reproduced in the appendix as required by Sup. Ct. Prac. R. VI(B)(5)(f).

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have a constitutional bound are not overreached, but they may not act as judges as they might as legislators.[2] Justice Felix Frankfurter wrote:[3]

> Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

The actions of Ohio's courts have eroded a basic aspect of infliction of the death penalty: effective appellate review. Accordingly, the death penalty cannot be administered with certainty, reliability, and predictability. Absent those safeguards, the sentence of death must be vacated.

To satisfy the state and federal constitutions, the procedure for invoking the death penalty must be reliable and evenhandedly applied. If the procedure lacks these essential qualities, the government is disentitled to execute any death sentence imposed.

Courts have struggled with the notion of trying to make the death penalty work. They have not been successful, despite their claims to the contrary. Former Justice Harry Blackmun concluded after a long career that the death penalty cannot be applied in a fashion consistent with the federal constitution. He lamented that "the prospect of meaningful judicial oversight has diminished." Callins v. Collins (1994), 510 U.S. 1141

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[2]See, Gregg v. Georgia (!976), 428 U.S. 153, 174-175.

[3]Dennis v. United States (1951), 341 U.S. 494, 525, Frankfurter, J., concurring in affirmance of the judgment.

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(dissenting from denial of certiorari). He went on to say:

> Twenty years have passed since this court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, and despite the efforts of ll the states and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, can never be achieved without compromising an equally essential component of fundamental fairness– individualized sentencing. See, Lockett v. Ohio, 438 U.S. 586, (1978).

Not only must death penalty statutes contain individualized sentencing, they must also provide for effective appellate review. States must, in order for death penalty laws to satisfy the federal constitution, tailor and apply their laws in a manner that avoids the arbitrary and capricious infliction of the death penalty. Godfrey v. Georgia (1980), 446 U.S. 420, 428.

Nowhere is adequate and scrutinizing appellate review more necessary than in a death penalty case and yet, Ohio fails to provide effective appellate judicial review. The United States Supreme Court has acknowledged that, even with efforts at guided discretion, juries may misapply sentencing procedures, and may impose the death sentence for someone outside the narrowly defined class of those who truly deserve consideration of the death sentence. In Gregg v. Georgia (1976), 428 U.S. 153, 192, the Court said:

> But the provision of relevant information under fair procedural

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> rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. Since members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given.

In Gregg, the Court upheld Georgia's post-Furman death penalty law. In doing so, however, the Court noted that the automatic appellate review was a vital additional safeguard to avoid capricious infliction of the death penalty. There the court indicated that it would rely on the Georgia Supreme Court to construe the aggravating circumstances in the revised Georgia statute in a narrow way. Four years later the United States Supreme Court found the Georgia Supreme Court had failed to provide the necessary construction of the aggravating circumstance that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." In Godfrey, the court found that the failure of the court to define any of the statutory terms rendered the aggravating circumstance in question unconstitutional. The Court said:

> The standard less and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court. Under state law that court may not affirm a judgment of death until it has independently assessed the evidence of record and determined that such evidence supports the trial judge's or jury's finding of an aggravating circumstance.
>
> ... There is no principled way to distinguish this case, in which the death penalty was imposed from the many in which it was not.

Id., at 429-433. Godfrey's death sentence was vacated because the Georgia courts

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had not done what the United States Supreme Court had assumed they would do. The United States Supreme Court had approved the Georgia death penalty aggravating circumstance in question on the explicit assumption that meaningful judicial review would remove caprice from infliction of the death penalty. When the state court failed to provide meaningful judicial review the United States Supreme Court reversed and remanded.

This court must do likewise with the case before it. The appellate courts of Ohio have not reserved the death penalty for only the worst of Ohio's murderers. The process utilized by the court does not provide the necessary safeguards.

First we will examine the issue of mitigation. The United States Supreme Court made clear in Gregg that the federal constituting does not act as a bar to a jury granting mercy in a given case, the statutorily defined aggravating and mitigating circumstances notwithstanding. The court held:

> The petitioner next argues that the requirements of Furman are not met here because the jury has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case. This contention misinterprets Furman. See, supra, at 198-199. Moreover, it ignores the role of the Supreme Court of Georgia which reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated interprets of a jury to afford ;mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

The proportionality requirement, the Court made clear, is to prevent capricious infliction of the death penalty, not to prevent the capricious imposition of a life sentence.

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Hand in hand with that notion is a series of cases. The central holding of those cases is that there can be no limit placed on the mitigating evidence which a jury is permitted to consider. In Eddings v. Oklahoma (1982), 455 U.S. 104, the Court held it error to exclude consideration of evidence of Eddings' youth and troubled childhood from the sentencing determination. In Lockett v. Ohio (1978), 438 U.S. 586, the Court invalidated Ohio's first post-Furman effort to resurrect the death penalty. The court found that the requirement that death be imposed unless one of three statutory conditions was met inappropriately limited consideration of mitigating evidence. Obviously, this court had found that the statute was constitution. The emphasizes the fallacy of state appellate review being adequate. This court should not strive for the minimum requirements when dealing with the death penalty but should instead any and all efforts to avoid caprice.

In Hitchcock v. Dugger (1987) 481 U.S. 393, a unanimous Supreme Court vacated the death sentence of the defendant. There the jury had not been instructed that it could consider nonstatutory mitigating factors. Here again the state system found that the minimum requirements had been met. Hitchcock was before the United States Supreme Court on his federal habeas appeal and therefore, obviously, very near execution.
An Ohio case, Glenn v. Tate (6TH Cir. 1995) 71 F. 3d 1204 provides further evidence of the quality of appellate review in Ohio. Glenn, like Hitchcock, have gone through his state appeals, state post-conviction and had been denied federal relief at the district court level. When his was heard by the 6th Circuit on his habeas appeal, the court appeared quite disturbed by what had transpired in the state court. It becomes obvious to all that the Ohio appellate review consists of something to the effect of: bad guy, bad crime equals

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execution.

This is also demonstrated in State v. Green (1993), 66 Ohio St. 3d 141, 153-154. There, this court acknowledged mitigating factors of low IQ, youth, remorse, poor upbringing, alcohol and drug addiction, the disparate treatment of the co-defendant, and the fact that the victim may have induced or facilitated the offense. How much mitigation is enough? Where, as here, the victim is frail and elderly, it appears there can never be enough. It is only in dissent that this court is seen to consider the mitigating evidence.

While this Court ruled in State v. Zuern (1987), 32 Ohio St. 3d 56 that an Ohio jury is not precluded from extending mercy to a defendant, the jury is not told by the Court that mercy is an option. This Court held that a mercy instruction is not to be permitted because it is not one of the mitigating factors set forth in the law. In State v. Lorraine (1993) 66 Ohio St. 3d this Court held that a mercy instruction is not to be permitted because it is not one of the mitigating factors set forth in the law. That conflicts with the federal cases discussed above.

This Court's decision in Lorraine makes clear that, while a defendant may argue for mercy, the trial courts may not instruct that it may be considered. As argued in Hitchcock, if the jury is not told to consider the plea for mercy, they will not do so, thus in practical effect limiting their consideration. By a sin of omission the jury is instructed not to consider evidence of mercy. This procedure denies due process and other constitutional principles guaranteed to all persons by the Ohio Constitution.

A review of the various court opinions makes clear that the court of Ohio routinely, illegally consider the facts of the case when making a penalty determination. They do not

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weigh the aggravating circumstances presented in the charge but instead, weigh the mitigation against the manner in which the victims were killed.

Particular attention must be paid to State v. Lawson (1992),64 Ohio St.3d 336, 351, the court said:

> We therefore give appellant's personal weaknesses (suggestibility, low intelligence, impulsiveness) little weight in reducing his culpability. Also, we reject Dr. Lutz's diagnosis of appellant suffering from "brief reactive psychosis" as did most of the experts. Appellant murdered Martin to prevent his testimony against Tim Lawson and to prevent appellant's own apprehension, conviction and punishment for the Titus burglary. These aggravating circumstances strike against the judicial system itself and deserves {sic} severe punishment. Moreover, appellant murdered Martin during the course of kidnaping. The lack of violence in the kidnaping arguably reduces the weight of the specification, but it does not eliminate it. Having conducted the statutory balancing, we conclude that the aggravating circumstances outweigh the factors presented in mitigation beyond a reasonable doubt.

The weighing and independent review resulted in affirmance of the death sentence because the court felt a sense of outrage when a potential witness in a criminal case was murdered. The very language "deserves severe punishment" flies in the face of the unemotional guided discretion demanded by the state and federal constitutions.

In State v. Ritchey (1992), 64 Ohio St. 3d 353, this court again looked to facts of the crime, not the statutory aggravating circumstances. This was shown when the court indicated, "In torching an apartment building at night, he jeopardized the lives of others in addition to killing an innocent two-year old child." What might have happened has no place in the analysis of aggravating circumstances and is completely improper.

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The result of the process used by this court is basically that if there is a death specification and no "plain errors" are made the death sentence will be affirmed because the of the "bad facts." While each case is a bad case when the fact pattern makes a defendant eligible for the death penalty, the whole concept of the careful balancing of aggravating and mitigating evidence is to give each defendant an opportunity to distinguish himself from all other defendants. To the contrary, he process currently being utilized discourage the analysis of the evidence and instead encourages emotional responses by repeatedly affirming cases and admitting in the affirmance that the terrible facts were the basis for the decision.

Several justices of this Court have agreed with the above analysis. In State v. Simko (1994) 71 Ohio St. 3d 483 former Justice Wright stated in dissent:

> ...it would appear that the trial panel may well have treated the nature and circumstances of the crime as a second aggravating circumstance insofar as they made detailed findings of fact concerning the circumstances of the crime and used the plural several times in alluding to aggravating circumstances. This court has held it is appropriate to consider the nature and circumstances of the offense as a mitigating factor, but not as an additional statutory aggravating circumstance.

Appellant review is to be a safeguard in the capital murder case, not a rubber stamp. It must be an unemotional, carefully guided objective weighing of legal factors. It simply is not. It appears that when reviewing death penalty cases, the appellate courts of Ohio have abandoned the long-standing constitutional principle eloquently stated by Justice Bradley over one hundred years ago in Boyd v. United States (1886) 116 U.S. 616, 635 when he stated:

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> ... It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and undo notational practices get their first footing in that was, namely, by silent approaches and slight deviation from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon.

In Ohio, sound over substance seems to be the rule in death penalty appellate review. With federal court review of state cases becoming increasingly limited it is of utmost importance this court take up the mantel and provide serious review of all the issues in these cases. And that review must commence by insuring that the guidelines for imposition of the death penalty set forth by the United States Supreme Court are followed in this state. The federal courts on post-conviction review will have less and less opportunity to correct state errors and the philosophy which seems to have been so long relied upon, that the federal courts can sort it out is no more.

The only way to insure that this Defendant, like Richey is not subjected to arbitrary and capricious infliction of the death penalty is to remove that possibility by vacating his death sentence.

Sub-Proposition of Law XI(B)

Death by Electrocution and Lethal Injection Violate U.S. CONST. Amend. VIII and XIV and OHIO CONST., Art. I Section 9.

Ohio has two forms of execution: lethal injection, if requested, otherwise electrocution. Death by either constitutes cruel and unusual punishment and deny due

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process under the state and federal constitution.

Ohio Constitution, Article 1, Sections 9 and 16 and the United States Constitution amend. VIII and XIV bar the imposition of penalties which are grossly disproportionate to the crime, or are excessive as they do not make a measurable contribution to an acceptable punishment goal, or are "nothing more than the purposeful and needless imposition of pain and suffering." Coker v. Georgia (1977), 433 U.S. 584,592. The court noted that it firmly embraced the holdings of earlier cases... to the effect that the Eighth Amendment bars not only those punishments that are barbaric but also those that are excessive in relation to the crime committed.

In barring executions by cyanide gas, the United States Court of Appeals for the Ninth Circuit looked to the severity of pain, the possibility of the execution process lasting several minutes and the unnecessary cruelty presented by this method of punishment. Fierro v. Gomez (9th Cir. 1996), 77 F.3d 301.

When one reads writings from observers of electrocution on cannot image how the process can be any more disturbing than gas. Observers have described it as follows:

> ...the prisoner's eyeballs sometimes pop out and rest on [his] cheeks. The prisoner often defecates, urinates, and vomits blood and droll. The body turns bright red as it's temperature rises and the prisoner's flesh swells and the skin stretches to the point of breaking. Sometimes the prisoner catches fire, particularly if [he] perspires excessively. Witnesses hear a loud and sustained sound like bacon frying and the sickly sweet smell of burning flesh permeates the chamber. Glass v. Louisiana (1985), 471 U.. 1080 (Brennan, dissenting from the denial of certiorari). Denno, "Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century", 35 WM. And Mary L. Rev. 551, 664 (1994).

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A prisoner may be alive for several minutes after the current has passed through his body. No study has offered tangible evidence that suggests that an electrocuted person may lose consciousness and all sense of pain immediately. Indeed, research on those who have survived accidental electrocutions indicates an individual is very likely to feel intense pain, does not die instantly, experiences extreme emotional trauma, and does not lose consciousness. Denno, at 639-643. Electrocution causes severe burning. An electrocuted corpse is hot enough to blister if touched, and autopsies must be delayed while internal organs cool; the brain appears cooked in most cases. Denno, at 637-639.

Foul-ups have been known to occur when equipment malfunctions. The execution of Jesse Tafero in Flordia was described as follows:

> On May 4, 1990 Jesse Tafero was strapped into Old S p a r k y fourteen years after he had murdered two police officers. In all previous procedures, the prison staff had packed a sea sponge into the headpiece but over time the sponge had rotted. The electrician had gone to the supermarket and bought a new synthetic sponge. When the switch was thrown, the sponge caught fire. Flames leapt from Tafero's head. At the end of the first jolt, he was still breathing; his head nodded after the second dose; only after the third cycle of current was the killer pronounced dead. Von Drehle, Among the Lowest of the Dead(New York: Fawcett Crest, 1995(380).

No other country in the world allows death by electrocution. Only seven of the forty capital punishment states require execution by electrocution. Two states,including Ohio allow for a choice. Electrocution is inhumane and inconsistent with standards of human decency and must be barred in this state.

Death by lethal injection is equally repugnant. In 1984, James Autry was

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executed in Texas by injection. He "took at least ten minutes to die and throughout much of that time he was conscious, moving about and complaining of pain" according to a Newsweek account of the execution. If a prisoner's veins are damaged due to drug use or other reasons or are simply hard to find, the inmate may be prodded repeatedly. In Texas, Stephen Morin was prodded for 41 minutes before the drugs could be administered.

While intended to diminish pain, lethal injection risks cruel and unusual punishment. No other nations make use of this means of punishment. Like electrocution, lethal injection should be barred.

This court should recognize that the death penalty is contrary to fundamental human rights, and international law, and must declare that the penalty is unconstitutional under the Ohio and United States Constitutions.

Sub-Proposition of Law XI(C)

> Ohio's death penalty law violates the guarantee of due process law, equal protection of the law, and cruel and unusual punishment specified in U.S. CONST. AMEND. VIII and XIV and OHIO CONST. Art. I, Sections 2, 9, and 16.

The right to and enjoyment of life is an "inalienable right" guaranteed by the Ohio Constitution. Before taking a life by legislative enactment, the government must demonstrate that the action is the least restrictive means to achieve a compelling governmental end. Gregg v. Georgia (1976), 428 U.S. 153.

The societal interests most commonly espoused as justification for capital punishment are: (1) deterrence of serious crimes; (2) retribution; and (3) incapacitation and elimination of dangerous criminals. Repeatedly it has been shown the death

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penalty has no deterrent effect, it does not promote the general welfare of public safety any more than does a term of life imprisonment. Further, as the Due Process Clause was intended to apply to state action, it does not impose a duty on the states to protect their citizenry from deprivation of life by a private citizen. DeShaney v. Winnebago County Department of Human Services (1989), 487 U.S. 189. This is not to say that the government may not punish a citizen for killing another in order to promote peace and general order in society. However, the government has no duty to protect the life of a private citizen from being taken by another citizen. A life imprisonment term sufficiently satisfies the governmental goal of protecting domestic peace.

Sub-Proposition of Law XI(D)

> The unbridled charging discretion given the government results in Ohio's death penalty being in violation of U.S. CONST. Amend. VIII and XIV and OHIO CONST. Art. I, Sections 2,9, and 16.

For a death sentence to be constitutional, sentencing discretion "must be suitably directed and limited as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, supra, at 189. Yet in Ohio, there is no control of the prosecutor's unbridled discretion in charging. Capital indictments are arbitrarily misled, and Ohio law provides no independent review of the propriety of the charging decision to insure that indictments are not a arbitrarily issued. Obviously, a person either becomes eligible for or avoids imposition of the death penalty as a result of the indictment first issued. No judicial or reviewing body determines the appropriateness of a charge or oversees the unbridled discretion of the prosecutor in seeking a capital

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specification. Because death qualified juries are more conviction prone than juries which are not death qualified, the prosecutor simply by energizing his charging function, can affect a defendant's constitutional rights to a fair and impartial jury. The grand jury, of course, issues the indictment. Practically speaking, however, the grand jury composed of laymen and will follow the prosecutor's recommendation as to whether to issue a death specification.

Two Mahoning County, Ohio cases draw particular attention to the prosecutorial discretion. Willie "Flip" Williams, Case No. 95-2572, originally was indicted for four (4) homicides without death specifications. After he escaped from jail, the grand jury was reconvened and a superseding indictment with death specifications was returned.

In the case of Christopher Westerfield, a possible death case, no death specification was added. When the county prosecutor was asked how the decision was made he explained, "In a death penalty case, a jury has to dislike the defendant. They jurors have to have a reason to dislike him." The prosecutor feeling that a defendant was likeable saved his life. Liking or disliking the defendant, of course, has nothing to do with the crime, nor does it reflect any pre-indictment prosecutorial decision making as to what case is appropriate for the death penalty based on the aggravating circumstances. These comments demonstrate with unusual clarity the power of the prosecutor in these cases. Maybe, to have that much power is one thing,but to strut it about must surely be curtailed.

Constitutionally, this raises the prospect that there are some good people who people like so they can live because they have likeable personalities, and bad people

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who are not so likeable who deserve to be put to death. Much like victim impact, evidence where those who killed persons making a contribution to our society are likely to be executed, while those who kill societies "undesirable" can simply be incarcerate, this creates two classes of people, with the county prosecutor serving as God.

Some counties, recognizing the potential for political prosecutorial decision making has established a procedure for reviewing capital indictments. In Cuyahoga County a review process helps to guarantee that death specifications are based on fact, not on political aspirations.

Death specifications are expensive. Small counties simply cannot afford to pursue a death specification as recently demonstrated in the robbery and murder of a Harrison county hunter. No specification was sought in a case where no doubt, the Mahoning County prosecutor, (since the defendant was apparently liked by no one),would have held a press conference to announce the death specification.

Prosecutors must not be given unlimited control over charging. To allow same is inconsistent with a system of criminal procedure fair to defendants and the public. See, Vorenberg, Decent Restraint of Prosecutorial Power(1981), 42 Harv. L. Rev. 1521, 1525.

The death penalty impinges on the rights of defendant before the trial safeguards commence and denies a defendant equal protection and benefit of the law. It further imposes upon the defendant cruel and unusual punishment, especially if the product of the intentional acts on the part of the government result in arbitrary and

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unusual imposition of a death sentence. See, McCleskey v. Kemp (1987), 481 U.S.279.

This case demonstrates this problem in the venue arena. It appears that regardless of how this court decides the venue question, presented in a separate assignment of error, this case could easily and in appellant's opinion, more appropriately been venued in Cuyahoga County, where unquestionably the murder occurred. Instead, the case was tried in Lorain County, surely smaller and more conservative, resulting in a death specification and conviction.

Sub-Propositions of Law XI(E)

> The Ohio death penalty fails to provide adequate guidelines for deliberation and therefore violates U.S. CONST. Amend. VIII and XIV and OHIO CONST. , Art. I, Section 9.

The Ohio law, which requires that aggravating circumstances outweigh the mitigating factors violates U.S. CONST. Amend. VIII and XIV, and also violates OHIO CONST., art. I Sections 9 and 16. The use of the term outweigh encourages a jury to use a preponderance of the evidence standard, while the constitutions demand proof beyond a reasonable doubt. The statute requires that the sentencing body be convinced beyond a reasonable doubt that the aggravating factors are marginally greater than the mitigating factors. Any perceived difference in weight between the aggravating circumstances and the mitigating factors would result in imposition of the death penalty.

The sentencing scheme creates an unconstitutional and unacceptable risk of arbitrary or capricious sentencing. The Ohio statutes do not explicitly provide for merciful discretion on the part of the trier of fact, even though as stated above,

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mercy was first introduced into Ohio capital law in 1898. The death penalty is mandatory if the government proves that the aggravating circumstances outweigh the mitigating factors. The law fails to give the appropriate guidance, and a pattern of arbitrary and capricious sentencing found unconstitutional in Furman v. Georgia (1972), 408 U.S. 238, persists. The vague terminology of the mitigating circumstances neither gives specific and detailed guidance to a jury, nor provides a jury with clear and objective standards.

Without such objective standards, there can be no confidence that the verdict at the second phase is not infected with caprice. Moreover, it is impossible to explain to a jury composed of laymen that the aggravating circumstances, which it already found to exist beyond a reasonable doubt, must now be weighed against mitigating factors which it has not heard until now. For the jury to do so, it might well think that it has to recant the first phase verdicts as to the capital specification. Most lawyers don't understand how the weighing process works in a capital case. To expect laymen to understand is to engage in a legal and psychological fantasy. This is especially true when the court refuses the define the terms utilized, which may have different connotations that used in non-legal usage.

The dangerousness of the charge in appellant's case was compounded when the trial court instructed the jury as to all the mitigating factors listed in R.C., 2929.04(B) (T. 338). The practice has been rejected by the Ohio Supreme Court. The instruction creates the unnecessary danger that the jury will convert mitigating factors into aggravating circumstances.

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In State v. DePew , (1988), 38 Ohio St. 3d 275, *cert. denied* (1989), 109 S. Ct. 1773, the Ohio Supreme Court concluded that when the trial court instructs the jury about the mitigating factors, "the better practice is certainly to refrain from even referring to mitigating factors not raised by the defense." DePew at 290. In so concluding, this Court explained that "R.C. 2929.04(B) and (C) deal with mitigation and were designed to enable the defendant to raise issues in litigation and to facilitate his presentation thereof. If the defendant chooses to refrain from raising some of or all the factors available to him, those factors not raised may not be referred to or commented upon [sic} the trial court or the prosecution. DePew, at 289. The Court reiterated its position in State v. Benner (1988), 40 Ohio St. 3d 101. When the jury is instructed on all the factors the implication becomes that this defendant did not present evidence on all the mitigating factors; he must not have thenecessary factors. Here, when the defense only offered evidence at the penalty phase which addressed " any other factors that are relevant to the issue of whether the offender should be sentenced to death", the jury was permitted to convert the absence of the other mitigating factors into an aggravating circumstance.

The Ohio capital statutory scheme does not permit the jury to consider aggravating circumstances which are not properly included in the indictment and proven by proof beyond a reasonable doubt in the guilt phase. State v. Jenkins (1984), 15 Ohio St. 3d 164, 215, *cert. denied* (1985), 472 U.S. 1032, *reh.denied* (1985), 473 U.S. 927 set forth the following:

> The State cannot, in the sentencing phase, present proof of aggravating factors other than those of which the appellant w a s

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found guilty of committing in the guilt phase of the trial. R.C. 2929.03(D)(1).

Additionally, by instructing on all the mitigating factors , the trial court changed the focus of the penalty hearing from a qualitative analysis of the evidence to a quantitative analysis. In other words, the importance in the hearing no longer rested with the quality of the evidence presented by the defense, but with the number of mitigating factors present or absent. By instructing as it did, the trial court ensured an improper weighing process. The focus was on the number of mitigating factors presented and proven, rather than with the weight of the mitigating evidence presented.

The trial court instructed the jury that it could not consider sympathy. (T. p.337). This is incorrect. The jury may consider sympathy if it grows from the presented mitigation testimony. They may not, however, consider "mere sympathy" if it is "untethered" to the mitigation testimony. California v. Brown, (1987), 479 U.S. 538.

Sub-Proposition of Law XI(E)

The requirement that death be imposed in certain circumstances violates U.S. CONST. AMEND VIII and XIV and OHIO CONST., Art. I, Section 9.

The Ohio law violates the state and federal constitutions because it precludes a mercy option for the jury in two circumstances: (1) in the absence of mitigation: or (2) when aggravating circumstances outweigh mitigating factors. In those situations the law requires the imposition of the death penalty. The law emasculates the requirement of individualized sentencing and impermissibly limits the possibility of the jury returning a decision of life imprisonment. At least two circuits, the Fifth and Eleventh,

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have remanded cases, finding error in the jury instructions when the trial court failed to clearly instruct the jury that it, the jury, had the option to return a life sentence even if aggravating factors outweighed mitigating factors.

If capital sentencing is to be truly individualized as required by the state and federal constitutions, a mercy option is required under all circumstances. Individualized sentencing requires that the sentencing body have the ability to choose mercy and to determine that death is not the appropriate penalty in the particular situation. In Barclay v. Florida, (1983) 463 U.S. 939 the United States Supreme Court held that the jury must be and is free to "determine whether death is the appropriate punishment." Ohio law eliminates that option. Without the mercy option in all circumstances, death becomes mandatory in certain cases. This was found unconstitutional in Lockett v. Ohio, supra. It also flies in the face of California v. Brown (1987) 479 U.S. 538 where the United States Supreme Court reaffirmed the requirement that there be reliability in the determination that death is the appropriate punishment in a specific case.

In Ohio, a jury is not permitted to make that determination; instead, a death sentence is mandatary when the jury finds the aggravating circumstances outweigh mitigating factors. Ohio law also fails to require the trial court to make a decision about appropriateness of a death sentence in every case. The United States Supreme Court in Coker v. Georgia (1977), 433 U.S. 584 ruled that a finding of a appopriateness of the death penalty is constitutionally required each time the death penalty is imposed. The death penalty is unconstitutional if it is not the only penalty

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PROPOSITION OF LAW XI

Appellant Jalowiec was denied his Sixth, Eight and Fourteenth amendment right as guaranteed by the U.S. CONST. and Section 9 and 10, article I of the OHIO CONST. to a fair trial, due process and a reliable determination of his guilt and sentence when gruesome, prejudicial and cumulative photographs were admitted into evidence even though their prejudicial effect outweighed their probative value even though their prejudicial effect outweighed their probative value.

During the guilt phase of Mr. Jalowiec's trial, the State produced several vividly-colored photographs of the victim and crime scene. Exhibits 1-A through 1-Q. The exhibits were admitted over objections lodged by defense counsel. Trial Tr. 614-617. Defense counsel objected on the basis that the photographs were gruesome as well as prejudicial. Defense counsel also objected to the admission of the vividly colored photographs taken during the autopsy. Exhibits 2-A through 2-CC. Defense counsel once again objected to the photographs due to their gruesome and repetitive nature. Defense counsel also objected to the photographs on the ground of relevancy. Trial Tr. 642-643. Admission of these photographs constituted prejudicial, reversible error. The inflammatory and cumulative nature of the photos far outweighed any conceivable probative value.

Evid. R. 403 would require exclusion even if this case were not a capital case. That rule provides:

> (A)Exclusion mandatory.
>
> Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of

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the issues, or of misleading the jury.

(B) Exclusion discretionary.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by consideration of undue delay, or needless presentation of cumulative evidence. (Emphasis added.)

Ohio goes further in capital cases to protect against prejudicial photographs. In State v. Maurer (1984), 15 Ohio St. 3d 239 and State v. Morales (1987), 32 Ohio St. 3d 252, the Ohio Supreme Court established the standards for admissibility of gruesome photographic evidence in capital cases. The court reiterated the Ohio rule in State v. Jells (1990), 53 Ohio St. 3d 22, 31:

> "To be admissible in a capital case, the probative value of each photograph must outweigh the danger of prejudice to the defendant and, additionally, not be repetitive or cumulative in nature. Contrary to the Evid. R. 403 standard, where the probative value must be minimal and the prejudice great before the evidence may be excluded, pursuant to Maurer, supra, if the probative value does not, in a simple balancing of the relative values, outweigh the danger of prejudice to the defendant, the evidence must be excluded."

The Court further found that photos are cumulative when they are taken from the same camera angle, id. or where the photos depict the same subject and differ only in the distance from which they are photographed. State v. Thompson (1987), 33 Ohio St. 3d 1, 9.

Neither the fact of the victim's death nor the cause of his death were in dispute. The probative value of the photographs thus was outweighed by their prejudicial impact. The photos did not serve any other proper purpose, such as to clarify or illustrate

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confusing testimony. Id., at 1217. See, also, People v. Faulkner (1973), 389 Mich. 682. In Faulkner, as in the instant case, there was no dispute as to the cause of death, and therefore, the gruesome photos were inadmissible. See also State v. Poe (1968), 441 P.2d 512 (abuse of discretion to admit color slides of autopsy when all facts already presented by medical and lay testimony). Even if the photographs of the victim's remains had some probative value, they were merely cumulative. "[W]hen the photos are merely cumulative... that fact must enter into the probative/prejudice balance." Tobler v. State, (1984), 688 P.2d 350, 356.

The profound emotional impact which gruesome photographs can have on jurors in a capital case has been documented. Dr. Stanley Kaplan, a professor of psychiatry at the University of Cincinnati College of Medicine, interviewed the jurors who convicted and sentenced Adremy Steffen to death in 1983. He published his findings in Psychology Today. Dr. Kaplan found that seeing the gruesome picture of the victim's body was a traumatic experience for many of those jurors:

> "More typical, however, were statements such as: 'The pictures were gross. I went home and went right to bed. I didn't want to think about them.' 'The pictures, you'd see them constantly. My body felt numb for three or four days after I got home."

S. Kaplan, "Death, So Say We All", Psychology Today (July, 1985) 48, 50. Even a juror who was a war veteran was deeply affected by the pictures of the victim:

> "Mr. E, for example, had served in Okinawa during World War II, where he had seen the mutilated bodies of fallen buddies. He felt that the photographs of the murder victim had left an undeniable impression. 'The position that girl was lying in, her throat cut,'

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and therefore, the gruesome photos were inadmissible. See also State v. Poe (1968), 441 P.2d 512 (abuse of discretion to admit color slides of autopsy when all facts already presented by medical and lay testimony). Even if the photographs of the victim's remains had some probative value, they were merely cumulative. "[W]hen the photos are merely cumulative... that fact must enter into the probative/prejudice balance." Tobler v. State, (1984), 688 P.2d 350, 356.

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S. Kaplan, "Death, So Say We All", Psychology Today (July, 1985) 48, 50. Even a juror who was a war veteran was deeply affected by the pictures of the victim:

> "Mr. E, for example, had served in Okinawa during World War II, where he had seen the mutilated bodies of fallen buddies. He felt that the photographs of the murder victim had left an undeniable impression. 'The position that girl was lying in, her throat cut,' reawakened long-repressed memories of the war."

Id. at 53.

Dr. Kaplan's study shows that jurors do have very emotional reactions to

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gruesome photographs and are prejudiced by same.

That is why the emotional responses engendered by such photographs must be outweighed by their probative value in order to be properly admitted in a capital case.

For all the foregoing reasons, the erroneous admission of prejudicial and gruesome photographs at Mr. Jalowiec's capital trial denied him due process of law, a fair trial on the issue of his guilt and a fair and reliable determination of the appropriate sentence in violation of the Sixth, Eighth and Fourteenth Amendments to the federal constitution.

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PROPOSITION OF LAW XI

To allow evidence of nonstatutory aggravating factors during the sentencing phase of appellant's trial violated his rights a guaranteed by the U.S. CONST..amendments 6, 8, and 14, and the OHIO CONST. Article I, I, Section 10.

At trial, the prosecutor, under the guise of rebuttal, adduced numerous witnesses who were able to testify about other acts committed by the appellant. The testimony was regarding various illegal criminal activity that appellan allegedly participated in, but for which he was never convicted.

The case at trial contained one aggravating circumstance, that a witness in a criminal prosecution was murdered to prevent his testimony. Here, however, the state introduced testimony in an effort to demonstrate that appellant was basically a bad person, prone to violence and a drug dealer.

A review of the transcript demonstrates that the court admitted the evidence under Evid. R. 404(A) as rebuttal testimony. That section reads:

> (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 the following exceptions:
>
> (1) Character of Accused. Evidence of a *pertinent* trait of his character offered by an accused, or by the prosecutin to rebut the same is admissible.

Rebuttal testimony by definition must be such that it actually rebuts something testified to by the defense. Here, the state stretches comments made by appellant in his unsworn statement to allow the introduction of numerous acts allegedly committed by appellant.

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In this case, the admission of said evidence was extremely prejudicial. The actual evidence against the appellant was very weak; this testimony was merely an effort to enhance the state's case by utilizing alleged character evidence.

For example, Kenneth Roland was permitted to testify that he was seriously injured in a bar fight. He was unable to identify the appellant as the individual who struck him. (T. P. 254-262). Nevertheless, the court permitted the testimony as rebuttal against Jalowiec. This is clearly an abuse of discretion.

Police officers were also permitted to testify as to alleged drug activity by Jalowiec. In as much as this cse involved the murder of a drug informant that testimony was extremely prejudicial. It is undisputed that appellant had not been convicted for selling crack cocaine or for possessing a pipe allegedly used for smoking crack cocaine.

Prior to appellant leaving the stand, the court ruled that various matters would be permitted to be discussed by the prosecution. Counsel then made the decision to have appellant discuss these matters on the record. Counsel clearly had no other choice; to allow the evidence of the "bad acts" to come from the prosecution would have been even more prejudicial than the manner in which it actually occurred.

The purpose of the stAte's rebuttal can only be seen as an attempt to discredit appellant, an individual without a criminal record. It was an effort to introduce additional evidence which could only be seen as aggravating. It becomes of particular importance when the state's arguments are examined. The record demonstrates repeatedly that theprosecutor referred to aggravating circumstances.[4]

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[4]The Ninth District court of appeals in its decision, comments on the fact that the the appellee in its brief argues that the record is incorrect. This is completely improper.

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By permitting the prejudicial testimony, the court paved the way for appellant's conviction. The admission of the testimony was violative of appellant's Fifth, Sixth and Fourteenth Amendments under the United States Constitution and a violation of the Constitution of the State of Ohio.

As a result, appellant's convictions are wrongful and the decision of the trial must be reversed.

The court speaks only through its record; a mechanism is available to correct the record and appellee failed to file the necessary motion upon the filing of the transcript with the court. Therefore, this court must treat the repeated references to aggravated circumstances as just that. To somehow infer that the court reporter erred or the machinery was not capable of a singular word is improper.

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PROPOSITION OF LAW XII

To allow evidence of nonstatutory aggravating factors during the sentencing phase of appellant's trial violated his rights a guaranteed by the U.S. CONST..amendments 6, 8, and 14, and the OHIO CONST. Article I, I, Section 10.

At trial, the prosecutor, under the guise of rebuttal, adduced numerous witnesses who were able to testify about other acts committed by the appellant. The testimony was regarding various illegal criminal activity that appellan allegedly participated in, but for which he was never convicted.

The case at trial contained one aggravating circumstance, that a witness in a criminal prosecution was murdered to prevent his testimony. Here, however, the state introduced testimony in an effort to demonstrate that appellant was basically a bad person, prone to violence and a drug dealer.

A review of the transcript demonstrates that the court admitted the evidence under Evid. R. 404(A) as rebuttal testimony. That section reads:

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Rebuttal testimony by definition must be such that it actually rebuts something testified to by the defense. Here, the state stretches comments made by appellant in his unsworn statement to allow the introduction of numerous acts allegedly

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committed by appellant.

In this case, the admission of said evidence was extremely prejudicial. The actual evidence against the appellant was very weak; this testimony was merely an effort to enhance the state's case by utilizing alleged character evidence.

For example, Kenneth Roland was permitted to testify that he was seriously injured in a bar fight. He was unable to identify the appellant as the individual who struck him. (T. P. 254-262). Nevertheless, the court permitted the testimony as rebuttal against Jalowiec. This is clearly an abuse of discretion.

Police officers were also permitted to testify as to alleged drug activity by Jalowiec. In as much as this cse involved the murder of a drug informant that testimony was extremely prejudicial. It is undisputed that appellant had not been convicted for selling crack cocaine or for possessing a pipe allegedly used for smoking crack cocaine.

Prior to appellant leaving the stand, the court ruled that various matters would be permitted to be discussed by the prosecution. Counsel then made the decision to have appellant discuss these matters on the record. Counsel clearly had no other choice; to allow the evidence of the "bad acts" to come from the prosecution would have been even more prejudicial than the manner in which it actually occurred.

The purpose of the stAte's rebuttal can only be seen as an attempt to discredit appellant, an individual without a criminal record. It was an effort to introduce additional evidence which could only be seen as aggravating. It becomes of particular importance when the state's arguments are examined. The record demonstrates

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repeatedly that theprosecutor referred to aggravating circumstances.[4]

By permitting the prejudicial testimony, the court paved the way for appellant's conviction. The admission of the testimony was violative of appellant's Fifth, Sixth and Fourteenth Amendments under the United States Constitution and a violation of the Constitution of the State of Ohio.

As a result, appellant's convictions are wrongful and the decision of the trial must be reversed.

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[4]The Ninth District court of appeals in its decision, comments on the fact that the the appellee in its brief argues that the record is incorrect. This is completely improper. The court speaks only through its record; a mechanism is available to correct the record and appellee failed to file the necessary motion upon the filing of the transcript with the court. Therefore, this court must treat the repeated references to aggravated circumstances as just that. To somehow infer that the court reporter erred or the machinery was not capable of a singular word is improper.

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PROPOSITION OF LAW XIII

The trial court's jury instructions in the fact-finding phase denied petitioner his rights to be free from cruel and unusual punishment to a fair trial, to the effective assistance of counsel, to a fair and impartial jury and to due process of law under the Fifth, Sixth, Eighth and Fourteenth Amend to the U.S. CONST. and Article I, Section 10 of the OHIO CONST.

R.C. 2903.01(D) reads as follows:

> No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another In no case shall a jury in an aggravated murder case be instruct in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense. If a jury in an aggravated murder cases is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of or attempt to commit the offense, the jury shall also be instructed that the inference is conclusive, that the inference may be considered in determining intent that it is to considered all the evidence introduced by the prosecution to indicate to er person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the

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> specific intent of the person to have caused the death by proof beyond a reasonable doubt.

The charge actually given by the court is in direct contradiction to the statute. It read as follows:

> "Cause" is an essential element of the offense charged in Count One. "Cause" is an act or failure to act, which in the natural and continuous sequence directly produces the death, and without which it would not have occurred.
>
> "Cause" occurs when the death is the natural and foreseeable result of the act, or the failure to act. The Defendant's responsibility is not limited to the immediate or most obvious result of the Defendant's act, or failure to act. The Defendant is also responsible for the natural and foreseeable consequences or results that follow, in the ordinary course of events, from the act or failure to act.

It is impossible to reconcile the specific intent requirement of the statute with the charge given by the court. The charge was not only confusing to the jury, but also legally incorrect. While deliberating, the jury would not havev known whether the were to utilize the specific intent portion of the statute, or the lesser burden of the causation and foreseeability charge.

Foreseeability has no place in an capital murder case. Specific intent to kill and foreseeability are mutually exclusive.

State v. Phillips, 74 Ohio St. 3d at 100 requires that the instructions as a whole make clear that the jury must find purpose to kill in order to convict. Here, the entire charge was so confusing one simply cannot find that the jury was clearly instructed.

While a single instruction to a jury may not be judged in artificial isolation, here, the overall charge makes it impossible for the jury to understand its task.

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Based on the foregoing, Appellant respectfully states that the sentence of death imposed upon him should be vacated and the case remanded for sentencing in accordance with this Court's opinion.

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CONCLUSION

For each of the foregoing reason, Stanley Jalowiec's convictions and sentence of death must be reversed and remanded to the trial court for a new trial or resentencing consistent with this Court's decison.

Respectfully submitted,

PATRICIA A. MILLHOFF

NATHAN RAY

COUNSEL FOR APPELLANT
STANLEY JALOWIEC

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PROOF OF SERVICE

I certify that a copy of this merit brief was sent by ordinary U.S. mail to Gregory White, Counsel for Appellee, State of Ohio, 226 Middle Ave., 4th Floor, Elyria, Ohio 44305.



PATRICIA A. MILLHOFF

Counsel for Appellant
Stanley Jalowiec

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IN THE SUPREME COURT OF OHIO

State of Ohio Appellee -vs- Stanley E. Jalowiec Appellant	)	On Appeal from the Lorain County Court of Appeals Ninth Appellate District Court of Appeals Case No. 96 CA 006445 **THIS IS A DEATH PENALTY CASE**

NOTICE ON APPEAL OF APPELLANT STANLEY E. JALOWIEC

THIS CRIME WAS COMMITTED PRIOR TO JANUARY 1, 1995

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Gregory A. White
Lorain County Prosecutor
226 Middle Avenue
Elyria, OH 44035

COUNSEL FOR STATE OF OHIO

Notice of Appeal of Appellant Stanley E. Jalowiec

Appellant Stanley E. Jalowiec hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lorain County Court of Appeals, Ninth Appellate District, entered in the Court of Appeals Case No. 96 CA 006445 on April 15, 1998.

This is an appeal as of right pursuant to Supreme Court Practice R. II (1) (A) (1).

Respectfully Submitted,

By: _____
Patricia A. Millhoff

By: _____
Nathan A. Ray

COUNSEL FOR APPELLANT,
STANLEY E. JALOWIEC

Proof of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellee, Gregory A. White, Lorain County Prosecutor, 226 Middle Avenue, Elyria, OH 44035 on May 13, 1998.

_____
Patricia A. Millhoff

COUNSEL FOR APPELLANT,
STANLEY E. JALOWIEC

FILED
LORAIN COUNTY

MAR 8 4 14 PM '95

CLERK OF COURTS PLEAS
DONALD J. ROTHGERY

LORAIN COUNTY COMMON PLEAS

THE STATE OF OHIO	:	**THE TERM OF** JANUARY, 1995
VS.	:	CASE NO.
STANLEY E. JALOWIEC	:	95CR046840
A TRUE BILL INDICTMENT FOR	:	AGGRAVATED MURDER, 2903.01(A)(1); SPECIFICATIONS (2)

THE STATE OF OHIO :
: **SS**
LORAIN COUNTY :

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), in the County of Lorain, unlawfully on or about January 19, 1994, did, purposely and with prior calculation and design, cause the death of Ronald Lally, in violation of Section 2903.01(A) of the Ohio Revised Code, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION ONE TO COUNT ONE

The Jurors of the Grand Jury, further find and specify that STANLEY E. JALOWIEC, had a firearm, other than an automatic firearm or a firearm equipped with a firearm muffler or silencer, as defined in Section 2923.11 of the Revised Code, to wit: a firearm, on or about his person or under his control, while committing the felony enumerated in Count One.

SPECIFICATION TWO TO COUNT ONE

Ronald Lally was a witness to an offense and was purposely killed to prevent his testifying in any criminal proceeding and the aggravated murder of Ronald Lally was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which Ronald Lally was a witness or Ronald Lally was a witness to an offense and was purposely killed in retaliation for his testifying in any criminal proceeding.

Robert C Tomkinson
Foreman of the Grand Jury

GREGORY A. WHITE
Prosecuting Attorney

Assistant Prosecuting Attorney

(1)

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FILED
LORAIN COUNTY

ENTERED

Apr 24 11 28 AM '96

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

CLERK OF COMMON PLEAS
DONALD J. ROTHGERY

STATE OF OHIO,	)	Case No. 95CR046840
	)	JUDGE KOSMA J. GLAVAS
Plaintiff,	)	
	)	
-vs-	)	OPINION
	)	R.C. 2929.03 (F)
	)	
STANLEY E. JALOWIEC,	)	
	)	
Defendant.	)	

On March 20, 1996, a jury of twelve (12), having been sequestered during deliberations, returned the following verdicts upon proof beyond a reasonable doubt: Guilty of Aggravated Murder, R.C. 2903.01 (A) (1); Guilty of Firearm Specification, R.C. 2941.141; and Guilty of the Aggravating Circumstance Specification, 2941.14 and 2929.04 (A) (8).

On April 9, 1996, the jury returned and found by proof beyond a reasonable doubt that the aggravating circumstance of which the Defendant was found guilty outweighed the mitigating factors presented by the Defendant. As a result thereof, the jury returned a verdict recommending the sentencing of the Defendant to death on the offense of Aggravated Murder.

R.C. 2929.03 (F) requires the Court to ". . . state in a separate opinion its specific findings as to the existence of any mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the

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(115)

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aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors." In compliance with said requirement the Court finds the following:

MITIGATING FACTORS

At the penalty hearing the Defendant presented evidence and the Court considered the following in mitigation under R.C. 2929.04 (B):

A) the nature and circumstance of the offense;

B) the history, character and background of the offender;

C) the youth of the defendant.

Under subsection (7) of R.C. 2929.04 (B), "Any other factors . . ." the Defendant presented the following:

A) Defendant is not a "bad person".

AGGRAVATING CIRCUMSTANCE

The jury found by proof beyond a reasonable doubt that the Defendant was guilty of the aggravating circumstance identified in R.C. 2929.04 (A) (8), to-wit:

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

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The Court will consider the mitigating factors in the order in which they are mentioned above.

A. THE NATURE AND CIRCUMSTANCES OF THE OFFENSE

This event took place in the early morning hours of January 19, 1994 with an early morning breakfast at a restaurant in Elyria, Ohio. After a prearranged rendezvous on Middle Avenue, the Defendant, along with Raymond Smith and his son, Michael Smith, in a borrowed car, took the victim to Cleveland, Ohio. The Defendant, Stanley E. Jalowiec, drove the car. Enroute to Cleveland, Raymond Smith revealed a gun and was questioning the victim regarding setting up his son, Daniel Smith.

The victim was then taken to a cemetary in Cleveland, Ohio, removed from the car by Raymond Smith (convicted Defendant Lorain County Court of Common Pleas Case No. 95CR046838), and shot by Raymond Smith. Upon request of Raymond Smith, the Defendant, Stanley E. Jalowiec, exited the automobile and assisted Raymond Smith by beating the victim with his fists and by kicking him to the head and body. Attempts were made to run over the victim with the car by the Defendant, Stanley E. Jalowiec, the victim's throat was cut, and he was ultimately abandoned, half naked, in the roadway of the cemetary. The night in question was the coldest night ever recorded in the City of Cleveland, being at least -20°, and with the wind chill, even lower.

This Court finds that the nature and circumstances of the offense provides no mitigating weight. The victim was

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shot by Defendant's companion, and the Defendant and his companion beat him, attempted to run him over, cut his throat, and abandoned him. The Court assigns no weight in mitigation.

B. THE HISTORY, CHARACTER, AND BACKGROUND OF THE OFFENDER

Testimony regarding the history, character and background of the offender was that as a young child, the Defendant enjoyed school and was proud of the fact of his perfect attendance in school his first five years. It was related that the Defendant loved animals and at one time contemplated the possibility of becoming a veterinarian. Somewhere in his early childhood he was diagnosed as having arthritis which ultimately interrupted his perfect attendance in school and he then became a drop out. Further testimony revealed that he got along well with his siblings and was very kind and loving with younger children. The Defendant's parents and his sister testified that they were not aware that the Defendant was involved with drugs, either as a user or as a peddler.

During the Defendant's adult years he lived with a female friend. This friend testified as to how good the Defendant was with her child.

Testimony also was given which revealed that the Defendant had difficulty holding any particular job, even on the family golf course. He did hold a job as a male "go go" dancer in a gay bar longer than any other job reported.

As time went by, the Defendant met up and befriended the "Smith" family, (Raymond, Daniel and Michael) and they

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would frequent several of the bars at night, getting involved in, at first, minor altercations, and later on, altercations of a more serious nature. One particular incident was related that after a minor scuffle in a bar, outside of the bar, the Defendant hit one of the people across the face with a baseball bat, fracturing the person's jaw.

Taking all of these matters into consideration, it seemed that the Defendant was given an opportunity to start off right, and indeed did so, but very shortly, the Defendant's attitude and conduct started to deteriorate which seemed to have culminated in the crime of Aggravated Murder. This Court assigns no significant mitigating weight in Defendant's history or character and any other mitigating factors.

C. THE YOUTH OF THE DEFENDANT

It was reported that the Defendant is 25 years of age. His appearance is, in fact, youthful. His acts, however, heavily outweigh his youth and this Court also did not attach any mitigating factor to his age.

The final matter taken into consideration by the Court in this matter was the presence of two others in the planning of this crime and subsequently the presence of one of these two two at the scene. The one at the scene has been convicted and is now on "Death Row" processing appeals and awaiting results. (Raymond Smith). The other is awaiting trial.

From the evidence that was presented and a review of such evidence, nothing appears to alter this Court's feelings on the part played by this Defendant. Therefore, no weight in mitigation

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is assigned to the fact that the Defendant had accomplices.

Having conducted the Court's examination, this Court finds that the weight assigned to the aggravating circumstance is great and that the mitigating factors are weak and are entitled to little weight.

In mitigation, Defendant offers factors which many law abiding people face but do not cause them to commit aggravated murder. As such, this Court finds by proof beyond a reasonable doubt that the aggravating circumstance outweighs all mitigating factors. Accordingly, the death penalty was imposed by this Court on April 10, 1996.

JUDGE KOSMA J. GLAVAS

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STATE OF OHIO	)	IN THE COURT OF APPEALS
	) ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	
STATE OF OHIO	)	C.A. NO. 96CA006445
	)	
Appellee	)	
	)	
v.	)	APPEAL FROM JUDGMENT
	)	ENTERED IN THE
STANLEY E. JALOWIEC	)	COMMON PLEAS COURT
	)	COUNTY OF LORAIN, OHIO
Appellant	)	CASE NO. 95CR046840

DECISION AND JOURNAL ENTRY

Dated: April 15, 1998

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

REECE, Judge.

Appellant Stanley Jalowiec appeals from his conviction on one count of aggravated murder with specifications and his sentence of death. We affirm.

On June 7, 1993, Ronald Lally, an informant for the Elyria Police Department, purchased crack cocaine from Raymond Smith and Danny Smith, Raymond's son. At the time, Lally was wired by the police, and three officers listened to and taped the drug buy. As a result, both Raymond and Danny were arrested and charged with aggravated drug trafficking. Raymond and Danny

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were to be tried on the drug charges on January 19, 1994.[1]

On September 15, 1993, Patrolman John Homoki of the Elyria Police Department responded to a disturbance call outside a fast-food restaurant. As Patrolman Homoki approached in his vehicle, he saw Jalowiec walking away from the area and Danny Smith in front of the restaurant door. Homoki exited his vehicle, and Ron Lally, who was an acquaintance of Homoki, hurried toward the police car. Lally was very agitated and told Homoki, "John, these guys are going to f*** me up." Lally indicated that Jalowiec and Danny had threatened his life. At that point, Jalowiec was standing across the street from the restaurant.

The night of January 18-19, 1994, was one of the coldest nights on record in northeast Ohio. The evening of January 18, the day before the Smiths' drug trial, Jalowiec and an acquaintance, Brian Howington, went to Lally's apartment and smoked crack cocaine with Lally and Lally's roommate. After an hour or two, Howington, Lally, and Jalowiec drove to the house of Howington's aunt, Joann Fike, who was also known as "Queen Bee." Once there, Howington, Lally and Jalowiec smoked more crack cocaine and played pool. At some point after 1 a.m., Jalowiec told Howington that he was going to borrow Fike's car. Howington testified at trial that he believed Jalowiec said

[1]The record is unclear as to whether there were to be separate trials, or whether Raymond and Danny were to be tried together.

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this after receiving a page on his pager. Howington initially resisted, but later he relented. Lally left with Jalowiec in Fike's car.

That same night, Raymond and Danny were out drinking with several friends and with Michael Smith, another son of Raymond. After the bar where the group was drinking closed at 2:30 a.m., the group went to a restaurant across the street to eat. During the meal, Raymond made a phone call. Thereafter, Raymond indicated to the others that it was time to leave. Raymond, Danny, Michael, and Danny's girlfriend left in Danny's car.

Danny drove the car to South Middle Avenue in Elyria. Raymond got out of the car and told Michael to accompany him. Michael asked what they were waiting for, and Raymond responded, "A ride," and "Just look for Queen Bee's car." A while later, Jalowiec arrived in Fike's car with Lally. Raymond and Michael entered the car, and the four drove off.

Once inside the car Jalowiec was driving, Raymond introduced Michael to Lally, then pulled out a gun and told Lally not to move. Jalowiec drove the car to a Speedway gas station. Raymond exited the car and purchased some beer and cigarettes and put gas in the car. Lally made no attempt to leave. Raymond re-entered the car, and they drove off. At that point, Raymond asked Lally, "Why did you set my son up[?]" Lally denied that he had set up Danny and Raymond. After a while, Raymond told Lally that they were going to put Lally on a bus and send him out of town so that he could not testify at Danny's

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trial. Lally agreed. The four then began drinking the beer and smoking crack cocaine as Jalowiec continued to drive toward Cleveland.

When they arrived in Cleveland, Raymond asked where they could purchase more crack cocaine for Lally to take on his trip. Michael told him to go to East Cleveland. However, as the car headed in that direction, they encountered police and fire trucks, so Jalowiec drove toward downtown Cleveland again. Raymond then directed Jalowiec where to drive. Eventually, they ended up in a cemetery in Woodland.

Raymond got out of the car, put the gun in Lally's face, and ordered Lally to get out of the car. Lally complied. Raymond then said, "You will never snitch on nobody again." Michael testified that he heard a gun shot, followed by Lally saying, "You shot me in my head, you shot me in my head." Raymond then told the others in the car to get out and help him. Jalowiec left the car; Michael dropped his head and remained in the car. Michael testified that he heard "thumps like hitting" and that he heard Lally saying that he would not tell anyone and begging that they not kill him. Raymond asked Jalowiec if he had a knife, and Jalowiec responded that he did not. Jalowiec then returned to the car and removed something. Michael testified that there was silence for a period of two to five minutes, followed by someone opening the trunk. Michael felt the car move as if Raymond and Jalowiec were trying to put something in the trunk and heard them say words to the effect of "He ain't going to fit, he

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ain't going to fit, he is too stiff." Michael then heard something drop to the ground.

Raymond and Jalowiec re-entered the car, with Jalowiec assuming the driver's seat. Jalowiec then put the car into drive, moved forward a short distance, and put the car in reverse. The car's movement was stopped by what Michael surmised to be Lally's body. Jalowiec repeated this two more times. Jalowiec then drove the car away. As they drove, Raymond chastised Michael for not helping with the killing and also took the gun apart, throwing a piece of the gun out the car window about every couple of miles.

When the three returned to Elyria, Jalowiec and Raymond dropped off Michael at Danny's house. Raymond and Jalowiec returned Fike's car at about 5 a.m. It was covered with ice, as if it had been washed on that cold night. When Fike inspected the car, she found blood on it. She asked Jalowiec to explain, and he said that he had been in a fight with someone that night in Elyria.

Lally's body was discovered at approximately 10 a.m. on January 19, 1994. Officers from the Cleveland Police Department investigated the scene, collected evidence (including a large knife), and transported Lally's body to the Cuyahoga County Coroner's Office. Through the testimony of police officers, a forensic pathologist, and a forensic serologist, it was established that Lally's head was struck at least eleven times, that his throat was slashed superficially,

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and that he had been shot in the head, with the bullet splitting his tongue and lodging against Lally's spinal column. Lally had numerous lacerations and scrapes all over his body, and his lips were split. The causes of death were established as the blows Lally received and exposure to the extreme cold of that night. The time of death was placed between 2:30 a.m. and 8:30 a.m. Tests also showed that Lally had traces of crack cocaine in his system, but no signs of alcohol.

After a lengthy investigation, Jalowiec was indicted by the Lorain County Grand Jury on March 8, 1995. Jalowiec was indicted on one count of aggravated murder for the death of Lally. Two specifications accompanied the aggravated murder charge: the first was a firearm specification; the second was a specification that Jalowiec killed Lally to prevent Lally from testifying in a criminal proceeding. Jalowiec pleaded not guilty to the aggravated murder charge and the specifications.

The case was tried before a jury in the Lorain County Court of Common Pleas. Voir dire began on March 12, 1996, and a jury of twelve with two alternates was seated on March 13, 1996. Opening statements in the guilt phase of Jalowiec's trial began March 14, 1996, with the prosecution beginning its case-in-chief that same day. The case was submitted to the jury on March 19, 1996. On March 20, 1996, the jury found Jalowiec guilty of aggravated murder and also found both specifications.

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The penalty phase of Jalowiec's trial was held on April 9 and 10, 1996. The prosecution incorporated its evidence from the guilt phase on the issue of the sole aggravating circumstance: the killing of Lally to prevent him from testifying in a criminal proceeding. Jalowiec presented evidence on the mitigating factors, and the prosecution presented evidence in rebuttal. After deliberating, the jury recommended the death sentence. The trial court confirmed the sentence of death. Jalowiec now appeals to this court.

Jalowiec asserts thirteen assignments of error. We review each in due course.

I. Jury Issues

First Assignment of Error

The trial court abused its discretion by dismissing for cause prospective jurors who could fairly consider the possibility of death and failing to dismiss for cause a juror for death whose views in favor of the death penalty precluded fair consideration of life options.

Jalowiec's first assignment of error deals with three potential jurors, and their exclusion from or retention in the panel by the trial court. The potential jurors involved were Mrs. Porter, Mr. Eubanks, and Mrs. Kulcsar.

Potential jurors Porter and Eubanks were excused by the trial court after voir dire on the issue of the jurors' views on the death penalty. Both expressed some hesitancy in being able to vote for imposition of the death penalty if the law and facts of Jalowiec's case warranted such penalty. Jalowiec argues that

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the trial court erred by excusing them from the panel.

We note that no objection was raised to the trial court's decision. Therefore, we can only take notice of the error if it rises to the level of plain error. Crim.R. 52(B). "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. In order for this court to apply Crim.R. 52(B), it must be clear that the outcome of the trial would have been different but for the alleged error. See *State v. Lane* (1995), 108 Ohio App.3d 477, 482.

We conclude that the exclusion of potential jurors Porter and Eubanks does not rise to the level of plain error. "The proper standard for determining when a prospective juror may be excluded for cause based on his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *State v. Rogers* (1985), 17 Ohio St.3d 174, paragraph three of the syllabus, vacated and remanded on other grounds (1985), 474 U.S. 1002, 88 L.Ed.2d 452. In reviewing the trial court's decision, we view the voir dire in its entirety. *State v. Landrum* (1990), 53 Ohio St.3d 107, 118.

When questioned about her feelings on the death penalty, prospective juror Porter initially stated that she was opposed to the imposition of the death penalty and could not consider it as an option. After Porter was rehabilitated

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by counsel for Jalowiec, she began to state that she could consider the death penalty. However, Porter's comments showed that she could not impose the death penalty if the law required such.[2] Viewing her voir dire as a whole, we

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[2]The following exchange occurred between the prosecutor and Porter after counsel for Jalowiec rehabilitated Porter:

> MR. ROSENBAUM [the prosecutor]: Do you see this fellow [Jalowiec] at the end of the table here? (Indicating)
>
> THE JUROR [Porter]: Yes, I see him.
>
> MR. ROSENBAUM: Look at him.
> Could you sign your name to a piece of paper condemning him to death if you thought the law and the evidence required it?
>
> MR. GRUNDA [co-counsel for Jalowiec]: I would object to that question.
>
> THE COURT: Overruled.
>
> MR. ROSENBAUM: Look at him. That is what you are going to have to do, that is what we are talking about.
> Could you do that if the law and the evidence required it?
>
> THE JUROR: If the law and the evidence required it.
>
> MR. ROSENBAUM: Or are your personal feelings so strong that you can't?
>
> THE JUROR: Yes, my personal feelings are strong.
>
> MR. ROSENBAUM: So, you could not sign your name to a piece of paper condemning him to death?
>
> THE JUROR: No, I could not sign my name to anything that would say that he would have to have death.
>
> MR. ROSENBAUM: So, you cannot vote for the death penalty?
>
> THE JUROR: No, I could not.

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conclude that the trial court did not err by excluding potential juror Porter from the jury.

Potential juror Eubanks also was questioned on the issue of the death penalty and indicated that he could consider it along with the other two possible sentences, life with a minimum thirty year sentence, and life with a minimum twenty year sentence. However, when the prosecutor asked him about whether he could sign his name to a piece of paper that would call for the death penalty to be imposed on Jalowiec, Eubanks vacillated, responding with "I don't know, I better not say yes," and "I thought I could, but I have that little doubt in the back of my mind." His responses to this line of questioning demonstrated that he would be unable to impose the death penalty if required. Again, viewing Eubanks' voir dire as a whole, we find the trial court did not err.

Jalowiec also argues that the trial court improperly refused to dismiss for cause potential juror Kulcsar. At voir dire, Kulcsar's answers to questions regarding her views on capital punishment and law enforcement showed a tendency to favor the State and disfavor criminal defendants.[3] When asked if

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THE COURT: Thank you, Ma'am, you are excused.

[3]The most notable exchange occurred as follows:

MR. CLEARY [co-counsel for Jalowiec]: Now, you also say in here [the prospective juror questionnaire] when asked what your views are concerning the death penalty, when there is an eyewitness to a murder, execute the person two days after the murder like they do in China.

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her views would influence her individual determination as to guilt or innocence or as to the death penalty, Kulcsar answered, "Maybe yes, maybe no." Counsel for Jalowiec challenged Kulcsar for cause; the trial court denied the request and retained Kulcsar on the panel. Jalowiec eventually exercised his first peremptory challenge to remove Kulcsar from the panel.

Even assuming *arguendo* that potential juror Kulcsar should have been dismissed for cause, Jalowiec's argument lacks merit. Kulcsar never sat on the jury, but was removed by Jalowiec through the use of a peremptory challenge. "So long as the jury that *sits* is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Ross v. Oklahoma* (1988), 487 U.S. 81, 88, 101 L.Ed.2d 80, 90. (Emphasis added.) Accord *State v. Broom* (1988), 40 Ohio St.3d 277, 287-88; *State v. Williams* (Nov. 1, 1995), Summit App. No. 16418, unreported, at 11, affirmed (1997), 79 Ohio St.3d 1. Because Kulcsar did not

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THE JUROR [Kulcsar]: Right. I believe in that.

MR. CLEARY: Is there something lacking like a trial?
Do you believe that perhaps they should try the guy before they execute him two days later?

THE JUROR: If there is an eyewitness, if somebody saw them shoot that person, I think that they should be, eye for eye, tooth for tooth.

MR. CLEARY: And we should do away with some of the procedural rights and stuff?

THE JUROR: Right.

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sit on the jury, and Jalowiec does not contend that any jurors who actually sat were not impartial, Jalowiec was not prejudiced by the trial court's failure to exclude Kulcsar for cause.

The exclusion of potential jurors Porter and Eubanks by the trial court was not error. Jalowiec was not prejudiced by the trial court's refusal to exclude potential juror Kulcsar for cause. Jalowiec's first assignment of error is overruled.

II. Motion for Acquittal

Second Assignment of Error

The trial court erred by failing to grant appellant's motion for judgment of acquittal under Ohio Rule of Criminal Procedure 29, in that the evidence presented by the State of Ohio was insufficient to sustain a conviction for the offense of aggravated murder, in violation of appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 10 & 16 of the Ohio Constitution.

Crim.R. 29(A) provides that a trial court "shall order the entry of a judgment of acquittal *** if the evidence is insufficient to sustain a conviction of such offense or offenses." A trial court may not grant an acquittal by authority of Crim.R. 29(A) if the record demonstrates that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. In making this determination, all evidence must be

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construed in a light most favorable to the prosecution. *State v. Williams* (1996), 74 Ohio St.3d 569, 576.

R.C. 2903.01(A) states: "No person shall purposely, and with prior calculation and design, cause the death of another." Jalowiec argues that two material elements were not proven beyond a reasonable doubt: prior calculation and design, and venue.

A. Prior Calculation and Design

"Prior calculation and design" requires more than instantaneous or momentary deliberation. *State v. Cotton* (1978), 56 Ohio St.2d 8, paragraph two of the syllabus.

> Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified.

Id. at paragraph three of the syllabus. No bright-line test exists to show the presence or lack of "prior calculation and design." *State v. Taylor* (1997), 78 Ohio St.3d 15, 20. Each case must be resolved on its own facts. *Id.*

In the case at bar, the evidence showed that Jalowiec's involvement was more than an instantaneous reaction or an action taken on the spur of the moment. On September 13, 1993, Lally told Patrolman Homoki that Jalowiec and Danny were going to get Lally and that they had threatened his life. On the

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night of the murder, Jalowiec, Lally, and Howington smoked crack cocaine and played pool at the house of Howington's aunt for some time. After he received a page, Jalowiec borrowed the car of Howington's aunt, who was known as "Queen Bee," and took Lally with him. Before Raymond left the restaurant in Danny's car with Danny and Michael, Raymond made a phone call. After making the call, Raymond told Danny and Michael that they were leaving. After arriving at a certain spot outside Elyria, Raymond and Michael stood waiting for the car of "Queen Bee." When the car arrived, Jalowiec was driving, and Lally was a passenger. Raymond and Michael entered the car. Jalowiec then got on the freeway and eventually drove to the cemetery where Lally was killed.

Viewing the evidence in a light most favorable to the prosecution, we conclude that Jalowiec had sufficient time and opportunity to participate in a plan to kill Lally, and that the circumstances showed a scheme to kill Lally. The trial court properly overruled the motion for acquittal on the element of prior calculation and design.

B. Venue

Venue is not a material element of any crime, but is a fact that must be proven beyond a reasonable doubt. *State v. Headley* (1983), 6 Ohio St.3d 475, 477. Venue may be established by all the facts and circumstances in a case. *Id.* Venue is proper in the jurisdiction, *i.e.*, county, where an offense, or any

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element thereof, is committed. *Id.* at paragraph one of the syllabus. "When it appears beyond a reasonable doubt that an offense or any element of an offense was committed in any of two or more jurisdictions, but it cannot reasonably be determined in which jurisdiction the offense or element was committed, the offender may be tried in any such jurisdiction." R.C. 2901.12(G).

Jalowiec argues that venue was not proven beyond a reasonable doubt. He contends that all elements of the crime of aggravated murder took place in Cuyahoga County, where Lally's body was found. Because Raymond stated that they were going to put Lally on a bus, and any deviation from that plan did not occur until the car was in Cleveland, Jalowiec asserts that no element of the crime occurred in Lorain County.

The trial court did not err in overruling Jalowiec's motion for acquittal on the issue of venue. As demonstrated above, the facts from which the jury could have inferred prior calculation and design on the part of Jalowiec occurred in Lorain County. Even if that were not the case, venue would still be proper in Lorain County because it could not be reasonably determined whether the element of prior calculation and design occurred in Lorain County or Cuyahoga County. This is a situation clearly covered by R.C. 2901.12(G). See *State v. Miller* (1989), 63 Ohio App.3d 479, 484-85. Viewing the evidence in a light most favorable to the prosecution, venue was properly established in Lorain County.

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C. Summary

The trial court properly overruled Jalowiec's motion for acquittal. Jalowiec's second assignment of error is overruled.

III. Evidentiary Issues

A. Hearsay Testimony

Third Assignment of Error

> **The allowance of testimony as to out-of-court statements attributed to danny smith [*sic*] over defense counsels' objection was prejudicial error and deprived appellant of his rights under the Fifth, Sixth, Eighth and Fourteenth amendments [*sic*] to the U.S. Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.**

In his third assignment of error, Jalowiec contends that certain testimony containing statements made by Danny were hearsay and were improperly admitted. One of these statements was in Patrolman Homoki's testimony. After Homoki spoke with Lally, he approached Danny, who said, "That snitch will get his." Other statements came from other prosecution witnesses, who testified that Danny had either threatened Lally, solicited someone else's help in killing Lally, or admitted to killing Lally. The State contends that these statements fall within the co-conspirator exception to the hearsay rule, Evid.R. 801(D)(2)(e).

Regardless of whether the alleged hearsay statements were properly admitted under the co-conspirator exception, any error was harmless. "Any

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error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A). Accordingly, "[w]here constitutional error in the admission of evidence is extant, such error is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of defendant's guilt." *State v. Williams* (1983), 6 Ohio St.3d 281, paragraph six of the syllabus. "Error in admitting hearsay does not justify reversal where it is harmless." *State v. Carter* (1995), 72 Ohio St.3d 545, 550. As we noted above, none of the alleged hearsay testimony would have been required to meet the "prior calculation and design" element of aggravated murder. The evidence also showed that Jalowiec drove Fike's car to the cemetery, got out of the car to help Raymond kill Lally, retrieved something from the car to slash Lally's throat, and then attempted to run over Lally's body with the car three times. Thus, overwhelming evidence of Jalowiec's guilt is found without resort to the alleged hearsay statements. Jalowiec's third assignment of error is overruled.

B. Admission of Photographs as Evidence

Eighth Assignment of Error

The gruesome coroner's photographs are unfairly prejudicial where they are solely used to inflame the passion of the jury.

Jalowiec's eighth assignment of error attacks the introduction of gruesome photographs into evidence. The prosecution introduced into evidence

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twenty-eight photographs taken of Lally's body during the autopsy. Jalowiec argues that the photographs were repetitive and cumulative, and that the photographs would have inflamed the jury.

"[T]he mere fact that a photograph is gruesome or horrendous is not sufficient to render it *per se* inadmissible." *State v. Maurer* (1984), 15 Ohio St.3d 239, 265.

> Properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting the trier of fact to determine the issues or are illustrative of testimony and other evidence, as long as the danger of material prejudice to a defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number.

Id. at paragraph seven of the syllabus. So long as the photographs admitted into evidence are not repetitive or cumulative and the probative value of each photograph outweighs its prejudicial impact, the trial court's discretion in admitting the photographs will not be disturbed. *State v. Morales* (1987), 32 Ohio St.3d 252, 258.

We find no error in admitting the photographs of Lally's body. Though several are quite gruesome, each is demonstrative of the testimony of the forensic pathologist who performed Lally's autopsy as to the manner in which Lally died. See *State v. Biros* (1997), 78 Ohio St.3d 426, 444-45. See, also, *State v. Phillips* (1995), 74 Ohio St.3d 72, 77-79. Each photograph displays some feature that is not cumulative of the others. Their probative value

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outweighs any prejudicial effect. Jalowiec's eighth assignment of error is overruled.

IV. Other Guilt Phase Issues

A. Improper Comments by Trial Court

Fourth Assignment of Error

> **The trial court deprived appellant of his right to a fair trial by improperly admonishing, criticizing and/or correcting defense counsel in front of the jury, depriving appellant of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.**

Jalowiec contends in his fourth assignment of error that the trial court made prejudicial remarks. There are five instances that Jalowiec argues deprived him of his right to a fair trial.

The standard for determining whether the trial court's comments were prejudicial was set forth in *State v. Wade* (1978), 53 Ohio St.2d 182, vacated and remanded on other grounds (1978), 438 U.S. 911, 57 L.Ed.2d 1157:

> (1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel.

Id. at 188. In addition, the defendant must object to the comments, in order to give the judge an opportunity to correct the error by curative instruction or

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otherwise. *Id.* The failure to object waives all but plain error. See *id.*

In the case at bar, Jalowiec entered no objection to any of the trial court's comments. Upon reviewing the comments in the context in which they were made, we find no plain error. Furthermore, Jalowiec has not demonstrated how the comments prejudiced his right to a fair trial. Jalowiec's fourth assignment of error is overruled.

B. Prosecutorial Misconduct

Fifth Assignment of Error

The prosecutor improperly commented on the appellant's Fifth Amendment protections.

In his fifth assignment of error, Jalowiec takes issue with comments made by the prosecution in its closing argument. The following occurred during the prosecution's closing argument:

> [Mr. Rosenbaum, the prosecutor]: Well, you have heard evidence put on by the State that is uncontradicted. There was no evidence called refuting what the State said --
>
> MR. GRUNDA [co-counsel for Jalowiec]: Objection.
>
> MR. ROSENBAUM: (Continuing) -- or produced as evidence.
>
> MR. GRUNDA: We don't have to do that.
>
> THE COURT: And you may say that in your closing, Mr. Grunda.
>
> MR. ROSENBAUM: And he doesn't have to. He is right. He chose not to, so you are bound by the evidence the State gave

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> you unless they can persuade you that the State's people should not be believed and I anticipate that that is exactly what is going to happen.

Jalowiec argues that these comments amount to the prosecutor improperly commenting on his Fifth Amendment right not to testify on his own behalf.

Jalowiec's argument lacks merit. "[S]tatements made by the prosecutor to the effect that the evidence against appellant was uncontradicted and unrefuted does not constitute a comment by the prosecutor upon the failure of the defendant to testify, prejudicial to appellant's right to a fair trial." *State v. Lockett* (1976), 49 Ohio St.2d 48, 65, vacated and remanded on other grounds (1978), 438 U.S. 586, 57 L.Ed.2d 973. The prosecutor's statements in the case at bar fall within the ambit of commenting on the State's case being unrefuted and uncontradicted. Viewing the prosecutor's closing argument in its entirety, we find that Jalowiec was not materially prejudiced. See *State v. Hill* (1996), 75 Ohio St.3d 195, 204. Jalowiec's fifth assignment of error is overruled.

C. Guilt Phase Jury Instructions

Seventh Assignment of Error

> **Where the court provides the jury with inaccurate trial phase instructions, a defendant is deprived his protections under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.**

Jalowiec next argues in his seventh assignment of error that "the trial court made numerous errors in its instructions to the jury." However, he refers

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us only to the court's instruction on causation. The pertinent instructions were given as follows:

> "Cause" is an essential element of the offense charged in Count One.
>
> "Cause" is an act, or a failure to act, which in the natural and continuous sequence directly produces the death, and without which it would not have occurred.
>
> "Cause" occurs when the death is the natural and foreseeable result of the act, or the failure to act.
>
> The Defendant's responsibility is not limited to the immediate or most obvious result of the Defendant's act, or failure to act.
>
> The Defendant is also responsible for the natural and foreseeable consequences or results that follow, in the ordinary course of events, from the act or failure to act.
>
> There may be more than one cause for an event. However, if a Defendant's act or failure to act was one cause, the existence of other causes is not a defense.

Jalowiec contends that the fourth and fifth paragraphs of the above quoted instructions are erroneous under *State v. Jacks* (1989), 63 Ohio App.3d 200, 204-05.

Jalowiec did not object to these instructions, as required by Crim.R. 30(A). Therefore, we can only take notice of the error if it rises to the level of plain error. Furthermore, "[a] single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge." *State v. Price* (1979), 60 Ohio St.2d 136, paragraph four of the syllabus.

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The trial court did not err in the case at bar. First, the instructions are not identical to those in *Jacks*. Second, when the particular instructions at issue are used, reversal is not required "where the instructions as a whole make clear that the jury must find purpose to kill in order to convict." *State v. Phillips*, 74 Ohio St.3d at 100. Taking the instructions as a whole, we find that the jury was clearly instructed that it was required to find purpose to kill in order to convict Jalowiec. Jalowiec's seventh assignment of error is overruled.

V. Penalty Phase Issues

A. Prosecutorial Misconduct in Penalty Phase

Sixth Assignment of Error

The trial court erred by allowing the state to adduce evidence of non-statutory aggravating factors during the sentencing phase of trial.

Jalowiec next assigns as error testimony adduced by the prosecution at the penalty phase of Jalowiec's trial. Under R.C. 2929.04(A), the death penalty may be imposed only if one or more of eight statutory aggravating factors is proven beyond a reasonable doubt. In the guilt phase of Jalowiec's trial, the jury found that Jalowiec killed Lally to prevent him from testifying in a criminal proceeding, meeting the aggravating circumstance in R.C. 2929.04(A)(8).[4] During the penalty phase of the trial, Jalowiec made an

[4]R.C. 2929.04(A)(8) permits the imposition of the death penalty if it is proven beyond a reasonable doubt that

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unsworn statement and called several witnesses on his behalf. Jalowiec and the other witnesses testified that Jalowiec suffered from rheumatoid arthritis; that he was unable to maintain jobs because of his arthritic condition; that he was kind and gentle with children; that he never used crack cocaine; and that Jalowiec did not kill Lally.

The prosecution presented seven rebuttal witnesses. Three of these witnesses testified that Jalowiec had been arrested for selling crack cocaine and for possessing a pipe used for smoking crack cocaine. Three other witnesses testified that Jalowiec had beaten and kicked two men during an altercation outside a bar. Jalowiec argues that the trial court improperly allowed these witnesses to testify as to these alleged "other acts" by Jalowiec.

"Subject to applicable Rules of Evidence, *** counsel for the state at the penalty stage of a capital trial may introduce *** evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant ***." *State v. Gumm* (1995), 73 Ohio St.3d 413, syllabus. Evid.R. 404(A) governs the introduction of evidence of a criminal defendant's character traits:

> [t]he victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness ***.

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> (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[.]

The admission or exclusion of evidence is reviewed under an abuse of discretion standard. *State v. Dunlap* (1995), 73 Ohio St.3d 308, 316.

We find no error in the admission of the testimony of the prosecution's rebuttal witnesses. In his unsworn statement, Jalowiec put into issue that he was peaceable, that his arthritis was crippling, and that he did not use crack cocaine. The prosecution was permitted to rebut each of these contentions under Evid.R. 404(A). Jalowiec asserts that the introduction of the rebuttal testimony was tantamount to introducing non-statutory aggravating factors into evidence. However, this is clearly not the case. The trial court did not err by allowing the prosecution to adduce rebuttal testimony. Jalowiec's sixth assignment of error is overruled.

Ninth Assignment of Error

> **Prosecutorial misconduct deprived the appellant a [*sic*] fair penalty determination phase of his capital trial.**

Jalowiec argues in his ninth assignment of error that, in the prosecution's closing argument, the prosecutor improperly referred to non-statutory aggravating factors. At various times during the prosecution's closing

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argument of the penalty phase, the transcript shows that reference was made to "aggravating circumstances."[5] Jalowiec asserts that the prosecutor's use of that phrase was prejudicial, because it allowed the prosecution to argue that aggravating circumstances not delineated in R.C. 2929.04(A) were to be considered by the jury.

We note that Jalowiec did not object to any of the instances of which he complains: Therefore, we will take notice of plain error only.

Jalowiec's argument is not well-taken. A prosecutor may not argue in the penalty phase of a capital trial that the nature and circumstances of a crime are "aggravating circumstances." *State v. Wogenstahl* (1996), 75 Ohio St.3d 344, paragraph two of the syllabus. However, taking the comments in context, the prosecutor clearly referred only to the single statutory aggravating circumstance found in this case: that Lally was killed to prevent him from testifying in a criminal case. Furthermore, the trial court correctly instructed the jury that only one statutory aggravating circumstance was present. See *State v. Hill*, 75 Ohio St.3d at 202. No error prejudicial to Jalowiec occurred. Jalowiec's ninth assignment of error is overruled.

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[5]The State argues that the references to "aggravating circumstances" resulted from a glitch in the court reporter's transcription equipment, and that each reference should read "circumstance." The steps necessary to correct the record were not taken, and we cannot consider the State's argument. However, the various references to "aggravating circumstances" in the record lend credence to the State's argument, because in these instances the rest of the sentence indicates that "circumstance" probably was meant.

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B. Penalty Phase Jury Instructions

In two of his assignments of error, Jalowiec takes issue with the trial court's instructions to the jury during the penalty phase of the trial. Because Jalowiec did not object to any of the allegedly erroneous instructions at trial, he has waived all but plain error. Crim.R. 30(A); *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus. We review the errors assigned accordingly.

Tenth Assignment of Error

> **The trial court's erroneous penalty phase instructions deprived the appellant of a fair and reliable determination of his sentence in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, sections 9, 10 and 16 of the Ohio Constitution.**

Jalowiec asserts in his tenth assignment of error that five different portions of the trial court's instructions to the jury in the penalty phase of the trial were erroneous. Jalowiec first argues that the trial court erred by not defining the term "mitigation." However, Jalowiec did not request that an instruction defining mitigation be given to the jury. The trial court's instructions on the definition of "mitigating factors" were sufficient and in accord with R.C. 2929.04(B). We find no error.

Jalowiec next argues that the trial court erred by stating all seven statutory mitigating factors listed in R.C. 2929.04(B). Jalowiec argues that evidence was only presented relative to the seventh, "catch-all" factor, "[a]ny other factors that are relevant to the issue of whether the offender should be

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sentenced to death." R.C. 2929.04(B)(7). Because no evidence was presented on the other six factors,[6] Jalowiec asserts that the instructions were prejudicial under *State v. DePew* (1988), 38 Ohio St.3d 275, 289-90.

We first note that Jalowiec did in fact present evidence on other mitigating factors. In closing arguments, Jalowiec's counsel made specific mention of Jalowiec's youth (he was twenty-three at the time of Lally's murder), and counsel also argued to the jury that Jalowiec was under duress when he acted, that Jalowiec lacked a significant prior criminal history, that Jalowiec was not the principal offender, and that the jury should consider Jalowiec as not having a great degree of participation in the offense or in the act

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[6]The six other statutory mitigation factors of R.C. 2929.04(B) are:

> (1) Whether the victim of the offense induced or facilitated it;
>
> (2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
>
> (3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;
>
> (4) The youth of the offender;
>
> (5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications; [and]
>
> (6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim[.]

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that led to Lally's death. Jalowiec's counsel further argued:

> [W]e have six mitigating factors that you must consider by law, so we have the six against one [aggravating circumstance] that have to be considered on behalf of Stan and I am asking you to consider those because you are supposed to and I am asking you, after considering them, and I believe they outweigh--in other words, these six mitigating factors outweigh the aggravating factors ***.

Thus, only two mitigating factors were not supported by evidence.

We find no error in the trial court's instruction. As in *DePew*, 38 Ohio St.3d at 289-90, the trial court did not comment on those factors that Jalowiec's counsel did not discuss in closing argument. Furthermore, the inclusion of all statutory mitigating factors does not require reversal. *Id.*; *State v. Keith* (1997), 79 Ohio St.3d 514, 533. Jalowiec's argument is without merit.

Third, Jalowiec contends that the trial court erred by instructing the jury that it could not consider sympathy. We find no error in this instruction. See *State v. Combs* (1991), 62 Ohio St.3d 278, 288-89.

Jalowiec's fourth argument is that the trial court improperly gave the jury an "acquittal first" instruction. The trial court instructed the jury as follows;

> You should recommend the sentence of death if you unanimously, that is, all twelve of you, find by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors.
>
> If you do not so find, you shall unanimously (all twelve) recommend either a life sentence with parole eligibility after serving twenty years of imprisonment, or a life sentence with parole elligibility [*sic*] after serving thirty years of imprisonment.

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Jalowiec argues that this instruction violates *State v. Thomas* (1988), 40 Ohio St.3d 213, 219-20. We disagree. The trial court's instruction was not improper. See *State v. Taylor*, 78 Ohio St.3d at 28-29.

Jalowiec's final contention is that the trial court erred by continuously referring to "aggravated circumstances" when only one statutory aggravated circumstance was present. At times, the plural "circumstances" does appear in the jury charge. However, the trial court clearly delineated that there was only one aggravating circumstance when the court instructed the jury: "The aggravating circumstances which you have already found are the following: (1) That the victim was killed to prevent his testimony in a criminal proceeding." Jalowiec has not overcome the presumption that a jury follows the instructions given to it.

We find no error in the trial court's penalty phase instructions. Jalowiec's tenth assignment of error is overruled.

Twelfth Assignment of Error

The argument to the jury that their decision is a mere recommendation is unacceptable as it diminishes the responsibility of the jury.

In his twelfth assignment of error, Jalowiec contends that the trial court erred by referring to the jury's decision in the penalty phase of the trial as a "recommendation" during voir dire of the potential jurors, the guilt phase of the trial, the penalty phase, and in the court's instructions to the jury during the

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penalty phase.[7] We disagree. "[T]he term 'recommendation' accurately reflects Ohio law and does not diminish the jury's sense of responsibility. There is no error, plain or otherwise." *State v. Moore* (1998), 81 Ohio St.3d 22, 37. (Citation omitted.) Jalowiec's twelfth assignment of error is overruled.

VI. Ineffective Assistance of Trial Counsel

Eleventh Assignment of Error

The failure of trial counsel to make proper objections, constitutes ineffective assistance of counsel.

The standard under which an attorney's performance will be adjudged deficient was set forth in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus:

> 2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance.

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[7]In its instructions to the jury, the trial court told the jury:

> ***It is going to be your responsibility at this point to decide which sentence to recommend to the Court regarding the alternative charges of Aggravated Murder with the specification.
>
> I have used the word recommend many times and the attorneys have used it, and I want to make sure that you understand that you are not to construe that word to diminish your responsibility in this matter. It is an awesome task, and the fact thadt [*sic*] the word recommend is used should not be considered by you to lessen your task.

Additional reference to a recommendation was made in the instructions found in our previous discussion of the "acquittal first" argument in Jalowiec's tenth assignment of error.

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> 3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

The defendant has the burden of proof, and must overcome the strong presumption that counsel's performance was adequate and that counsel's action might be sound trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Furthermore, an attorney properly licensed in Ohio is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56.

Jalowiec argues that he was deprived of a fair trial by virtue of ineffective assistance of trial counsel. He argues that his trial attorneys were ineffective in six respects. He first argues that trial counsel was ineffective for failing to object to the dismissal of potential jurors Porter and Eubanks, and for failing to object to potential juror Kulcsar being retained on the jury panel. In our analysis of Jalowiec's first assignment of error, we determined that the trial court did not err by excluding potential jurors Porter and Eubanks; therefore, Jalowiec was not prejudiced by his attorneys' failure to object. With regard to potential juror Kulcsar, Jalowiec's trial counsel did object to Kulcsar being retained on the panel. Counsel's performance was not deficient in this respect.

Jalowiec next asserts that four instances of ineffective assistance of counsel occurred when his trial attorneys failed to object to or offer penalty phase jury instructions, as discussed in our analysis of Jalowiec's tenth

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assignment of error. He cites four specific instances. The first instance is counsel's failure to request a jury instruction defining "mitigation." However, Jalowiec has failed to demonstrate that but for this error, the result of the penalty phase would have been different. Jalowiec has not shown ineffective assistance of counsel on this issue.

Jalowiec's second, third, and fourth alleged instances of ineffective assistance with regard to penalty phase jury instructions are counsel's failure to object to the instruction listing all of the statutory mitigating factors, failure to object to the "no sympathy" instruction, and failure to object to the "acquittal first" instruction. With respect to each of these objections, we held above that the trial court did not err in giving these instructions; objections on the part of Jalowiec's trial counsel would not have changed the outcome. Jalowiec's trial attorneys were not deficient for failing to object to these instructions.

Jalowiec's final assertion is that trial counsel should have objected to the pervasive use of the term "recommendation" by the trial court and the prosecutor in describing the jury's decision in the penalty phase. Jalowiec also contends that his attorneys were ineffective for frequently using the term themselves. As we stated above in response to Jalowiec's twelfth assignment of error, the use of the word "recommendation" is not error at all. Jalowiec's trial attorneys were not ineffective for failing to object to, or refrain from using, the word "recommendation."

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In sum, Jalowiec was not deprived of effective assistance of counsel. Accordingly, the eleventh assignment of error is overruled.

VII. Constitutionality of Death Penalty

Thirteenth Assignment of Error

Imposition of the death sentence violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I, of the Ohio Constitution.

In his final assignment of error, Jalowiec presents thirteen arguments as to why the imposition of the death penalty is unconstitutional. Each of these arguments has previously been rejected. See *State v. Reynolds* (July 10, 1996), Summit App. No. 16845, unreported, at 14-20, affirmed (1998), 80 Ohio St.3d 670; *State v. Dennis* (May 8, 1996), Summit App. No. 17156, unreported, at 46-49, affirmed (1997), 79 Ohio St.3d 421; *State v. Williams* (Nov. 1, 1995), Summit App. No. 16418, unreported, at 34-38, affirmed (1997), 79 Ohio St.3d 1; *State v. Wilson* (Oct. 12, 1994), Lorain App. No. 92CA005396, unreported, at 21-27, affirmed (1996), 74 Ohio St.3d 381. Jalowiec's thirteenth assignment of error is overruled.

VIII. Independent Review of Sentence

Pursuant to R.C. 2929.05(A), this court is required to conduct an independent review of Jalowiec's sentence, to determine whether the aggravating circumstance he was found to have committed outweighs the

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mitigating factors present in the case, and whether the sentence of death is appropriate.

A. Aggravating Circumstance v. Mitigating Factors

In making a determination that the aggravating circumstance outweighs the mitigating factors, the offender and the offense must be considered. R.C. 2929.05(A). We must also consider the nature and circumstances of the offense; the offender's character, background and history; and the seven statutory mitigating factors listed in R.C. 2929.04(B). The death sentence must be vacated unless we find that the aggravating circumstance outweighs any mitigating factors beyond a reasonable doubt. *State v. Slagle* (1992), 65 Ohio St.3d 597, 613.

The applicable aggravating circumstance found by the jury is that Lally was killed to prevent his testimony against Raymond and Danny. This falls under R.C. 2929.04(A)(8).

We find no mitigating value in the nature and circumstances of the offense. Jalowiec participated fully in the murder of Lally. Jalowiec drove the car to the cemetery, as directed by Raymond. When Raymond told Jalowiec and Michael to help him kill Lally, Jalowiec left the car and assisted Raymond in stomping Lally. Jalowiec returned to the car to retrieve something to slash Lally's throat. Jalowiec attempted to help Raymond put the body in the trunk of the car, and once they determined that the body would not fit, Jalowiec

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attempted to back the car over Lally three times. Lally was then left for dead on one of the coldest nights on record in Cleveland. Jalowiec's full participation in the murder of Lally precludes any mitigating value from being placed on the nature and circumstances of the offense.

We accord some weight to Jalowiec's character, background, and history. Jalowiec was a studious boy who developed rheumatoid arthritis by the time he entered the sixth grade. He attempted to find work, but the arthritis made work difficult. Jalowiec's family was loving and supportive of him. Jalowiec also was kind in his relationships with his family. A former girlfriend of Jalowiec testified that he was kind with her children and caring toward her. We also note that this kindness may have led Jalowiec to the point where he is today: when he met Danny Smith, he allowed Danny to stay at his residence. When it became apparent that Danny was involved in illegal activities, Jalowiec did not disassociate himself from Danny.

We find three statutory mitigating factors applicable. Jalowiec was twenty-three at the time of the offense, see R.C. 2929.04(B)(4) (youth of offender); however, we give little weight to this factor. Jalowiec also lacks a significant prior criminal record, see R.C. 2929.04(B)(5); we give some weight to this factor. With respect to R.C. 2929.04(B)(7), other relevant factors, Jalowiec was under the influence of crack cocaine at the time of Lally's murder. However, we accord this factor no weight. The evidence does not support a

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finding that any of the other statutory factors apply.

We accord some weight to the mitigating factors, as discussed. However, we find that the aggravating circumstance outweighs these mitigating factors beyond a reasonable doubt.

B. Appropriateness of Sentence

In determining the appropriateness of Jalowiec's sentence, our analysis is twofold. First, we must determine whether the evidence supports the aggravating circumstance being found beyond a reasonable doubt. Second, we must determine whether Jalowiec's sentence is excessive or disproportionate in relation to the seventeen other cases in which this court has affirmed the death penalty.[8]

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[8]*State v. Smith* (Mar. 25, 1998), Lorain App. No. 96CA006331, unreported; *State v. Filiaggi* (Dec. 10, 1997), Lorain App. No. 95CA006240, unreported; *State v. McNeill* (Apr. 1, 1997), Lorain App. No. 95CA006158, unreported; *State v. Reynolds* (July 10, 1996), Summit App. No. 16845, unreported, affirmed (1998), 80 Ohio St.3d 670; *State v. Dennis* (May 8, 1996), Summit App. No. 17156, unreported, affirmed (1997), 79 Ohio St.3d 421; *State v. Williams* (Nov. 1, 1995), Summit App. No. 16418, unreported, affirmed (1997) 79 Ohio St.3d 1, certiorari denied (1998), 522 U.S. ----, 139 L.Ed.2d 646; *State v. Wilson* (Oct. 12, 1994), Lorain App. No. 92CA005396, unreported, affirmed (1996), 74 Ohio St.3d 381, certiorari denied (1996), 519 U.S. ---, 136 L.Ed.2d 78; *State v. Phillips* (Aug. 31, 1994), Summit App. No. 16487, unreported, affirmed (1995), 74 Ohio St.3d 72, certiorari denied (1996), 517 U.S. ---, 134 L.Ed.2d 938; *State v. Brooks* (July 13, 1994), Summit App. No. 16192, unreported, affirmed in part and reversed in part (1996), 75 Ohio St.3d 148; *State v. Simko* (Jan. 20, 1993), Lorain App. No. 91CA005214, unreported, affirmed (1994), 71 Ohio St.3d 483, certiorari denied (1995), 516 U.S. 831, 133 L.Ed.2d 57; *State v. Johnson* (Nov. 4, 1992), Summit App. No. 15065, unreported, reversed (1994), 71 Ohio St.3d 332, certiorari denied, (1995) 515 U.S. 1164, 132 L.Ed.2d 864; *State v. Davis* (Apr. 18, 1990), Lorain App. No. 88CA004390, unreported, affirmed (1991), 62 Ohio St.3d 326, certiorari dismissed (1992), 506 U.S. 803, 121 L.Ed.2d 6; *State v. Huertas* (July 6, 1988), Lorain App. No. 4202, unreported, affirmed in

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The evidence showed that Lally was to be a witness in the criminal proceedings against Raymond and Danny Smith, and that Lally was killed to prevent him from testifying in those proceedings. It is irrelevant that Lally was not going to testify against Jalowiec in a criminal proceeding. We find the aggravating circumstance found in R.C. 2929.04(A)(8), that the victim was killed to prevent his testimony in a criminal proceeding, was proven beyond a reasonable doubt.

We also find that the death sentence in the case at bar is proportionate to cases previously decided by this court. This court has previously affirmed the imposition of the death penalty where the victim was murdered to prevent the victim from testifying in a criminal proceeding. See *State v. Smith* and *State v. Filiaggi, supra*, footnote 8. Jalowiec's sentence of death is not disproportionate to other cases decided by this court.

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part and reversed in part (1990), 51 Ohio St.3d 22, certiorari dismissed (1991), 498 U.S. 336, 112 L.Ed.2d 837; *State v. Cooey* (Dec. 23, 1987), Summit App. No. 12943, unreported, affirmed (1989), 46 Ohio St.3d 20, certiorari denied (1991), 499 U.S. 954, 113 L.Ed.2d 482; *State v. Benner* (July 22, 1987), Summit App. No. 12664, unreported, affirmed (1988), 40 Ohio St.3d 301, certiorari denied (1990), 494 U.S. 1090, 108 L.Ed.2d 962; *State v. Greer* (Mar. 4, 1987), Summit App. No. 12258, unreported, affirmed (1988), 39 Ohio St.3d 236, certiorari denied (1989), 490 U.S. 1028, 104 L.Ed.2d 201-02; *State v. Post* (Jan. 15, 1986), Lorain App. No. 3868, unreported, affirmed (1987), 32 Ohio St.3d 380, certiorari denied (1988), 484 U.S. 1079, 98 L.Ed.2d 1023.

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CONCLUSION

All of Jalowiec's assignments of error are overruled. In conducting our independent review, this court concludes that the aggravating circumstance was proven beyond a reasonable doubt, that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt, and that the sentence of death is not inappropriate or disproportionate. Jalowiec's conviction and sentence of death are affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Lorain Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to appellant.

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Exceptions.

JOHN W. REECE
FOR THE COURT

SLABY, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

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GREGORY WHITE, Prosecuting Attorney, and JONATHAN E. ROSENBAUM, Chief Counsel, Criminal Division, 226 Middle Avenue, 4th Floor, Elyria, Ohio 44035, for Appellee.

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AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Articles in addition to, and amendments of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth article of the original Constitution.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
(Effective 1791)

Comparative Legislation

Freedom of speech, press, Ohio Const. art. I, § 11.
Rights of assembly petition, Ohio Const. art. I, § 3.

AMENDMENT II

A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.
(Effective 1791)

Comparative Legislation

Ohio Const. art. I, § 4.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.
(Effective 1791)

Comparative Legislation

Ohio Const. art. I, § 13.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
(Effective 1791)

Comparative Legislation

Ohio Const. art. I, § 14.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
(Effective 1791)

Comparative Legislation

Compensation for taking for public use, Ohio Const. art. I, § 19.
Double jeopardy, Ohio Const. art. I, § 10.
Due process, art. I, § 16.
Indictment by grand jury, Ohio Const. art. I, § 10.
Self-incrimination, Ohio Const. art. I, § 10.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
(Effective 1791)

Comparative Legislation

Compulsory process, Ohio Const. art. I, § 10.
Confronting witnesses, Ohio Const. art. I, § 10.
Nature of charge, Ohio Const. art. I, § 10.
Right to counsel, Ohio Const. art. I, § 10.
Right to trial by jury, Ohio Const. art. I, § 5.
Speedy and public trial by jury, Ohio Const. art. I, § 10.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.
(Effective 1791)

Comparative Legislation

Ohio Const. art. I, § 5.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
(Effective 1791)

Comparative Legislation

Ohio Const. art. I, § 9.

AMENDMENT IX

The enumeration in the Constitution, of certain

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rights, shall not be construed to deny or disparage others retained by the people.
(Effective 1791)

Comparative Legislation

Ohio Const. art. I, § 20.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
(Effective 1791)

Comparative Legislation

Ohio Const. art. I, § 20.

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.
(Effective 1798)

AMENDMENT XII

The Electors shall meet in their respective states and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;— The President of the Senate shall, in the presence of the Senate and House of Representatives; open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. — The person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.
(Effective 1804)

AMENDMENT XIII

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.
(Effective 1865)

Comparative Legislation

Ohio Const. art. I, § 6.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion

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against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
(Effective 1868)

Comparative Legislation

Due process, Ohio Const. art. I, § 16.
Equal protection, Ohio Const. art. I, § 2.

AMENDMENT XV

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.
(Effective 1870)

AMENDMENT XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.
(Effective 1913)

Comparative Legislation

Taxation, Ohio Const. art. XII, §§ 3, 4, 5, 9.

AMENDMENT XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.
(Effective 1913)

Comparative Legislation

Vacancies, Ohio Const. art. II, § 11.

AMENDMENT XVIII

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.
(Effective 1919)

AMENDMENT XIX

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.
(Effective 1920)

Comparative Legislation

Elective franchise, Ohio Const. art. V, § 1.

AMENDMENT XX

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Comparative Legislation

Rules of conduct, Ohio Const. art. II, § 8.

SECTION 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person

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shall act accordingly until a President or Vice President shall have qualified.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SECTION 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

(Effective 1933)

AMENDMENT XXI

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

(Effective 1933)

AMENDMENT XXII

SECTION 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Comparative Legislation

Executive power, Ohio Const. art. III, § 2.

SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

(Effective 1951)

AMENDMENT XXIII

SECTION 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

(Effective 1961)

AMENDMENT XXIV

SECTION 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

(Effective 1964)

Comparative Legislation

Elective franchise, Ohio Const. art. V, § 1.

AMENDMENT XXV

SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SECTION 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SECTION 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

SECTION 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

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Thereafter, when the President transmits to the President quo tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

(Effective 1967)

Comparative Legislation

Vacancy, Ohio Const. art. III, § 17.

AMENDMENT XXVI

SECTION 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Comparative Legislation

Elective franchise, Ohio Const. art. V, § 1.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

(Effective 1971)

AMENDMENT XXVII

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

(Proposed 1789, Adopted 1992)

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CONSTITUTION OF THE STATE OF OHIO

ADOPTED MARCH 10, 1851

SELECTED PROVISIONS INCLUDING LATEST AMENDMENTS EFFECTIVE MARCH 20, 1996

ARTICLE I: BILL OF RIGHTS

§ 1 Right to freedom and protection of property.

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

§ 2 Right to alter, reform, or abolish government, and repeal special privileges.

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

§ 3 Right to assemble together.

The people have the right to assemble together, in a peaceable manner, to consult for their common good; to instruct their representatives; and to petition the general assembly for the redress of grievances.

§ 4 Bearing arms; standing armies; subordination of military power.

The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

§ 5 Trial by jury; reform in civil jury system.

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

(As amended September 3, 1912.)

§ 6 Slavery and involuntary servitude.

There shall be no slavery in this state; nor involuntary servitude, unless for the punishment of crime.

§ 7 Rights of conscience; education; necessity of religion and knowledge.

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

§ 8 Writ of habeas corpus.

The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it.

§ 9 Bailable offenses; of bail, fine, and punishment.

All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

§ 10 Trial of accused persons and their rights; depositions by state and comment on failure to testify in criminal cases.

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall

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be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an imparital jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

(As amended September 1, 1912.)

§ 10a Rights of victims of crime.

Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process, and, as the general assembly shall define and provide by law, shall be accorded rights to reasonable and appropriate notice, information, access, and protection and to a meaningful role in the criminal justice process. This section does not confer upon any person a right to appeal or modify any decision in a criminal proceeding, does not abridge any other right guaranteed by the Constitution of the United States or this constitution, and does not create any cause of action for compensation or damages against the state, any political subdivision of the state, any officer, employee, or agent of the state or of any political subdivision, or any officer of the court.

(Adopted November 8, 1994)

§ 11 Freedom of speech and of the press; libel.

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

§ 12 Transportation, etc., for crime.

No person shall be transported out of the state, for any offense committed within the same; and no conviction shall work corruption of blood, or forfeiture of estate.

§ 13 Quartering of troops.

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor, in time of war, except in the manner prescribed by law.

§ 14 Search warrants and general warrants.

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

§ 15 No imprisonment for debt.

No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.

§ 16 Redress in courts.

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

§ 17 Hereditary privileges, etc.

No hereditary emoluments, honors, or privileges, shall ever be granted or conferred by this state.

§ 18 Suspension of laws.

No power of suspending laws shall ever be exercised, except by the general assembly.

§ 19 Inviolability of private property.

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

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§ 19a Damage for wrongful death.

The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law.

§ 20 Powers reserved to the people.

This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people.

ARTICLE II: LEGISLATIVE

§ 39 Regulating expert testimony in criminal trials.

Laws may be passed for the regulation of the use of expert witnesses and expert testimony in criminal trials and proceedings.

(Adopted September 3, 1912.)

ARTICLE III: EXECUTIVE

§ 11 May grant reprieves, commutations, and pardons.

He shall have the power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as he may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law. Upon conviction for treason, he may suspend the execution of the sentence, and report the case to the general assembly, at its next meeting, when the general assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. He shall communicate to the general assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with his reason therefor.

ARTICLE IV: JUDICIAL

§ 1 In whom judicial power vested.

The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law.

(Amended May 7, 1968; Nov. 6, 1973; SJR No. 30.)

§ 2 The supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B)(1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained,

(c) In direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in cases in which the death penalty has been imposed;

(d) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(e) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(f) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

(Amended May 7, 1968; November 8, 1994.)

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§ 3 Court of appeals.

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

(Adopted May 7, 1968. Former § 3 repealed and analogous provisions reenacted as § 4; Amended November 8, 1994.)

§ 4 Common pleas court.

(A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. Any judge of a court of common pleas or a division thereof may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.

(Amended, effective Nov. 6, 1973; SJR No. 30. Adopted May 7, 1968. Former § 4 repealed.)

§ 5 Additional powers of supreme court; supervision; rule making.

(A)(1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

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(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of person so admitted.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

(Amended, effective Nov. 6, 1973; SJR No. 30. Adopted May 7, 1968.)

§ 20 Style of process, prosecution, and indictment.

The style of all process shall be, "The State of Ohio;" all prosecutions shall be carried on, in the name, and by the authority, of the state of Ohio; and all indictments shall conclude, "against the peace and dignity of the state of Ohio."

ARTICLE V: ELECTIVE FRANCHISE

§ 3 [Repealed, June 8, 1976.]

This section referred to the privilege from arrest of voters during elections.

§ 4 Forfeiture of elective franchise.

The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony.

(Amended, effective June 8, 1976; SJR No. 16.)

ARTICLE XVIII: MUNICIPAL CORPORATIONS

§ 3 Powers.

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

(Adopted September 3, 1912.)

§ 7 Home rule.

Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

(Adopted September 3, 1912.)

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its boundaries and the air space above that land and water, with respect to which this state has either exclusive or concurrent legislative jurisdiction. Where the boundary between this state and another state or foreign country is disputed, the disputed territory is conclusively presumed to be within this state for purposes of this section.

(2) The courts of common pleas of Adams, Athens, Belmont, Brown, Clermont, Columbiana, Gallia, Hamilton, Jefferson, Lawrence, Meigs, Monroe, Scioto, and Washington counties have jurisdiction beyond the north or northwest shore of the Ohio river extending to the opposite shore line, between the extended boundary lines of any adjacent counties or adjacent state. Each of those courts of common pleas has concurrent jurisdiction on the Ohio river with any adjacent court of common pleas that borders on that river and with any court of Kentucky or of West Virginia that borders on the Ohio river and that has jurisdiction on the Ohio river under the law of Kentucky or the law of West Virginia, whichever is applicable, or under federal law.

(D) When an offense is committed under the laws of this state, and it appears beyond a reasonable doubt that the offense or any element thereof took place either in Ohio or in another jurisdiction or jurisdictions, but it cannot reasonably be determined in which it took place, such offense or element is conclusively presumed to have taken place in this state for purposes of this section.

HISTORY: 134 v H 511 (Eff 1-1-74); 144 v S 371. Eff 1-15-93.

Not analogous to former RC § 2901.11 (RS § 7388-52; 98 v 180; GC § 12408; Bureau of Code Revision, 10-1-53; 125 v H 88; 132 v H 65; 133 v H 1), repealed 134 v H 511, § 2, eff 1-1-74.

1974 Committee Comment to H 511

This section is designed to allow the state the broadest possible jurisdiction over crimes and persons committing crimes in or affecting this state, consistent with constitutional limitations. In addition, the section eliminates some paradoxes and legal fictions arising out of the common law doctrine that the location of a crime fixes jurisdiction and that the location depends on where the "gist" of the offense occurs. Also, the section provides a new rule determining criminal law jurisdiction over disputed territory.

§ 2901.12 Venue.

(A) The trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter, and in the territory of which the offense or any element of the offense was committed.

(B) When the offense or any element of the offense was committed in an aircraft, motor vehicle, train, watercraft, or other vehicle, in transit, and it cannot reasonably be determined in which jurisdiction the offense was committed, the offender may be tried in any jurisdiction through which the aircraft, motor vehicle, train, watercraft, or other vehicle passed.

(C) When the offense involved the unlawful taking or receiving of property or the unlawful taking or enticing of another, the offender may be tried in any jurisdiction from which or into which the property or victim was taken, received, or enticed.

(D) When the offense is conspiracy, attempt, or complicity cognizable under division (A)(2) of section 2901.11 of the Revised Code, the offender may be tried in any jurisdiction in which the conspiracy, attempt, complicity, or any of its elements occurred.

(E) When the offense is conspiracy or attempt cognizable under division (A)(3) of section 2901.11 of the Revised Code, the offender may be tried in any jurisdiction in which the offense that was the object of the conspiracy or attempt, or any element thereof, was intended to or could have taken place. When the offense is complicity cognizable under division (A)(3) of section 2901.11 of the Revised Code, the offender may be tried in any jurisdiction in which the principal offender may be tried.

(F) When an offense is considered to have been committed in this state while the offender was out of this state, and the jurisdiction in this state in which the offense or any material element of the offense was committed is not reasonably ascertainable, the offender may be tried in any jurisdiction in which the offense or element reasonably could have been committed.

(G) When it appears beyond a reasonable doubt that an offense or any element of an offense was committed in any of two or more jurisdictions, but it cannot reasonably be determined in which jurisdiction the offense or element was committed, the offender may be tried in any such jurisdiction.

(H) When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, he may be tried for all of those offenses in any jurisdiction in which one of those offenses or any element of one of those offenses occurred. Without limitation on the evidence that may be used to establish such course of criminal conduct, any of the following is prima-facie evidence of a course of criminal conduct:

(1) The offenses involved the same victim, or victims of the same type or from the same group.

(2) The offenses were committed by the offender in his same employment, or capacity, or relationship to another.

(3) The offenses were committed as part of the same transaction or chain of events, or in furtherance of the same purpose or objective.

(4) The offenses were committed in furtherance of the same conspiracy.

(5) The offenses involved the same or a similar modus operandi.

(6) The offenses were committed along the offender's line of travel in this state, regardless of his point of origin or destination.

(I)(1) When the offense involves a computer, computer system, or computer network, the offender may

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CHAPTER 2903: HOMICIDE AND ASSAULT

Section

[HOMICIDE]

2903.01 Aggravated murder.
2903.02 Murder.
2903.03 Voluntary manslaughter.
2903.04 Involuntary manslaughter.
2903.05 Negligent homicide.
2903.06 Aggravated vehicular homicide.
2903.07 Vehicular homicide.
2903.08 Aggravated vehicular assault.
2903.09 Repealed.
2903.10 Definitions: functionally impaired person: caretaker.

[ASSAULT]

2903.11 Felonious assault.
2903.12 Aggravated assault.
2903.13 Assault.
2903.14 Negligent assault.
2903.15 Repealed.
2903.16 Failing to provide for a functionally impaired person.

[MENACING]

2903.21 Aggravated menacing.

[STALKING]

[2903.21.1] 2903.211 Menacing by stalking.
[2903.21.2] 2903.212 Consideration in setting amount and conditions of bail for violations of certain protection orders.
[2903.21.3] 2903.213 Motion for issuance of anti-stalking protection order.
[2903.21.4, 2903.21.5] 2903.214, 2903.215 Repealed.
2903.22 Menacing.
2903.31 Hazing.

[PATIENT ABUSE AND NEGLECT IN CARE FACILITIES]

2903.33 Definitions.
2903.34 Patient abuse; neglect.
2903.35 Filing false patient abuse or neglect complaints.
2903.36 Discrimination, retaliation prohibited.
2903.37 License revocation.

1974 Committee Comment to H 511

Chapter 2903. defines those offenses, other than assaultive sex offenses, of which the primary thrust is actual or potential harm to persons.

The chapter contains the single capital offense defined in the code, aggravated murder, which includes the planned killing in cold blood, and the purposeful killing committed during kidnaping, rape, arson, robbery, burglary, or escape. The lesser offense of murder is defined simply as the purposeful killing of another.

Elements of the former offense of first degree manslaughter are divided between two sections: voluntary manslaughter, which is knowingly killing another while under extreme emotional stress brought on by serious provocation; and involuntary manslaughter, which is killing another as a proximate result of the commission of a felony. Involuntary manslaughter carries a more severe penalty if the death was caused through commission of a felony than if it resulted from commission of a misdemeanor. Under former law the penalty for manslaughter was the same regardless of whether the offense was voluntary or involuntary, and regardless of the cause of death. Negligent homicide, a new offense, is defined as negligently killing another by means of a deadly weapon or dangerous ordnance.

Two vehicular homicide offenses are included in the chapter, both dealing with killing another while operating a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft. The difference between the two is that the aggravated offense is committed recklessly, while the less serious offense is committed negligently. Former law connected these offenses to the violation of various traffic laws, rather than to the recklessness or negligence of the offender. Also, former law did not provide a homicide offense involving snowmobiles or aircraft, and the offense involving locomotives was obsolete and unenforceable.

Four assault and two menacing offenses are defined in the chapter. Felonious assault is knowingly causing serious physical harm to another by any means, or knowingly causing or attempting to cause physical harm to another by means of a deadly weapon or dangerous ordnance. Aggravated assault is the same, except that it is committed while the offender is under extreme emotional stress induced by serious provocation. Thus, felonious assault and aggravated assault complement murder and voluntary manslaughter, respectively. Simple assault and negligent assault offenses are also defined, complementing involuntary manslaughter and negligent homicide, respectively. The two menacing offenses are defined as causing another to believe the offender will harm him or his family or his property, and the distinction between the two is based on the degree of threatened harm.

[HOMICIDE]

§ 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to

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produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1. Eff 10-19-81.

Not analogous to former RC § 2903.01 (GC § 12423-1; 109 v 45; 121 v 557 (572); Bureau of Code Revision, 10-1-53; 126 v 114), repealed 134 v H 511, § 2, eff 1-1-74.

1974 Committee Comment to H 511

The first part of this section restates the former crime of premeditated murder so as to embody the classic concept of the planned, cold-blooded killing while discarding the notion that only an instant's prior deliberation is necessary. By judicial interpretation of the former Ohio law, murder could be premeditated even though the fatal plan was conceived and executed on the spur of the moment. See *State v. Schaffer*, 133 Ohio App.125, 17 O.O. 2d 114, 177 N.E. 2d 534 (Lawrence Co. App., 1960). The section employs the phrase, "prior calculation and design," to indicate studied care in planning or analyzing the means of the crime, as well as a scheme compassing the death of the victim. Neither the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves, but they must amount to more than momentary deliberation.

The second part of the section defines the offense of felony murder. The requirement that the killing must be purposeful is retained. See, *Turk v. State*, 48 Ohio App.489, 2 O.O. 96, 194 N.E. 425 (Cuyahoga Co. App., 1934); aff'd 129 Ohio St. 245, 194 N.E. 453. The section expands upon the former offense of felony murder by listing kidnapping and escape, in addition to rape, arson, robbery and burglary, as the felonies during which a purposeful killing constitutes aggravated murder.

Aggravated murder is a capital offense, for which the penalty may be death or imprisonment for life. In addition, the offender may be fined up to $25,000. If any one of seven aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt, and none of three mitigating circumstances is established by a preponderance of the evidence, the penalty is death. Otherwise, the penalty is life imprisonment. The penalties, the procedure for determining the penalty to be imposed in a given case, and the lists of aggravating and mitigating circumstances are set forth in sections 2929.02, 2929.03, and 2929.04.

Transition — capital offenses.

Persons charged with a capital offense committed prior to January 1, 1974, must be tried under the law as it existed at the time of the offense and, if convicted, sentenced to life imprisonment. If the section defining the offense provides for a lesser penalty under the circumstances of a particular case, then the lesser penalty must be imposed in that case.

Persons committing aggravated murder (the only capital offense in the new code) on and after January 1, 1974, must be charged and tried under the new law and, if convicted, may be subject to the death penalty. See, sections 2903.01, 2929.02 to 2929.04, and 2941.14.

§ 2903.02 Murder.

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

HISTORY: 134 v H 511. Eff 1-1-74.

Not analogous to former RC § 2903.02 (RS § 6998; S&S 377; 59 v 65; 83 v 202; GC §§ 12962, 12963; Bureau of Code Revision, 10-1-53; 131 v 671), repealed 134 v H 511, § 2, eff 1-1-74.

The effective date is set by section 4 of HB 511.

1974 Committee Comment to H 511

This section defines murder simply as the purposeful killing of another, and the offense can thus be a lesser included offense to both forms of aggravated murder.

Murder is punishable by an indefinite term of imprisonment of not less than 15 years to life. In addition, the offender may be fined not more than $15,000. The penalty is specified in section 2929.02.

§ 2903.03 Voluntary manslaughter.†

(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another.

(B) Whoever violates this section is guilty of voluntary manslaughter, a felony of the first degree.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v H 103 (Eff 5-19-82); 139 v S 199 (Eff 1-5-83); 146 v S 2. Eff 7-1-96.

Not analogous to former RC § 2903.03 (RS § 6937; S&C 667; 54 v 196; GC § 12964; 103 v 864; Bureau of Code Revision, 10-1-53), repealed 134 v H 511, § 2, eff 1-1-74.

The effective date is set by section 6 of SB 2.

Committee Comment to H 511†

This section defines an offense analogous to the former

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(1) The person has been convicted of or has pleaded guilty to, and is being sentenced for committing, for complicity in committing, or for an attempt to commit, aggravated murder, murder, involuntary manslaughter, a felony of the first degree other than one set forth in Chapter 2925. of the Revised Code, a felony of the first degree set forth in Chapter 2925. of the Revised Code that involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person, or a felony of the second degree that involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person.

(2) Either of the following applies:

(a) The person previously was convicted of or pleaded guilty to, and served a prison term for, any of the following:

(i) Aggravated murder, murder, involuntary manslaughter, rape, felonious sexual penetration, a felony of the first or second degree that resulted in the death of a person or in physical harm to a person, or complicity in or an attempt to commit any of those offenses;

(ii) An offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to an offense listed under division (JJ)(2)(a)(i) of this section.

(b) The person previously was adjudicated a delinquent child for committing an act that if committed by an adult would have been an offense listed in division (JJ)(2)(a)(i) or (ii) of this section, the person was committed to the department of youth services for that delinquent act, and the juvenile court in which the person was adjudicated a delinquent child made a specific finding that the adjudication should be considered a conviction for purposes of a determination in the future pursuant to this chapter as to whether the person is a repeat violent offender.

(KK) "Sanction" means any penalty imposed upon an offender who is convicted of or pleads guilty to an offense, as punishment for the offense. "Sanction" includes any sanction imposed pursuant to any provision of sections 2929.14 to 2929.18 of the Revised Code.

(LL) "Sentence" means the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to a felony.

(MM) "Stated prison term" means the prison term or combination of all prison terms imposed by the sentencing court pursuant to section 2929.14 of the Revised Code. "Stated prison term" includes any credit received by the offender for time spent in jail awaiting trial, sentencing, or transfer to prison for the offense and any time spent under house arrest or electronically monitored house arrest imposed after earning credits pursuant to section 2967.193 [2967.19.3] of the Revised Code.

(NN) "Victim-offender mediation" means a reconciliation or mediation program that involves an offender and the victim of the offense committed by the offender and that includes a meeting between the offender and the victim to discuss the offense, establish restitution, and consider other sanctions for the offense.

HISTORY: 146 v S.2. Eff 7-1-96.

[PENALTIES FOR MURDER]

§ 2929.02 Penalties for murder.

(A) Whoever is convicted of, pleads guilty to, or pleads no contest and is found guilty of, aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022 [2929.02.2], 2929.03, and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 [2929.02.3] or division (C) of section 2929.05 of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of, pleads guilty to, or pleads no contest and is found guilty of, murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1. Eff 10-19-81.

1974 Committee Comment to H 511

This section establishes the penalty for aggravated murder as life imprisonment or death, plus an optional fine of up to $25,000. The penalty to be imposed in a given case of aggravated murder is determined by the procedure given in sections 2929.03 and 2929.04. The penalty for murder is given as imprisonment for 15 years to life, plus an optional fine of $15,000. A fine for aggravated murder or murder may not be imposed unless the crime was committed for hire or profit, or in support of organized crime. Also, a fine or fines may not be imposed, which to the extent not suspended exceeds the amount the offender can pay without undue hardship to himself or his dependents, or which will prevent him from making reparation for the victim's death.

[§ 2929.02.1] § 2929.021 Notice to supreme court of indictment charging aggravated murder; plea.

(A) If an indictment or a count in an indictment

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charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the clerk of the court in which the indictment is filed, within fifteen days after the day on which it is filed, shall file a notice with the supreme court indicating that the indictment was filed. The notice shall be in the form prescribed by the clerk of the supreme court and shall contain, for each charge of aggravated murder with a specification, at least the following information pertaining to the charge:

(1) The name of the person charged in the indictment or count in the indictment with aggravated murder with a specification;

(2) The docket number or numbers of the case or cases arising out of the charge, if available;

(3) The court in which the case or cases will be heard;

(4) The date on which the indictment was filed.

(B) If the indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the defendant pleads guilty or no contest to any offense in the case or if the indictment or any count in the indictment is dismissed, the clerk of the court in which the plea is entered or the indictment or count is dismissed shall file a notice with the supreme court indicating what action was taken in the case. The notice shall be filed within fifteen days after the plea is entered or the indictment or count is dismissed, shall be in the form prescribed by the clerk of the supreme court, and shall contain at least the following information:

(1) The name of the person who entered the guilty or no contest plea or who is named in the indictment or count that is dismissed;

(2) The docket numbers of the cases in which the guilty or no contest plea is entered or in which the indictment or count is dismissed;

(3) The sentence imposed on the offender in each case.

HISTORY: 139 v S 1. Eff 10-19-81.

[§ 2929.02.2] § 2929.022 Determination of aggravating circumstances.

(A) If an indictment or count in an indictment charging a defendant with aggravated murder contains a specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code, the defendant may elect to have the panel of three judges, if he waives trial by jury, or the trial judge, if he is tried by jury, determine the existence of that aggravating circumstance at the sentencing hearing held pursuant to divisions (C) and (D) of section 2929.03 of the Revised Code.

(1) If the defendant does not elect to have the existence of the aggravating circumstance determined at the sentencing hearing, the defendant shall be tried on the charge of aggravated murder, on the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code, and on any other specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code in a single trial as in any other criminal case in which a person is charged with aggravated murder and specifications.

(2) If the defendant does elect to have the existence of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code determined at the sentencing hearing, then, following a verdict of guilty of the charge of aggravated murder, the panel of three judges or the trial judge shall:

(a) Hold a sentencing hearing pursuant to division (B) of this section, unless required to do otherwise under division (A)(2)(b) of this section;

(b) If the offender raises the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and is not found at trial to have been eighteen years of age or older at the time of the commission of the offense, conduct a hearing to determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. After conducting the hearing, the panel or judge shall proceed as follows:

(i) If that aggravating circumstance is proven beyond a reasonable doubt or if the defendant at trial was convicted of any other specification of an aggravating circumstance, the panel or judge shall impose sentence according to division (E) of section 2929.03 of the Revised Code;

(ii) If that aggravating circumstance is not proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance, the panel or judge shall impose sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) At the sentencing hearing, the panel of judges, if the defendant was tried by a panel of three judges, or the trial judge, if the defendant was tried by jury, shall, when required pursuant to division (A)(2) of this section, first determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. If the panel of judges or the trial judge determines that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt or if they do not determine that the specification is proven beyond a reasonable doubt but the defendant at trial was convicted of a specification of any other aggravating circumstance listed in division (A) of section 2929.04

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of the Revised Code, the panel of judges or the trial judge and trial jury shall impose sentence on the offender pursuant to division (D) of section 2929.03 and section 2929.04 of the Revised Code. If the panel of judges or the trial judge does not determine that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge shall terminate the sentencing hearing and impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

HISTORY: 139 v S 1. Eff 10-19-81.

[§ 2929.02.3] § 2929.023 Defendant may raise matter of age.

A person charged with aggravated murder and one or more specifications of an aggravating circumstance may, at trial, raise the matter of his age at the time of the alleged commission of the offense and may present evidence at trial that he was not eighteen years of age or older at the time of the alleged commission of the offense. The burdens of raising the matter of age, and of going forward with the evidence relating to the matter of age, are upon the defendant. After a defendant has raised the matter of age at trial, the prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the defendant was eighteen years of age or older at the time of the alleged commission of the offense.

HISTORY: 139 v S 1. Eff 10-19-81.

[§ 2929.02.4] § 2929.024 Investigation services and experts for indigent.

If the court determines that the defendant is indigent and that investigation services, experts, or other services are reasonably necessary for the proper representation of a defendant charged with aggravated murder at trial or at the sentencing hearing, the court shall authorize the defendant's counsel to obtain the necessary services for the defendant, and shall order that payment of the fees and expenses for the necessary services be made in the same manner that payment for appointed counsel is made pursuant to Chapter 120. of the Revised Code. If the court determines that the necessary services had to be obtained prior to court authorization for payment of the fees and expenses for the necessary services, the court may, after the services have been obtained, authorize the defendant's counsel to obtain the necessary services and order that payment of the fees and expenses for the necessary services be made as provided in this section.

HISTORY: 139 v S 1. Eff 10-19-81.

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of

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age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment without parole, to life imprisonment with parole eligibility after serving twenty full years of imprisonment, or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, to life imprisonment with parole eligibility after serving twenty full years of imprisonment, or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment without parole;

(b) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(c) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

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(1) Life imprisonment without parole;

(2) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(3) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G)(1) Whenever the court or a panel of three judges imposes sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1 (Eff 10-19-81); 146 v S 4 (Eff 9-21-95); 146 v S 2. Eff 7-1-96.

The effective date is set by section 6 of SB 2.

The provisions of § 5 of SB 2 (146 v —) read as follows:

SECTION 5. The provisions of the Revised Code in existence prior to July 1, 1996, shall apply to a person upon whom a court imposed a term of imprisonment prior to that date and to a person upon whom a court, on or after that date and in accordance with the law in existence prior to that date, imposed a term of imprisonment for an offense that was committed prior to that date.

The provisions of the Revised Code in existence on and after July 1, 1996, apply to a person who commits an offense on or after that date.

Comment, Legislative Service Commission

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Sections 2929.03, 2929.06, and 2953.07 of the Revised Code are amended by this act [Am. Sub. S.B. 2] (effective July 1, 1996) and also by Am. Sub. S.B. 4 of the 121st General Assembly. • • • Comparison of these amendments in pursuance of section 1.52 of the Revised Code discloses that they are not irreconcilable so that they are required by that section to be harmonized to give effect to each amendment.

1974 Committee Comment to H 511

This section specifies the procedure to be followed in determining whether the sentence for aggravated murder is to be life imprisonment or death.

The death penalty is precluded unless the indictment contains a specification of one or more of the aggravating circumstances listed in section 2929.04. In the absence of such specifications, life imprisonment must be imposed. If the indictment specifies an aggravating circumstance, it must be proved beyond a reasonable doubt, and the jury must return separate verdicts on the charge and specification. If the verdict is guilty of the charge but not guilty of the specification, the penalty is life imprisonment.

If the verdict is guilty of both the charge and the specification, the jury is discharged and the trial begins a second phase designed to determine the presence or absence of one or more mitigating circumstances. If one of the three mitigating factors listed in section 2929.04 is established by a preponderance of the evidence, the penalty is life imprisonment. If none of such factors is established, the penalty is death. The procedure is essentially the same in the first phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state, the same rules of evidence apply, the specification must be proved beyond a reasonable doubt, and the panel's verdict must be unanimous.

With respect to the mitigation phase of the trial, the procedure is somewhat different depending on whether the case is tried by a jury or a three-judge panel. A jury tries only the charge and specification, and the judge in a jury trial determines mitigation. If a jury is waived, the same three-judge panel tries not only the charge and specification, but also determines the presence or absence of mitigation. Also, the statute expressly provides that the panel's finding that no mitigating circumstance is established must be unanimous, or the death penalty is precluded. In other respects, the procedure for determining mitigation is similar whether the trial judge or a three-judge panel tries the issue. Mitigation must be established by a preponderance of the evidence, and the rules of evidence also apply in this phase of the trial (the requirement for a pre-sentence investigation and report, the requirement for a psychiatric examination and report, and the provision for an unsworn statement by the defendant, represent partial exceptions to the rules of evidence).

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated

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murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1. Eff 10-19-81.

1974 Committee Comment to H 511

This section provides that the death penalty for aggravated murder is precluded unless one of seven listed aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt. The seven aggravating circumstances deal with: (1) assassination of the President, Vice President, Governor, Lieutenant Governor, or a person who has been elected to or is a candidate for any such office; (2) murder for hire; (3) murder to escape accountability for another crime; (4) murder by a prisoner; (5) repeat murder or mass murder; (6) killing a law enforcement officer; and (7) felony murder.

The section also provides that even if one or more aggravating circumstances is proved beyond a reasonable doubt, the death penalty for aggravated murder is still

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precluded if the trial court finds that any of three mitigating circumstances is established by a preponderance of the evidence. The mitigating circumstances are: (1) the victim of the offense induced or facilitated it; (2) the offender acted under duress, coercion, or strong provocation; and (3) although the defense of insanity could not be or was not established, the offense was chiefly the product of the offender's mental deficiency or psychosis (psychosis is mental illness, as distinguished from a behavioral disorder. Primarily psychopaths have a behavioral disorder.)

Transition—capital offenses.

Persons charged with a capital offense committed prior to January 1, 1974, must be tried under the law as it existed at the time of the offense and, if convicted, sentenced to life imprisonment. If the section defining the offense provides for a lesser penalty under the circumstances of a particular case, then the lesser penalty must be imposed in that case.

Persons committing aggravated murder (the only capital offense in the new code) on and after January 1, 1974, must be charged and tried under the new law and, if convicted, may be subject to the death penalty. See, sections 2903.01, 2929.02 to 2929.04, and 2941.14.

Transition—offenses other than capital offenses.

Persons charged with an offense, other than a capital offense, committed prior to January 1, 1974, must be tried under the law as it existed at the time of the offense. Any such person convicted and sentenced prior to January 1, 1974, must be sentenced under the penalty provided in the law under which he was tried. Any such person either convicted or sentenced on or after January 1, 1974, must be sentenced under the lesser of the penalties provided for the offense for which he was tried or for the substantially equivalent offense in the new code. If there is no substantially equivalent offense in the new code, sentence must be imposed under the old law.

[Editor's Note: A 1981 amendment added an eighth aggravating circumstance: murder of a witness to an offense. The amendment added four new mitigating circumstances: (1) youth of the offender, (2) lack of prior criminal involvement, (3) degree of participation, and (4) any other relevant matters.]

§ 2929.05 Appellate review of death sentence.

(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

A court of appeals that reviews a case in which the sentence of death is imposed for an offense committed before January 1, 1995, shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

(B) The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed, and, except as otherwise provided in this section, shall conduct the review in accordance with the Appellate Rules.

(C) Whenever sentence of death is imposed pursuant to section 2929.022 [2929.02.2] or 2929.03 of the Revised Code, the court of common pleas that sentenced the offender shall, upon motion of the offender and after conducting a hearing on the motion, vacate the sentence if all of the following apply:

(1) The offender alleges in the motion and presents evidence at the hearing that the offender was not eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced;

(2) The offender did not present evidence at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code that the offender was not eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced;

(3) The motion was filed at any time after the sentence was imposed in the case and prior to execution of the sentence;

(4) At the hearing conducted on the motion, the pros-

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ecution does not prove beyond a reasonable doubt that the offender was eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced.

HISTORY: 139 v S 1 (Eff 10-19-81); 146 v S 4. Eff 9-21-95.

§ 2929.06 Resentencing hearing after vacation of death sentence.

(A) If the sentence of death that is imposed upon an offender is vacated upon appeal because the court of appeals, in a case in which a sentence of death was imposed for an offense commited before January 1, 1995, or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by section 2929.05 of the Revised Code, is vacated upon appeal for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, or is vacated pursuant to division (C) of section 2929.05 of the Revised Code, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall sentence the offender to life imprisonment without paroie, to life imprisonment with parole eligibility after serving twenty full years of imprisonment, or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(B) If the sentence of life imprisonment without parole that is imposed upon an offender is vacated upon appeal for the sole reason that the statutory procedure for imposing the sentence of life imprisonment without parole that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, the trial court that sentenced the offender shall conduct a hearing to resentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

HISTORY: 139 v S 1 (Eff 10-19-81); 146 v S 4 (Eff 9-21-95); 146 v S 2. Eff 7-1-96.

The effective date is set by section 6 of SB 2.

See provisions, § 5 of SB 2 (146 v —) following RC § 2929.03.

See Comment, Legislative Service Commission following RC § 2929.03.

[PENALTIES FOR FELONY]

§ 2929.11 Purposes of felony sentencing; discrimination prohibited.

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

HISTORY: 146 v S 2. Eff 7-1-96.

Not analogous to former RC § 2929.11 (134 v H 511; 137 v S 119; 139 v S 199; 140 v S 210; 140 v H 265; 140 v S 4; 141 v H 284; 143 v H 51; 143 v S 258), repealed 146 v S 2, § 2, eff 7-1-96.

The effective date is set by section 6 of SB 2.

§ 2929.12 Considerations in imposing sentence for felony.

(A) Unless a mandatory prison term is required by division (F) of section 2929.13 or section 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood that the offender will commit future crimes and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or pro-

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§ 2945.25 Causes of challenging of jurors.

A person called as a juror in a criminal case may be challenged for the following causes:

(A) That he was a member of the grand jury that found the indictment in the case;

(B) That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial;

(C) In the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard.

(D) That he is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted, or to the defendant;

(E) That he served on a petit jury drawn in the same cause against the same defendant, and that [petit]† jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside;

(F) That he served as a juror in a civil case brought against the defendant for the same act;

(G) That he has been subpoenaed in good faith as a witness in the case;

(H) That he is a chronic alcoholic, or drug dependent person;

(I) That he has been convicted of a crime that by law disqualifies him from serving on a jury;

(J) That he has an action pending between him and the state or the defendant;

(K) That he or his spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him;

(L) That he is the person alleged to be injured or attempted to be injured by the offense charged, or is the person on whose complaint the prosecution was instituted, or the defendant;

(M) That he is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney of any person included in division (L) of this section;

(N) That English is not his native language, and his knowledge of English is insufficient to permit him to understand the facts and law in the case;

(O) That he otherwise is unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in this section shall be determined by the court.

HISTORY: GC § 13443-8; 113 v 123(183), ch 22, § 8; 118 v 429; Bureau of Code Revision, 10-1-53; 138 v H 965 (Eff 4-9-81); 139 v S 1. Eff 10-19-81.

† S 1 failed to contain the word "petit" here. It was added in H 965.

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RULE 29. Motion for Acquittal

(A) Motion for judgment of acquittal. The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

(B) Reservation of decision on motion. If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.

(C) Motion after verdict or discharge of jury. If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

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RULE 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(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; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(3) *Character of witness.* Evidence of the character of a witness on the issue of credibility is admissible as provided in Rules 607, 608, and 609.

(B) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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ARTICLE VIII
HEARSAY

RULE 801. Definitions

The following definitions apply under this article:

(A) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(B) Declarant. A "declarant" is a person who makes a statement.

(C) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(D) Statements which are not hearsay. A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with his testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (c) one of identification of a person soon after perceiving him, if the circumstances demonstrate the reliability of the prior identification.

(2) *Admission by party-opponent.* The statement is offered against a party and is (a) his own statement, in either his individual or a representative capacity, or (b) a statement of which he has manifested his adoption or belief in its truth, or (c) a statement by a person authorized by him to make a statement concerning the subject, or (d) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

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RULE 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

(2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then existing, mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge [illegible]

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ORIGINAL

ON COMPUTER-RAN

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, vs. STANLEY JALOWIEC, Defendant-Appellant.	)	CASE NO: 98-1074

FILED
NOV 05 1998
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

MOTION TO STRIKE

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COUNSEL FOR APPELLANT

Now comes the State of Ohio, Appellee, and moves this court for an order striking the Appellant's Merit Brief from the record for the following reasons:

(1) Appellant's brief was filed late after Appellant had already received its one extension pursuant to S.Ct.Prac.R. XIV, Sec. 3(B)(2). S.Ct.Prac.R. XIX. There is no other rule which permits the court or the Appellant to file a brief after this extension;

(2) This court sua sponte granted the Appellant an additional period of time in which to file his brief, which is not allowed by the rules. Whether fair or not and whether just or not, the rules are the rules. The State filed a request for this court to decide the case on the record and briefs that were before it; and

(3) The State of Ohio timely prepared and sent its Brief overnight mail by UPS on October 29, 1998 to be received by the Clerk on October 30, 1998. Totally due to the negligence of the United Parcel Service, the brief was not received until November 2, 1998. The Clerk of the Supreme Court indicated that she could not accept this brief nor could they accept a Motion for Leave to File the Brief Instanter.

WHEREFORE, the State of Ohio moves this court for an order striking the Appellant's brief from the file or to give the Appellee and the victims in this case a fraction of the consideration it gave to a convicted murderer. Either justice requires some flexibility in the rules for both parties or it requires none for either.

Respectfully submitted,

GREGORY A. WHITE
Prosecuting Attorney
Lorain County, Ohio

JONATHAN E. ROSENBAUM
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PROOF OF SERVICE

A copy of the foregoing ***MOTION TO STRIKE*** was sent by regular U.S. Mail to Patricia Millhoff, Counsel for Appellant at 80 West Bower Street, Suite 310, Akron, Ohio 44308 and Nathan Ray, Counsel for Appellant, at 137 S. Main Street, Akron, Ohio 44308, on this 3 day of November, 1998.

JONATHAN E. ROSENBAUM
Chief Counsel, Criminal Division

The Supreme Court of Ohio

FILED
DEC 23 1998
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SUPREME COURT OF OHIO

88-576 CR COMPUTER SMITH

1998 TERM

State of Ohio, Appellee,	:	Case No. 98-1074
v.	:	
Stanley E. Jalowiec, Appellant.	:	E N T R Y

This cause is pending before the Court as an appeal from the Court of Appeals for Lorain County. Upon consideration of appellee's motion to strike appellant's merit brief,

IT IS ORDERED by the Court that the motion to strike be, and hereby is, denied.

IT IS FURTHER ORDERED by the Court, sua sponte, that appellee may file a merit brief within 14 days of the date of this entry.

THOMAS J. MOYER
Chief Justice

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ORIGINAL

ON COMPUTER-AFD

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	*	CASE NO. 98 1074
Appellee	*	
-vs-	*	
STANLEY E. JALOWIEC	*	
Appellant	*	

FILED
NOV 13 1998
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SUPREME COURT OF OHIO

APPEAL FROM THE NINTH DISTRICT COURT OF APPEALS
SUMMIT COUNTY, OHIO
CASE NO. 96 CA 006445

MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION TO STRIKE APPELLANT'S BRIEF

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MEMORANDUM

On September 23, 1998, this Court denied Appellant Jalowiec's (hereinafter "Jalowiec") Motion to Withdraw as Counsel, and further ordered that Jalowiec had seven days within which to file his merit brief. On September 30, 1998, Jalowiec filed his brief. Appellee's (hereinafter "state") brief was due on or before October 30, 1998. The Ohio Supreme Court's clerk's office did not receive the brief until November 3, 1998, and therefore refused to accept it. The state now requests that this Court strike Jalowiec's brief.

Jalowiec has been sentenced to death. Capital punishment, because it involves the taking of life, is qualitatively different from other punishments. "The penalty of death differs from all other forums of criminal punishments, not in degree, but kind." Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). Under the Eighth and Fourteenth Amendments to the United States Constitution, the sentence of death is not appropriate in any case where there is not the highest degree of reliability to support it. As the United States Supreme Court held in Woodson v. North Carolina, 428 U.S. 280, 305 (1976):

> "This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment than a 100 year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

With these principles in mind, this Court permitted Jalowiec to file his brief out of time.

Because the state failed to timely file their brief, they now request that this Court disregard the principles of Furman and Woodson, and strike Jalowiec's brief. By requesting

that Jalowiec's brief be stricken, the state is also requesting that Jalowiec be denied his right to effective representation in his direct appeal of right in this court.[1]

Mr. Jalowiec has an absolute right to a direct appeal in this Court[2] and an absolute right to the effective assistance of counsel in the representation of that appeal. By requesting that Jalowiec's brief be stricken, the state is requesting that Jalowiec be denied these rights.

Mr. Jalowiec respectfully requests that this Court deny the state's motion to strike his brief.

Respectfully submitted,

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[1] See, e.g. Strickland v. Washington, 466 U.S. 668 (1984); State v. Bradley, 42 Ohio St.3d 136 (1989); State v. Miller, 44 Ohio App.3d 42 (1988); Cf. State v. Buell, 20 Ohio St.3d 1211 (1994), holding that "[t]he right to appointed counsel extends to the first appeal as of right, and no further." (emphasis in original). Citing Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). See also, State v. Gillard, 78 Ohio St.3d 548 (1997).

[2] Ohio Revised Code Ann. §2929.05

PROOF OF SERVICE

I hereby certify that a copy of the foregoing has been mailed by regular U.S. Mail this 12th day of November, 1998, to Gregory White, Prosecuting Attorney, Lorain County, 226 Middle Avenue, Elyria, Ohio 44035.

NATHAN A. RAY
PATRICIA MILLHOFF
Attorneys for Appellant

ORIGINAL

ON COMPUTER-AFD

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	CASE NO: 98-1074
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	
	)	
STANLEY JALOWIEC,	)	
	)	
Defendant-Appellant.	)	
	)	

FILED
DEC 31 1998
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SUPREME COURT OF OHIO

BRIEF OF APPELLEE

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STATEMENT OF FACTS

Ronald Lally was brutally murdered on January 19, 1994. He was shot, stabbed, bludgeoned, and struck by a car repeatedly. The crimes occurred in a cemetery in Cleveland, Ohio. Ronald Lally was an informant for the State of Ohio who bought drugs from the Raymond Smith and his son, Danny Smith. Their cases were set for trial on January 19, 1994. After his arrest, Danny Smith began to threaten Ronald Lally personally and indirectly through his girlfriend, Sandra Williams. He then attempted to recruit people to carry out the conspiracy to kill and silence Ronald Lally.

On the evening prior to the early morning hours of January 19, 1994, Raymond Smith, Danny Smith, and the appellant embarked upon an intricate and carefully orchestrated series of events that would place Ronald Lally in a car outside of the Elyria city limits. At this location, Raymond Smith and Michael Smith were able to get in the car and abduct the victim at gunpoint and kill him on the day that the victim was to testify.

Sharon Hopkins and Brian Howington testified to the carefully orchestrated series of events that placed the victim in a car, which he would recognize and not be afraid of, and in a position outside of the city limits where he could be so abducted.

Michael Smith happened to be in the car and was expected to help. He did not help. He panicked and remained in the car while Raymond Smith and the appellant shot, stabbed, stomped and then ran Ronald Lally over with the car repeatedly, leaving him partially clothed in sub-zero weather to die of his injuries. Upon their return, the four admitted their dealings and described the manner in which death was inflicted.

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The testimony of the witnesses describing the events of the evening, which occurred in Lorain County and led up to the assassination of Ronald Lally in a cemetery in Cleveland, was buttressed by the scientific evidence. The coroner's office confirmed the testimony of Terry Hopkins stating that the conspirators shot, stabbed, stomped, and ran over the victim with the car. The trunk lining was seized from the car described by Brian Howington and Sharon Hopkins as that used to forcibly abduct the victim. The trunk liner revealed traces of blood consistent with that of the victim. Dog hair taken from the victim's clothing found at the scene of the crime also was consistent with the dog owned by the owner of that car.

The preparation needed to get everyone out in the country in the early morning hours of January 19, 1994 simultaneously so as to abduct and surprise Ronald Lally, the brutal manner in which the execution was carried out, and the assassination taking place on the same date as the trial of Raymond Smith and his co-defendant son, Danny Smith, all show that an elaborate conspiracy to silence Ronald Lally, which culminated in his death, was conceived, premeditated, and purposely set into motion in Lorain County, which ultimately resulted in the taking of Ronald Lally's life in Cuyahoga County.

STATEMENT OF THE CASE

Appellant's statement of the case is accurate.

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RESPONSE TO PROPOSITION OF LAW NO. I

The appellant did not raise any of the claims that are addressed in Proposition of Law No. I of his brief in any of the lower courts. The State submits that issues that are neither raised in nor reached by a lower court should not be considered by an appellate court. **State v. Hill** (1995), 73 Ohio St.3d 433, 438 citing **State v. Williams** (1977), 50 Ohio St.2d 112 syl. 2; **Shover v. Cordis Corp.** (1991), 61 Ohio St.3d 213, 220; **In Re: Dismissal of Mitchell** (1979), 60 Ohio St.2d 85, 90. Parties may not assert new legal theories for the first time before an appellate court. **AMF, Inc. v. Mravek** (1981), 2 Ohio App.3d 29.

Appellant initially claims in Proposition of Law No. I that the State committed error in its opening statement by introducing a co-defendant's confession. The appellant concedes at page two of his brief that trial counsel did not object to the introduction of this "inadmissible hearsay statement." Since the appellant did not object, this court need not consider the claimed error occurring in the State's opening statement. **State v. Smith** (1997), 80 Ohio St.3d 89, 107.

"Any error in this statement by the prosecutor is harmless in light of the trial court's instruction that the opening statements of counsel are not evidence." **State v. Ashford** (Cuyahoga County, 1997), Case No. 68883, unreported, copy attached at 5.

> The Supreme Court has held that the conduct of a prosecuting attorney during a trial cannot be made a ground of error unless the conduct deprives the defendant of a fair trial. **State v. Maurer** (1984), 15 Ohio St.3d 239, 473 N.E. 2d 768. See also **State v. Keenan** (1992), 66 Ohio St.3d 402, 613 N.E. 2d 203 citing to **State v. Apanovitch** (1987), 33 Ohio St.3d 19, 514 N.E. 2d 394. Opening and closing arguments are not evidence, but are intended only to advise the jury as to what counsel expects the evidence to show. **State v. Turner** (1993), 91 Ohio App.3d 153, 631 N.E. 2d 1117.

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> In addition, this court notes that the failure to raise objections to improper arguments constitutes a waiver, unless the errors are cumulatively so egregious that the appellant was denied due process. **Keenan, supra.**

State v. Hatcher (Cuyahoga County, 1997), No. 70857, unreported, copy attached at 6.

Remarks that were not objected to in opening statement can only be the subject of plain error if they are to be considered. Notice of plain error is to be taken with the utmost caution under exceptional circumstances. **State v. Boyd** (1996), 110 Ohio App.3d 13 at 17. The State's comment concerning how the events occurred which identified the appellant as being involved in the investigation made during opening statement can hardly rise to the level of plain error, if indeed they were error as discussed below. Statements made in opening are not evidence and it is misleading to use the term "introduce" in this argument since no evidence was introduced.

Finally, the State responds that under the dictates of **State v. Gilliam** (1994), 70 Ohio St.3d 17, 20, the inculpatory statement of a co-defendant may or may not be inadmissible hearsay. Since the statement was never adduced at trial and no objections were lodged calling for its justification, plain error cannot be shown to exist.

In the second portion of Proposition of Law No. I, the appellant complains that it was improper for the State to introduce the two taped confessions of co-defendant Raymond Smith into evidence as State's Exhibits 11A and 11B in the penalty phase. A reading of the record of the transcript of the penalty phase, P.Tr. at 291, reveals that these exhibits were also received into evidence without objection.

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The appellant complains that the taped statements were improperly offered at the sentencing phase as confessions of the co-defendants which implicated the appellant. What the appellant overlooks is that these statements were offered in rebuttal at the penalty phase to contradict false statements made by the appellant attributed to the detective assigned to investigate the case. Tr. at 265-270.

The defense was well aware that it risked bringing in the tapes for rebuttal and practically so stated on the record. P.Tr. at 44 - 45. The defense was willing to stop if it felt it had not opened itself up for rebuttal. P.Tr. at 45. The appellant generally implies that he was wrongfully convicted because of perjury, negligence of a criminal justice official, coerced confessions, forensic errors, and overzealous police and prosecutors to solve a case. P.Tr. at 41. The appellant specifically alleges that Det. Leiby "set me up and he made some comments in the paper to the Chronicle and one of the comments was that it was impossible for him to get fifteen people to lie against us." P.Tr. at 42. Appellant goes on to suggest then that Det. Leiby went out and coerced people into coming forward and testifying against the appellant. P.Tr. at 42-44.

The tapes in question clearly show that Raymond Smith approached Det. Leiby and therefore were relevant and admissible as a result of the appellant's specific trial tactics.

RESPONSE TO PROPOSITION OF LAW NO. II

In his second Proposition of Law, appellant is essentially contending that the trial court did not have independent evidence of the proof of a conspiracy to admit the adduction of statements pursuant to O. Evid.R. 801(D)(2)(e). The appellant willfully overlooks the fact that this particular court presided over the prior trial of co-defendant Raymond Smith and

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heard all of the evidence. It is the State's position that this is akin to having a pretrial hearing to determine the existence of a conspiracy that would allow the adduction of the evidence in question. More importantly, this court had before it the entire deposition of witness Michael Smith, who was present when the appellant and Raymond Smith brutally shot, beat, stabbed, and ran over the victim in this case. Michael Smith's deposition was a part of the record and available to the court prior to trial. P.Tr. at 3. The State neglected to point this fact out on the record until the penalty phase, but nevertheless, it is in the record that the trial court had Michael Smith's complete deposition before it upon which to substantiate the determination that a conspiracy existed between Raymond Smith, Danny Smith, and the appellant of which the object was to silence him as a witness.

The prior trial and the deposition of Michael Smith notwithstanding, this court may still conclude that the State established a *prima facie* case that a conspiracy existed.

Prior to the State eliciting any statements pursuant to Ohio Evidence rule 801(D)(2)(e), the State proved that Ronald Lally was a confidential informant working for the Elyria Police Department Narcotics Unit. Tr. at 493. A photograph of Ronald Lally's body was identified as the informant. Tr. at 493; State's Exhibit 2B. The State also established that Ronald Lally purchased drugs on June 7, 1993 from Danny Smith and Raymond Smith. Tr. at 494-496. As a result of these efforts, both Danny Smith and Raymond Smith were arrested. Tr. at 496-497; State's Exhibits 6 and 7. Subsequently, both Danny Smith and Raymond Smith were indicted and had Common Pleas Court files which reflected a trial date of January 19, 1994. Tr. at 497-498; State's Exhibits 4 and 5. These cases were dismissed because the State could not produce its informant. Tr. at 498.

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The State's first witness was Det. Scott Ashley, who testified that the victim was an informant working for him who purchased drugs from Raymond and Danny Smith. Ashley testified that the victim's efforts resulted in cases that never went to trial as a result of the State not being able to produce the informant. He identified all court records and files including the tapes of the drug transactions regarding Raymond and Danny Smith. Tr. at 492-497.

The State called to the stand Sandra Williams to testify that Danny Smith had come to her house and threatened her, Ronald Lally, and his family's safety. Tr. at 511.

The State next called Ptlm. Homoki, who testified as outlined above that the appellant accompanied Danny Smith to Mr. Hero on Middle Avenue in Elyria, Ohio. Tr. at 528. The officer saw both the appellant and Danny Smith. Tr. at 524-525. The State established, through excited utterances, as argued above, that Ronald Lally had done some work for the Elyria Narcotics Department and "these individuals" were threatening him. Officer Homoki testified that Ronald Lally stated that "these individuals" had threatened his life because he was going to testify against them. Tr. at 528. At this point, the State had established a **prima facie** case that a conspiracy existed to silence the testimony of Ronald Lally and that the appellant participated in it.

> In order for statements to be admissible under the co-conspirator rule, it is sufficient if the conspiracy is established by evidence making a *prima facie case* which fairly raises a *presumption* or *inference* of conspiracy. [Citations omitted] A "*prima facie* case" is one in which the evidence introduced is sufficient to support but not to compel a certain conclusion and which does no more than furnish evidence to be considered and weighed, but not necessarily accepted by the trier of facts. [Citations omitted]

State v. Martin (Lake County, 1983), 9 Ohio App.3d 150 at 152.

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Assuming *arguendo* that this court is not satisfied with the above, it still has the option of finding, as the Court of Appeals did, that any error, if it occurred, was harmless. "Where constitutional error in the admission of evidence is extant, such error is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of the defendant's guilt." **State v. Williams** (1983) 6 Ohio St.3d 281 par. 6 of syl. "Error in admitting hearsay does not justify reversal where it is harmless." **State v. Carter** (1995), 72 Ohio St.3d 545, 550.

The appellant admitted to Terry Hopkins that "they stomped him and ran over him with a car" and that "they shot him and cut him." Tr. at 576 through 577. Hopkins further testified that Raymond Smith, Michael Smith, and Stanley Jalowiec were all three talking about it and that they were bragging about what they had done. Tr. at 577. This, coupled with the detailed statement of Michael Smith who was present and heard the appellant and Raymond Smith take Ronald Lally's life, even though he was pleading to survive, clearly prove the State's case and render any error in allowing testimony pursuant to the co-conspirator rule harmless based upon this record. **State v. Carter** (1995), 75 Ohio St.3d 545, 550; **State v. Milo** (Franklin County, 1982), 6 Ohio App.3d 19, 23.

RESPONSE TO PROPOSITION OF LAW NO. III

The appellant next contends that the trial court erred in denying his motion for acquittal pursuant to O. Crim.R. 29. The appellant's position is premised upon his claim that the State of Ohio did not prove venue. The appellant contends that the State did not prove venue because it did not demonstrate that the crime or any element of it occurred in Lorain

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County. For the reasons set forth below, as the Court of Appeals found, such claim is unfounded.

Appellant's position is summarized on page seventeen (17) of his brief where he wrongfully claims that "There is absolutely no evidence in this case to demonstrate the essential element of prior calculation and design." Appellant reasons that by failing to establish prior calculation and design or purpose, the State failed to prove an essential element of aggravated murder.

As the appellant acknowledges in his brief, Ohio Revised Code §2901.12(A) and (G) provide for trial in the court having jurisdiction of the subject matter and in the territory of which the offense or any element thereof was committed. It also provides that when it appears beyond reasonable doubt that an offense or any element was committed in any of two or more jurisdictions, but cannot be reasonably determined in which jurisdiction the offense or element was committed, the offender may be tried in any jurisdiction.

Appellant apparently is arguing that the elements of purposefulness and/or prior calculation and design did not occur in Lorain County. All preparation, planning, and prior calculation and design occurred in Lorain County. The only element that occurred in Cuyahoga County was the actual taking of Ronald Lally's life.

The State's first witness was Det. Scott Ashley of the Elyria Police Department. Det. Ashley testified that Ronald Lally was an informant working for him. Det. Ashley was a member of the Elyria Police Department Narcotics Division. Tr. at 492. Det. Ashley identified a photograph of Ronald Lally's body marked as State's Exhibit 2B. Tr. at 493. He also identified State's Exhibit 9, which was a confidential informant agreement signed by

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Ronald Lally. Tr. at 494. Det. Ashley testified that Ronald Lally, as an informant, purchased drugs from Danny and Raymond Smith. Tr. at 494. He identified tapes of the drug buys. State's Exhibit 10. He identified arrest reports for Danny Smith and Raymond Smith. Tr. at 496, State's Exhibits 6 and 7. He identified the court files pertaining the prosecutions of Raymond Smith and Danny Smith. State's Exhibits 4 and 5; Tr. at 497. He further testified that those cases never went to trial because the State of Ohio could not produce the informant. Tr. at 498.

The State called Sharon Hopkins to the stand. Sharon Hopkins testified to the carefully orchestrated events that occurred during the evening that put everyone involved at the right time and place. Such a chain of events would only be the result of prior calculation and design brought about in a skillful plan. Sharon testified that two cars were involved in the plan to get Ronald Lally outside of the city of Elyria limits in the country wherein Michael Smith and Raymond Smith could get into the car driven by Stanley Jalowiec containing Ronald Lally. Tr. at 681-689.

The State called Brian Howington to the stand who testified to the events of that evening and how Stanley Jalowiec ended up with his aunt's car so that he could transport Ronald Lally to the agreed meeting place outside of the City of Elyria. This permitted the abduction of the victim and the eventual murder could take place. Appellant left Brian Howington's aunt's home with the victim and met the other conspirators at the agreed meeting spot outside of the City of Elyria. His testimony concerning these carefully orchestrated events takes place on pages 714-723 of the transcript.

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Finally, the State called Michael Smith to the stand who testified to the events that led up to the gruesome killing of Ronald Lally. His testimony concerning the events of the evening begins on page 777 of the transcript and ends on page 787. He corroborates the testimony of Sharon Hopkins and Brian Howington by placing all of the conspirators at the location in the country outside of the city limits of Elyria at the right time and in the vehicle procured for the trip. He also testifies to the gruesome events that led up to the shooting, knifing, stomping and running over with the car of Ronald Lally after which he was left to freeze to death in the sub-zero snow-covered cemetery.

The State obviously presented facts from which the jury could have clearly inferred and concluded that the assassination of Ronald Lally on the date he was to testify against Raymond Smith and Danny Smith was a purposeful killing committed with prior calculation and design. The prior calculation and design clearly occurred in Lorain County before the plan was set in motion.

Appellant should not be heard to logically extricate himself from these facts by claiming that the plan was to put Ronald Lally on a bus. One can not logically or justly argue that Ronald Lally accepted the offer to do crack cocaine and leave town on a bus when he was held at gunpoint. Clearly, the testimony is uncontradicted that Raymond Smith brandished a gun and told Ronald Lally not to make any sudden moves as soon as he got in the car. Tr. at 781.

RESPONSE TO PROPOSITION OF LAW NO. IV

In his fourth Proposition of Law, appellant wrongfully contends that both the trial court and the prosecutor were not concerned about the potential of prospective jurors viewing

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the defendant in restraints. The appellant, through counsel, states "Possibly the most disturbing thing about this occurrence is the cavalier attitude of both the court and the prosecutor, sort of a 'too bad, so sad' response to defense counsel's concern." App. Brief at 20. Such claims are an absolute misrepresentation and/or falsehood. It is readily apparent that the prosecutor suggests that the court voir dire the jury to see if such conduct took place.

What is truly disturbing about this Proposition of Law is not the attitude of the court and the prosecutor, but appellate counsel's manipulation of the record. Appellate counsel clearly stops quoting the record in the middle of the court's statement regarding the issue. The court, after the portion of the record reproduced in the appellant's brief, went on to state "certainly you have the opportunity to inquire of the prospective jurors as to whether or not they have been prejudiced because of this, okay? Anything further?" Tr. at 36.

It is incumbent upon the appellant to demonstrate error. The fact that potential jurors may have seen the appellant in restraints does not automatically call for a mistrial without demonstrating that this fact had occurred. The State suggested the court voir dire the jury before automatically granting a mistrial. The court provided the defense the opportunity to inquire of the prospective jurors as to whether or not they had even seen the appellant in restraints. There is no evidence in the record to support that any potential juror in fact saw the appellant in restraints or that he was prejudiced in any way as a result of this sighting. As such, this issue is not even truly before this court. Solely as a result of the incomplete reproduction of the record on this issue, only the specter of error exists.

RESPONSE TO PROPOSITION OF LAW NO. V

Appellate counsel has correctly set forth the law regarding ineffective assistance of

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counsel. Appellant however misapplies this law to the facts of this case and misrepresents what the law is regarding some of the issues that counsel is supposedly ineffective for.

In his first example of alleged ineffectiveness, appellant contends that trial counsel was ineffective when he failed to rehabilitate jurors and failed to timely object to "unfounded challenges" to the jurors by the State. App. Brief at 22. For the reasons set forth in the next Proposition of Law, error was not committed in the voir dire of this case. However, this court has made it very clear that it has declined to call counsel ineffective for failing to rehabilitate jurors in a capital case stating that counsel was in a much better position to determine whether the jurors merited in depth examination. **State v. Keith** (1997), 79 Ohio St.3d 514, 521; **State v. Phillips** (1995), 74 Ohio St.3d 72, 85. This court recognized that voir dire is largely a matter of strategy and tactics, and found that counsel are in a much better position to determine whether prospective jurors were qualified to be on the panel.

This court also declined to find that even if counsel were deficient, that such deficiency in picking a jury would not amount to prejudice to the appellant. **State v. Bradley** (1989), 42 Ohio St.3d 136; **State v. Keith, supra**, at 521-522.

Appellant next assigns counsel's failure to object to the introduction of a co-defendant's statement which stated that the appellant was directly involved in the killing in this case. As previously pointed out in Proposition of Law No. I, there was no introduction into evidence of the co-defendant's statement. The recounting of the events that led up to this trial during the investigation, during opening statement, is not the introduction of evidence into the case.

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Thirdly, appellant argues that his trial counsel were ineffective for failing to request expert assistance in determining the cause of death. Appellant attempts to create the appearance of a need for a forensic expert by again misrepresenting the record. Appellate counsel correctly states that Dr. Heather Raff testified that the victim's injuries were consistent with being stomped and/or struck by a vehicle several times. However, appellate counsel wrongfully portrays the record by saying that there were no markings on the body to support this finding. The appellant cites the record at page 657. A reading of that page reveals that Dr. Raff testified that there were no specific markings that would positively identify a tire or shoe pattern. The doctor's testimony was that there were no specific patterns that she could trace back to a shoe or a boot. Tr. at 657-658. The doctor never said that there were not marks on the body. The marks on the body were consistent with stomping or being struck by a car. They were not proof positive that one or the other could be identified. This does not mean that there were no markings as appellate counsel states.

Therefore, there is no showing in the record that a forensic expert was needed on behalf of the appellant. This is especially true when one compares Dr. Raff's testimony with that of State's witness, Michael Smith, who was present at the victim's demise.

Fourthly, appellant claims that trial counsel was ineffective for failing to object to the jury instruction concerning all statutory mitigating factors and to the instruction requiring no sympathy, or what has been termed the acquittal first instruction. Appellant claims defense counsel was ineffective for failing to request a definition for the term "mitigation" at the penalty phase and to the instruction that the appellant was charged as a principal offender.

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Appellant only specifically contests the jury instructions for legal reasons in Propositions of Law Nos. IX and XIII. For the reasons set forth in the responses to those propositions of law, trial counsel could not have been ineffective since the instructions were legally correct. To the extent that there is no specific argument as to why counsel were ineffective for other reasons and no authority to support the claims in this section of this Proposition of Law, the State need make no further response.

Finally, appellant claims his trial counsel were ineffective in permitting him to make an unsworn statement which resulted in the State being able to supply rebuttal testimony. Trial counsel was not ineffective for the reasons set forth in the Response to Proposition of Law No. VII. Obviously, all testimony offered by the appellant is subject to rebuttal. To hold that counsel are ineffective per se because the State was able to supply rebuttal testimony would severely limit the practice of law and the discretion necessary to effectively represent any client in capital litigation.

For the reasons set forth above and in the corresponding responses to the claimed errors elsewhere in this brief, appellant has failed to establish that counsels' performance has fallen below an objective standard of reasonableness. Appellant has also failed to establish that counsel failed to act as counsel, prejudice arose from counsel's deficient performance, and that but for the deficient performance, there exists a reasonable probability that the result of the trial would have been different. **State v. Bradley** (1989), 42 Ohio St.3d 136. Counsel is presumed competent and his tactics are presumed sound. **State v. Smith** (1985), 17 Ohio St.3d 98, 100; **State v. Hamblin** (1988), 37 Ohio St.3d 153, 155-156.

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RESPONSE TO PROPOSITION OF LAW NO. VI

In his sixth Proposition of Law, appellant claims that potential Jurors Porter, Kowalski, Fobell, Eubanks, and Buck were improperly excused. Appellant only raised claims pertaining to Juror Porter, Juror Eubanks, and Juror Kulcsar in the court of appeals.

Despite appellant's claims to the contrary, the proper standard for determining when a prospective juror may be excluded for cause based upon his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. **State v. Rogers** (1985), 17 Ohio St.3d 174, 478 N.E. 2d 984 syl. 3. See also **State v. Wilson** (1996), 74 Ohio St.3d 381, 388, 659 N.E. 2d 292, 302 (reaffirming the **Rogers** standard).

It is not necessary for the State to show that a juror must unequivocally be opposed to the death penalty before he can be challenged for cause. On pages 44, 46, 50, and 52 of the transcript, potential juror Noreena Porter indicated she could not impose the death penalty. On pages 50 and 55, defense counsel managed to twist the issue to the point where she acknowledges she might be able to pick death as a possible punishment. The defense did so on page 53 as well and she expressed confusion on page 54 as to the questions "just going around and around." On page 55, the prospective juror acknowledged that she put in her questionnaire that she could not vote for the death penalty and would be just as much a criminal in executing a convict. On page 55-56 of the transcript, the juror again acknowledges that she could vote for the death penalty. However, on page 57, when facing the appellant, the juror admitted she could not vote for the death penalty and return such a verdict.

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The inquiry of potential juror Eubanks begins on page 332 of the transcript. Initially the potential juror commented that he could consider the death penalty along with the two life sentences. However, when confronted with the possibility of signing his name to a verdict which called for the death of another human being, the potential juror began to vacillate. Tr. at page 338. When asked if it was fair to say that his view substantially impaired his ability to impose the death penalty, the potential juror finally stated yes. Tr. at 339.

Regardless of what potential juror Kowalski stated at the close of his inquiry with the court and the attorneys, he realized that under no circumstances could he sign his name to a piece of paper imposing the death penalty. Tr. at 218. After the defense lawyers' attempt to rehabilitate him, he announced that he could not consider the death penalty as a potential sentence. Tr. at 220-221. On page 223, the juror admits that it would not be impossible for him to sign his name to the death penalty, but that it would be much harder. Tr. at 223. Finally, on pages 224-225, the potential juror Kowalski states that his views substantially impair him from considering the death penalty as one of the alternatives in this court and the court properly excuses him.

Next, appellant complains of the dismissal of potential Juror Fobell from the panel. As the appellant concedes, neither the court nor the defense asked him questions. The potential juror indicated that he was not sure if he believed in the death penalty and stated that his views substantially impaired him from considering the death penalty. Tr. at 244. Again, without objection, the potential juror was excused.

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Finally, appellant attempts to make to support his position in this proposition of law citing potential Juror Buck. Appellant acknowledges in his brief that the potential juror stated that his view substantially impaired his ability to impose the death penalty. Tr. at 383. Appellant again argues that the standard is that he must unequivocally refuse to impose the death penalty before being removed from a jury.

Appellant concedes that objections to the excusing of these jurors for cause were not made and argues plain error. As stated above, a trial court can properly dismiss a juror if his views regarding the death penalty would substantially impair his ability to impose it. Such was the case which each of the jurors complained of here. As stated in the proposition of law next above, great deference should be paid to the judgment of trial counsel and the trial court as they are there to witness and see things that may not be revealed in the record.

RESPONSE TO PROPOSITION OF LAW NO. VII

Appellant claims in his seventh Proposition of Law that the imposition of the death sentence in his case is inappropriate and unreliable because it was undermined by the admission of other criminal acts which the appellant had perpetrated and the introduction of an extra judicial statement from the co-defendant which directly involved the appellant in the killing. As the appellant admits in his brief on page 33, he took the stand and gave an unsworn statement. At the conclusion of the unsworn statement, the trial court obviously and properly ruled that the State could rebut this unsworn statement. At that time, the defense elected to put the appellant back on the stand to tell the jury about his prior criminal misdeeds. P.Tr. at 59-74. In his unsworn statement, the appellant also wrongfully cast

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aspersions upon the motivations of the investigating detective, claiming that he went out and improperly caused people to come in and falsely testify against him. P.Tr. at 41-43.

The appellant specifically accused Det. Leiby of altering evidence and lying about the facts of this case. He stated that he coerced confessions. P.Tr. at 41. Likewise, the appellant offered testimony that he took in other people and tried to maintain a job in an effort to show him being of good character. The State so argued. P.Tr. at 46. The State further argued that evidence of the felonious assaults were relevant to counteract the appellant's claim that he was somewhat disabled due to arthritis and incapable of manhandling people. The State argued that the appellant portrayed himself as a person who cared for little boys, was their buddy, and went on walks to the parks. He portrayed himself as being a kind person. The State argued that the appellant's criminal misdeeds were relevant to rebut the claim that they have established. P.Tr. at 49. The State denied that the evidence was being offered under Evid.R. 404(B) as consistent acts but as relevant rebuttal under Evid.R. 404(A). As a result of the court's granting the State the right to rebut this type of character evidence, the court allowed the defense to recall the appellant in an attempt to explain his violent acts. P.Tr. at 60-74.

What appellant is in essence claiming is that the State's rebuttal testimony "effectively destroyed any testimony that the appellant produced through his family members." Appellant's brief at 33.

The fact that the State's rebuttal evidence is effective hardly undermines the constitutional reliability required for the imposition of the death penalty. Likewise, the appellant's opening of the door by consciously choosing to offer evidence from his history,

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character, and background in a capital case in mitigation permits the State to offer evidence to the contrary in rebuttal. See **State v. McNeill** (1998), _____ Ohio St.3d _____, _____; **State v. Clark** (1988), 38 Ohio St.3d 252, 254-255, 527 N.E. 2d 844; **State v. Taylor** (Cuyahoga County 1995), Case No. 65711, unreported, copy attached; and **State v. Gumm** (1995), 75 Ohio St.3d 413, syl.

Appellant's misconception is readily demonstrated by the use of the term "mitigation phase" instead of "penalty phase." Appellant writes on page 34 of his brief "what should have been an opportunity to establish why the appellant did not deserve the death penalty turned into an opportunity for the State to present any and every bad act or misdeed of the appellant. Clearly, this is not the purpose of the mitigation phase of the trial." Despite appellant's claims to the contrary, if appellant chooses to place his character and background at issue as to why he did not deserve the death penalty, the State is entitled at a penalty phase, to offer evidence to show that his character and background show that he is deserving of the death penalty. **State v. McNeill, supra.**

> Along similar lines, this court has already written
>
> > we will not sanction a procedure by which counsel for a criminal defendant is provided full opportunity to vigorously argue the full range of mitigating evidence procured on behalf of his or her client, while his adversary, the prosecutor, is precluded from vigorously arguing the entire scope of facts surrounding the act of murder of which the defendant has been convicted. We instead affirm the view of Justice Cardozo as did the majority of the United States Supreme Court in **Payne,** that "[j]ustice, though due to the accused, is due to the accuser also."

State v. Hill (1996), 75 Ohio St.3d 195, 201.

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The reasoning is obvious. The appellant should not be heard to introduce evidence regarding his history, character, and background in mitigation on his own behalf without the State being able to offer specific examples from his history, character, and background pursuant to Evid.R. 404(A)(1) without undermining the constitutional reliability in Ohio's death penalty scheme.

RESPONSE TO PROPOSITION OF LAW NO. VIII

The appellant next contests the proportionality review that must be afforded a defendant in Ohio's death penalty scheme under Ohio Revised Code §2929.05. The appellant first contends that the life sentences should be included in the informational tracking system which constitutes a necessary part of Ohio's death penalty scheme and proportionality review. This Proposition of Law has been repeatedly rejected by Ohio's court system, recently in **State v. Spivey** (1998), 81 Ohio St.3d 405. Sub propositions of law nos. 5K, 5L, and 8.

RESPONSE TO PROPOSITION OF LAW NO. IX

In Proposition of Law No. IX, the appellant contests the jury charge given at the close of the penalty phase. A reading of the record reveals that there were no objections lodged concerning the charge. P.Tr. at 344.

Firstly, appellant complains that the jury instruction violated this court's dictate in **State v. Brooks** (1996), 75 Ohio St.3d 148, 160. A reading of the charge in this case will clearly reveal that it does not violate this court's dictates in **State v. Brooks, supra.** A similar instruction which was not quite as favorable as this one regarding the **Brooks** issue was upheld in **State v. Goff** (1998), 82 Ohio St.3d 123. Clearly, the instruction given in this

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case was not the erroneous language that required unanimity before going on to considering a life sentence that served as the basis for reversal in **Brooks**.

The appellant also claims that the jury was "no doubt confused by the court's repeated use of the plural aggravating circumstances." Not only did the State argue to the Ninth District Court of Appeals that the court reporter incorrectly transcribed the record, the State received an Order (which is attached hereto and made a part hereof) correcting the record demonstrating that the court reporter erred as a result of automatic transcription which automatically supplied the word aggravating "circumstances" instead of aggravating "circumstance."

Despite appellant's general disparaging of the charge in this case, it has been approved by this court and many others in the past as being legally sufficient.

RESPONSE TO PROPOSITION OF LAW NO. X

In his tenth Proposition of Law and Sub-Propositions of Law marked XI(A) through XI(E) (there are several Sub-Propositions of Law XI(E)), the appellant contests the constitutionality of Ohio's death penalty scheme. It is respectfully submitted that each and every sub-propositions of law contained in Proposition of Law No. X have been rejected time and time again, recently in **State v. Spivey** (1998), 81 Ohio St.3d 405, 429-431. Specifically, the propositions advanced have been denied in **Spivey** under Sub-Proposition of Law Nos. V(D), V(B), V(C), V(E), V(I) and V(M) respectively.

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RESPONSE TO PROPOSITION OF LAW NO. XI

> Properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting the trier of fact to determine the issues or are illustrative of testimony or other evidence, as long as the danger of the material prejudice to the defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number.

State v. Maurer (1984), 15 Ohio St.3d 239, syl. 7. **State v. DePew** (1988), 38 Ohio St.3d 275.

Despite the claims of the appellant to the contrary, these photographs were not cumulative, not repetitive and, even though gruesome, were relevant and probative to determine the issues and illustrated the testimony and other evidence in the case. The appellant, as appellants often do, claimed there was never any dispute concerning the cause of death. Yet, in his brief, the appellant only admits that the victim died of gunshot wounds and several blows to the head. The victim was shot, stabbed, stomped and run over by a car repeatedly.

It should be quite apparent from reading appellant's brief that the elements of prior calculation and design, and purposefulness of the events of the evening were extremely relevant and contested despite whether appellant claims he was not present. Indeed, several assignments of error were devoted to pointing out that the State failed to prove prior calculation and design. The manner of infliction of death is a factor to be considered in purposefulness. The fact that a gun and knife were present also indicate prior calculation and design.

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The appellant argued at trial that the State's witnesses were less than credible. The photographs document Michael Smith's testimony as he recounts the events that led up to Ronald Lally's death, including his pleading for his life. Each photograph shows a different scene or angle necessary to give the jury a complete picture of what happened that evening in corroboration of Michael Smith's testimony.

The claim that these photographs have no relevance to the facts and issue is, at best, an over-simplification.

Appellant also cites psychological works which are not a part of the record in this case. There is little doubt that gruesome photographs are gruesome because they have psychological impact. However, that does not mean they are irrelevant or inadmissible. The State represents to this court that the psychological arguments advanced in this Proposition of Law for the first time before this court would apply to every gruesome photograph ever offered in a murder trial and hence are inapposite to the issue before this court.

RESPONSE TO PROPOSITION OF LAW NO. XII

As previously stated under Proposition of Law No. VII, it is proper for the State to offer evidence in rebuttal of the appellant's history, character, and background to counter evidence along the same lines if offered by a capital defendant. Clearly, Evid.R. 404(A) permits as much as do the cases cited in Response to Proposition of Law No. VII above. The appellant intimates, but does not state that the State did not actually rebut something testified to by the defense. Clearly, the appellant, in his unsworn statement, represented that he was the kind of individual that was so disabled he could not work and hence could not commit the violent assaults. Tr. at 22, 23, 24, and 25. He offered testimony that he was a kind person that helped children. Tr. at 26.

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These statements about the appellant's kindness are only relevant to the penalty imposed because they suggest to the jury that he has some residual good in his makeup or background that warrants some sort of mercy. The State of Ohio has no quarrel with this logic. However, the State of Ohio is free to offer evidence on the same issues. **State v. McNeill, supra.** Violent offenses and infractions that he has committed in the past are relevant to show that he is not the kind person he portrayed himself to be. The State concedes that the evidence may be viewed as "aggravating." That does not make it a non-statutory aggravating circumstance. The appellant chose to avail himself of the catch-all section of Ohio Revised Code §2929.04(A)(7) which pertains to factors that are relevant to the issue of whether the capital sentence should be imposed. Rebuttal evidence offered on these same issues is permissible and does not automatically become a non-statutory aggravating circumstance because it is viewed by defense lawyers or appellate counsel for capital litigants as such. Likewise, the fact that it helped "pave the way for appellant's conviction" does not make it inadmissible or irrelevant under Ohio's death penalty scheme.

RESPONSE TO PROPOSITION OF LAW NO. XIII

In his last Proposition of Law, appellant attacks the jury charge given in the guilt phase of this matter. Specifically, the appellant argues that by incorporating the O.J.I. definition of cause, the jury is somehow prevented from reconciling the specific intent requirement of the murder statute with the definition of cause even though it is in the statute causation is clearly an element of Ohio Revised Code §2903.01. The appellant does so without having rendered an objection to the charge.

The appellant claims that the jury charge, when taken as a whole, was "so confusing one simply cannot find that the jury was clearly instructed" without specifically telling how

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or why. Appellant's brief at 5. It is quite clear from a reading of the charge that purpose to kill and prior calculation and design are two of the specific elements required to convict of the charge of aggravated murder. The charge is therefore legally proper. **State v. Phillips** (1995), 74 Ohio St.3d 72, 100. The jury can clearly tell from the charge that they must find that the defendant purposely caused the death of Ronald Lally with prior calculation and design. They must find purpose and they must also find causation. The State concedes that the finding of purpose may also result in the finding of causation, as a result of the means used, but this does not mean that cause can be substituted for purpose.

Respectfully submitted,

GREGORY A. WHITE
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Lorain County, Ohio

By: _____
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PROOF OF SERVICE

A copy of the foregoing ***BRIEF OF APPELLEE*** was sent by regular U.S. Mail to Patricia Millhoff, Counsel for Appellant, at 80 West Bowery Street, Suite 310, Akron, Ohio 44308 and Nathan Ray, Counsel for Appellant, at 137 S. Main Street, Akron, Ohio 44308, on this 29 day of December, 1998.

_____
JONATHAN E. ROSENBAUM
Chief Counsel, Criminal Division

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APPENDIX

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JOURNAL ENTRY

COURT OF COMMON PLEAS

Lorain County, Ohio

Donald J. Rothgery, Clerk

Case. No. 95CR046840

STATE OF OHIO — Plaintiff — Attorney for Plaintiff

vs.

STANLEY JALOWIEC — Defendant — Attorney for Defendant

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State's Motion to correct the record is granted.

Judge

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STATE OF OHIO, PLAINTIFF-APPELLEE
vs.
DONNIE HATCHER, JR., DEFENDANT-APPELLANT

NO. 70857
COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY
1997 Ohio App. LEXIS 3403
July 31, 1997, DATE OF ANNOUNCEMENT OF DECISION

CHARACTER OF PROCEEDING: Criminal appeal from Court of Common Pleas, Case No. CR-330382.

COUNSEL

APPEARANCES:
For Plaintiff-Appellee: Stephanie Tubbs Jones, Cuyahoga County Prosecutor, Martina Kulick, Assistant County Prosecutor, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.
For Defendant-Appellant: James A. Draper, Cuyahoga County Public Defender, Jean M. Gallagher, Assistant Public Defender, 1200 West Third Street N.W., 100 Lakeside Place, Cleveland, Ohio 44113-1569.

JUDGES

JAMES D. SWEENEY, CHIEF JUSTICE. PATRICIA A. BLACKMON, J., and, JAMES M. PORTER, J., CONCUR.
AUTHOR: SWEENEY

OPINION

JOURNAL ENTRY AND OPINION

SWEENEY, JAMES D., C.J.:

Defendant-appellant Donnie Hatcher, Jr. appeals from his convictions for: 1) preparation for shipment, shipment, transporting, delivering, preparing for distribution or distributing cocaine in violation of R.C. 2925.03(A)(2); 2) possession of cocaine in an amount greater than the bulk amount but less than three times the bulk amount in violation of R.C. 2925.03(A)(4); and 3) possession of criminal tools, money and/or motor vehicle, in violation of R.C. 2923.24. The appellant was sentenced to a term of incarceration of five to fifteen years on counts one and two, to be served concurrently, with three years of actual incarceration on count one. On count three the court imposed a term of incarceration of one year, to be served consecutively with counts one and two. A mandatory fine of $ 5,000 was imposed on count one, but the required fine was waived on count two.

Michael Robinson, Lester Whittsette and Dale Barber, a juvenile, were arrested at the same time as the appellant. Although Michael Robinson was tried with the appellant, he was ultimately acquitted by the jury. Prior to trial, the court was made aware that counsel for Mr. Robinson and counsel for the appellant are law partners. Both attorneys stated on the record that this potential conflict had been discussed with their respective clients (T. 19, 20). Counsel for Robinson indicated to the court that there was no problem under **United States v. Bruton.** The trial court inquired of the appellant, personally, as to his readiness to proceed, and he answered in the affirmative (T. 24). The court proceeded to hear and deny the appellant's motion to suppress evidence.

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After the suppression hearing, but prior to trial, Lester Whittsette pled guilty to: 1) possession of cocaine, less than the bulk amount; and 2) preparation for shipment, shipment, transporting, delivering, preparing for distribution or distributing cocaine. Whittsette testified at trial on behalf of the State, but he was made no promises as to his sentencing in return for his testimony (T. 558.) There is no evidence in the record as to sanctions imposed upon Barber by the juvenile justice system.

Also prior to trial, the appellant requested that the court prohibit the State from introducing evidence as to the specifications in the indictment regarding the appellant's past felony conviction for drug trafficking. Over the State's objection, the court granted the appellant's request and agreed that the prior conviction would not be mentioned (T. 522-526).

At trial the State presented the testimony of Lester Whittsette, Cleveland Police Detectives James Kooser, Ronald Ehrbar and Timothy Gaertner, and Scientific Examiner Cynthia Lewis-Dakota. The following facts were placed before the court throughout the testimony of the witnesses.

On May 25, 1995, the appellant picked up Whittsette, Robinson, and Barber in his Blazer and proceeded to Dove Park where they played basketball with five other people. The game was interrupted for a few minutes when a black Blazer arrived. The appellant approached the black Blazer and thereafter was seen with a bag in his hands. After the appellant placed this bag under the seat of his own Blazer, the basketball game continued. At some point the appellant injured his ankle and the four returned to their neighborhood in the appellant's Blazer. Because of the appellant's injury, Whittsette drove the vehicle. The appellant was seated in the front passenger position, Robinson and Barber were in the back seat. On the way home, they stopped at the store and the appellant purchased beer.

After this purchase, Whittsette proceeded to drive down Greenwich and turn right onto 112th Street. Garett Anderson was standing on the street and, as the vehicle turned, he approached. Anderson leaned into the open passenger window and spoke with the appellant. Suddenly an unmarked police vehicle came around the corner. Whittsette testified that the appellant began screaming "go, go, go, Vice" (T. 565). Cleveland Police Detectives Geartner, Kooser, and Ehbar testified that these, or substantially similar words, were spoken by Whittsette (T. 623, 682, 698). The police observed the appellant holding a brown paper bag apparently showing Anderson the contents (T. 623). Whittsette, Robinson and Barber, cooperated with the instructions given by the police. The appellant, however, attempted to exit the vehicle and leave the scene, but was prohibited by the police. When Detective Kooser looked inside the vehicle, he observed the cocaine in an open brown bag sitting on top of the beer (T. 624). Anderson fled but was apprehended by Detective Geartner as he ran down the street.

The detectives found six ounces of cocaine inside of a brown paper bag, each ounce in its own plastic bag. The bag containing the cocaine was placed on top of the beer which was in a larger brown bag. The officers found that the beer and cocaine had been placed on the floor of the Blazer's front passenger side, in between the appellant's feet. Whittsette testified that the cocaine did not belong to him.

Ms. Lewis-Dakota testified that she performed a drug analysis on the contents of the six plastic bags recovered by the detectives. In her opinion, the plastic bags contained a total of 167.52 grams of cocaine (T. 714). Detective Kooser testified that the street value of the recovered cocaine was approximately $ 7,200.00 (T. 632). A total of $ 91.00 was recovered from the four individuals inside the Blazer.

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The appellant presented the testimony of Robert Smith, Irene Bell, Dale Barber and Donnie Hatcher, Sr. Three of the witnesses, Mr. Smith, Ms. Bell, and Mr. Barber, are neighbors of the appellant. Each testified that Anderson was not standing next to the appellant's Blazer, but rather was down the street near Mr. Smith's garage. The witnesses also testified that it was the police who brought Anderson to the scene, but that the police did not place him under arrest.

Barber testified that during the basketball game, Whittsette left in the appellant's Blazer to answer a page. Whittsette was asked to bring back something to drink and he returned with beer forty-five minutes later. No one, save Whittsette, drank any beer. Barber testified that he, Robinson, and the appellant entered the truck and Whittsette drove home. Barber also testified that the appellant never reached in the bag containing the beer (T. 831).

The appellant sets forth seven assignments of error, five through his counsel and two pro se. This court will first consider the assignments of error raised by counsel.

The appellant's first assignment of error raised by counsel:

> MR. HATCHER'S RIGHTS UNDER ART. I, SECT. 5, 10 AND 16 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED AND HE WAS IMPROPERLY DENIED A CRIM.R. 29 ACQUITTAL WHEN THERE WAS INSUFFICIENT EVIDENCE OF VIOLATIONS OF R.C. 2925.03 (A), AND R.C. 2923.24, AND THERE WAS NO JURY VERDICT ON THE PRIOR CONVICTIONS IN COUNTS ONE AND TWO THAT WERE NECESSARY FOR THE OFFENSES OF HIGHER DEGREE.

The appellant argues that the trial court erred in failing to grant his motion for acquittal pursuant to Crim.R. 29 because his convictions are based upon insufficient evidence. Specifically, the appellant states that there was insufficient evidence presented to the jury: 1) that he prepared for shipment, shipped, transported, delivered, prepared for distribution or distributed cocaine that he knew or had a reasonable belief was intended for sale or resale by himself or another; 2) that he possessed either money or a motor vehicle as a criminal tool; and 3) of the appellant's prior drug trafficking conviction or the degree of offense as required by R.C. 2945.75(A)(2).

In challenging the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." State v. Jenks (1991), 61 Ohio St. 3d 259, 574 N.E.2d 492, paragraph two of the syllabus. The weight of the evidence and the credibility of the witnesses are primarily a matter for the trier of fact, and a reviewing court will not reverse a verdict where there is substantial and credible evidence upon which the trier of fact could reasonably conclude that all elements of the offense have been proven beyond a reasonable doubt. **State v. DeHass** (1967), 10 Ohio St. 2d 230, 227 N.E.2d 212.

R.C. 2925.03(A)(2) states that "no person shall knowingly ... prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe the controlled substance is intended for sale or resale by the offender or another." In order to sustain a conviction for drug trafficking, the State must produce direct or circumstantial evidence that the defendant did one of the following: 1)

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knowingly prepare the cocaine for shipment; 2) ship, transport or deliver the cocaine; 3) prepare the cocaine for distribution; or 4) distribute the cocaine. **State v. Anderson** (Nov. 27, 1996), 1996 Ohio App. LEXIS 5322, Cuyahoga App. No. 69620, unreported. Circumstances to be considered in evaluating the evidence are the nature of the discovered substance, and the accused's dialogue and course of conduct. **Id.** citing to **State v. Patterson** (1982), 69 Ohio St. 2d 445, 432 N.E.2d 802 and **State v. Ballard** (May 31, 1990), 1990 Ohio App. LEXIS 2096, Cuyahoga App. No. 56676, unreported.

In the case **sub judice,** there is sufficient evidence upon which the jury could have convicted the appellant of transporting or shipping cocaine in violation of R.C. 2925.03(A)(2). At the time the police detectives noticed the appellant's vehicle, the appellant was in the process of showing what turned out to be cocaine to a third party who was leaning into the motor vehicle. Upon investigation, the police found six ounces of cocaine, each ounce separately wrapped, in a plastic bag located on the floor of appellant's motor vehicle and in between the appellant's feet. The appellant made no statements, but did try to exit the vehicle even after directed otherwise by the officers. Viewing this evidence, as the court must, in the light most favorable to the prosecution, it is evident that a rational trier of fact could reasonably have believed that the appellant was in the midst of a drug sale that was interrupted by the police. This circumstantial evidence is sufficient upon which to base a conviction for transporting cocaine from the basketball court to the point of an attempted sale.

Likewise, there is sufficient evidence upon which to convict the appellant for possession of criminal tools in violation of R.C. 2923.24. This statute reads in pertinent part:

> (A) No person shall possess or have under his control any substance, device, instrument, or article with purpose to use it criminally.
>
> (B) Each of the following constitutes prima-facie evidence of criminal purpose:
>
> ***
>
> (3) Possession or control of any substance, device, instrument, or article commonly used for criminal purposes, under circumstances indicating such item is intended for criminal use.

It must first be noted that the appellant correctly points out that the State presented no evidence which would attribute any specific amount of money to the appellant. Therefore, the State has presented insufficient evidence that money was possessed by the appellant as a criminal tool.

However, it is equally clear that the State presented sufficient evidence that the appellant's Blazer was used as a criminal tool. As previously indicated, the evidence, viewed in the light most favorable to the prosecution, indicates that the appellant made a drug connection while playing basketball, transported or shipped the drugs acquired there to an assignation in his own neighborhood, and at the time of the arrest was in the midst of an interrupted drug sale. This

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circumstantial evidence is sufficient upon which to base a conviction for possession of criminal tools, a motor vehicle.

The appellant also asserts that the State failed to present any evidence of the appellant's prior trafficking conviction, and thus, that the jury lacked a requisite element necessary for conviction under both R.C. 2925.03(A)(2) and R.C. 2925.03(A)(4). It must be pointed out that the State does not contest the fact that although the appellant was indicted for having and transporting cocaine in excess of three times the bulk amount, a violation of R.C. 2925.03(A)(6), the verdict form presented to the jury only permitted the jury to make a finding of guilt or innocence as to possession and/or transportation of cocaine in an amount greater than one times the bulk amount but less than three times the bulk amount, a violation of 2925.03(A)(4). Therefore, distilled, the appellant's argument is that the prior conviction specifications are degree-enhancing elements of both R.C. 2925.03(A)(2) and R.C. 2925.03(A)(4), and that the appellant was entitled to have the jury make a determination on each element of each crime.

Where the existence of a prior conviction enhances the degree of a subsequent offense, it is an essential element of the crime, and the State must prove it beyond a reasonable doubt. **State v. Allen** (1987), 29 Ohio St. 3d 53, 506 N.E.2d 199. This court has recently considered a case in which the appellant argued to the court that the prior conviction should not be placed in front of the jury. The court withheld the information, and on appeal an argument was made that since the jury had failed to make a determination on each element of the crime, the conviction should be overturned. This court held that: "under the invited-error doctrine, a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make." **State v. Nievas** (May 22, 1997), 1997 Ohio App. LEXIS 2212, Cuyahoga App. No. 70645, unreported.

The identical issue is now before this court, and as in Nievas, **supra,** while it may have been error for the court to refuse the State's request to present the evidence to the jury, it was the appellant who requested that this evidence be kept from the jury in order to avoid the prejudicial effect inherent in having the jury exposed to appellant's past felony background. The appellant willingly stipulated to the existence of the prior conviction for this very reason. This court will not permit the appellant to take advantage of the error he invited the court to make.

The appellant's first assignment of error raised by counsel is overruled.

The appellant's second assignment of error raised by counsel:

THE MISCONDUCT OF THE PROSECUTOR IN MAKING STATEMENTS THAT WERE CALCULATED TO MISLEAD THE JURY, WENT BEYOND THE RECORD, AND WERE NOT SUBSTANTIATED BY THE EVIDENCE VIOLATED MR. HATCHER'S RIGHTS TO DUE PROCESS, A JURY TRIAL, AND A FAIR TRIAL AS GUARANTEED BY ART. I, SECT. 5, 10 AND 16 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The appellant asserts in the second assignment of error that he was prejudiced by the opening, closing and sentencing arguments of the State. The appellant delineates seven separate instances of prosecutorial misconduct: 1) in opening argument the State inaccurately asserted that Mr. Whittsette was made no promises for his testimony; 2) the prosecutor inaccurately argued during closing that taking away the appellant's liberty was not the jury's decision; 3) the prosecutor incorrectly argued that the failure to dust for fingerprints was futile since some

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surfaces never leave water marks; 4) the prosecutor, without evidence in the record to support his statement, argued in closing that defense witnesses were told what to say; 5) the prosecutor misled the jury by arguing that being close to drugs is probable cause to arrest; 6) the prosecutor misquoted the testimony of Dale Barber; and 7) at sentencing, the state attempted to manipulate the process by arguing that the appellant was a professional.

The Supreme Court has held that the conduct of a prosecuting attorney during trial cannot be made a ground of error unless the conduct deprives the defendant of a fair trial. **State v. Maurer** (1984), 15 Ohio St. 3d 239, 473 N.E.2d 768. See also **State v. Keenan** (1992), 66 Ohio St. 3d 402, 613 N.E.2d 203, citing to **State v. Apanovitch** (1987), 33 Ohio St. 3d 19, 514 N.E.2d 394. Opening and closing arguments are not evidence but are intended only to advise the jury as to what counsel expects the evidence to show. **State v. Turner** (1993), 91 Ohio App. 3d 153, 631 N.E.2d 1117.

The Supreme Court also noted that the effects of any prosecutorial misconduct must be considered in the context of the entire trial, "one factor relevant to the due-process analysis is whether the misconduct was an isolated incident in an otherwise properly tried case." **Kennan, supra** at 410. The test regarding prosecutorial misconduct in closing argument is whether the remarks were improper, and if so, whether they prejudicially affected a substantial right of the defendant. **State v. Johnson** (May 25, 1995), Cuyahoga App. No. 67286, unreported. In deciding whether or not the defendant was denied a fair trial, the court must determine whether the fact finder would have found the defendant guilty absent the prosecutor's remarks. **State v. Smith** (1984), 14 Ohio St. 3d 13, 470 N.E.2d 883; **Maurer, supra.**

In addition, this court notes that the failure to raise objections to improper arguments constitutes a waiver, unless the errors are cumulatively so egregious that the appellant was denied due process. **Keenan, supra.** In each of the appellant's assigned errors, no objection was raised by counsel. This court will proceed, **arguendo,** as though the errors, if substantiated, were sufficient to deny the appellant due process.

Taking the appellant's assertions in order, the prosecutor stated in the opening argument that," [Mr. Whittsette will] also testify that he pled guilty in this case to possession of cocaine and to preparation for shipment of cocaine. I haven't promised him anything. He's waiting sentence to this particular judge." (T. 539.) The appellant argues that because, as a result of the plea, Whittsette was eligible to receive a lesser sentence than the appellant, he was therefor given something in exchange for his testimony. While the appellant may find the prosecutor's statement objectionable, it is, nevertheless, a true statement. The prosecutor has no control over the sentence imposed upon the appellant, and the record is devoid of any evidence that the prosecutor even attempted to do so. The prosecutor was informing the jury of the evidence he expected to elicit during his case in chief, and in fact, this testimony was given by Mr. Whittsette. The appellant was not prejudiced by the opening statement made by the State.

Likewise, the appellant takes issue with the prosecutor's statement made in closing argument that:

> We have an indefinite attitude to the basic notion of fairness, accuracy and they are necessary and important in a case. We want to take away his liberty. That's not my decision. That's not your decision. That's the judge's decision. Our role is to present the evidence. Your role is to find out the truth, decide what the facts are. (T. 919.)

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This statement made by the prosecutor is a plain, straightforward statement of the law, and while it is the court's responsibility to inform the jury of the law they must apply, no prejudice accrues to the appellant from the prosecutor's statement of such a simple truth.

The appellant next argues that during closing argument, the prosecutor improperly used the following analogy to demonstrate why the police failed to take fingerprints from the bags containing the drugs:

> [The police] didn't call the pagers, they didn't fingerprint this stuff, they didn't find out who the pager belonged to when they pulled it off defendant Hatcher. ... Let's talk about water damage at a house as an example defense attorney used. Some guy tells you before you buy a house that there is no water damage. Do you go down in the basement and look? Sure. If you see the water marks, then you know. Is that a good example for this? No, because Detective Kooser didn't tell you there wasn't fingerprints on here. What he told you was if you went down in the basement and looked at the walls in my basement, you'll find out I have a surface on there that doesn't leave water marks. I have a surface that I just painted. It's not a good example. (T. 923.)

Once this statement is read in context, it is clear that the prosecutor's remarks were used to illustrate the point made by Detective Kooser at trial. The detective testified while it is possible to lift a fingerprint from a plastic bag, in his experience the attempt is rarely successful (T. 640, 654). No prejudice accrued to the appellant based upon the State's reflection of the trial testimony.

In the next instance given by the appellant, he correctly asserts that the prosecutor made the following statement without a basis in the record:

> [The defense witnesses] were real sure about one thing. They were real sure Garett Anderson wasn't there. They were very certain of that because that's what they've been told to say, and then when it comes down to the nitty gritty facts, they didn't even get close to knowing where the other cars came from, not even close." (T. 928.)

While this statement was improper, alone and in the context of an otherwise properly tried case, it is not sufficient to so prejudice the appellant as to deny him a fair trial.

Next, the appellant argues that the prosecutor misled the jury when he made the following argument:

> Now, remember an arrest is much different from a conviction because when you're arrested, all of us know and we all agree that you are presumed innocent at that point in time. Police officers have the discretion to arrest when they believe they have probable cause. Probable cause is much lower than a finding of guilt which is beyond a reasonable doubt. When you find somebody close to drugs, you have probable cause. You make arrests. It's common sense. We arrested him because he was close to drugs. They arrested everybody. They decided and they have discretion to let Garett Anderson go. It's their job. They can make that decision. But what happens after you make that arrest? Things turn up. People come forward and testify for the State much like Lester Whittsette. That's how you continue your investigation. That's why they arrested him on mere proximity.

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It's probable cause. They're allowed to do it. They can arrest whoever they want and they don't have to arrest unless they want to. (T. 930-931).

Once more, the appellant has taken the prosecutor's words out of context and ascribed a meaning not intended to the actual words used. The prosecutor merely reiterated for the jury the basis upon which a police officer may arrest a suspect. In reviewing the prosecutor's statement in its entirety, no prejudice accrued to the appellant.

For the sixth error, the appellant correctly points out that the prosecutor misstated the facts during closing argument when he stated that Dale Barber admitted that the appellant had the drugs and was showing them to Mr. Anderson. A review of Barber's testimony reveals that Barber asserted that Mr. Anderson was near the garage of Mr. Smith and was never near the window of the Blazer (T. 829, 830). Barber also testified that the appellant never reached into the bag later found to contain drugs (T. 831). This misstatement of facts, even when combined with the prosecutor's improper argument impugning the testimony of appellant's witnesses, is not sufficient to amount to deny the appellant a fair trial.

Finally, the appellant presents as error the following argument made to the judge during sentencing:

> The other thing that concerns me about this particular case is the attempts of this defendant to manipulate the process itself. You heard the witnesses who came in and testified for him, Your Honor. All I have to say based on that testimony is he's a professional, and I ask you to sentence him accordingly, Your Honor." (T. 996.)

The appellant points out that the witnesses, Mr. Smith and Ms. Bell, presented to the court were law abiding neighbors. It is clear from the context of the argument presented to the court that the State was merely attempting to reargue the issue of the credibility of the appellant's witnesses. The appellant has failed to demonstrate how this argument inured to his prejudice when the terms of incarceration imposed by the court were within the parameters set forth by the state legislature, and within the court's sole discretion.

The appellant has failed to illustrate any prejudice to the appellant resulting from the arguments made by the prosecutor to the jury in opening and closing arguments and to the judge at the time of sentencing.

The appellant's second assignment raised by counsel is overruled.

The appellant's third assignment of error raised by counsel:

> MR. HATCHER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, GUARANTEED BY ART. I, SECT. 10 OF THE OHIO CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN COUNSEL FAILED TO OBJECT TO THE PREJUDICIAL ARGUMENT OF THE PROSECUTOR OR REQUEST A LIMITING INSTRUCTION.

In the third assignment of error, the appellant argues that the appellant was rendered

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ineffective assistance of counsel because counsel failed to object to the above seven statements of the prosecutor and the failure to request a limiting instruction.

To prevail on a claim for ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient, and that the deficient performance prejudiced the defense. **Strickland v. Washington** (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052. A properly licensed attorney is presumed to execute his duties in an ethical and competent manner. Ineffectiveness is demonstrated by showing that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. **State v. Hamblin** (1988), 37 Ohio St. 3d 153, 524 N.E.2d 476. To establish prejudice, a defendant must show that there is a reasonable possibility that, but for counsel's errors, the result of the proceeding would have been different. **Strickland, supra.**

In the case **sub judice,** the appellant is unable to meet this burden. As stated in the previous assignment of error, the two errors made by counsel, that of misstating the testimony of Dale Barber and that of impugning the appellant's witnesses, were not so egregious as to accrue prejudice to the appellant or to deny the appellant a fair trial. Appellant's counsel's failure to object to statements which were not prejudicial to the appellant, and failure to request a limiting instruction regarding those alleged errors, were not so deficient as to deny the appellant a fair trial. The appellant has failed to show a reasonable possibility that the result of the trial would have been different.

The third assignment of error raised by counsel is overruled.

The fourth assignment of error raised by counsel:

> WHEN MR. HATCHER WAS CONVICTED OF VIOLATIONS OF R.C. 2925.03(A)(2) AND (A)(6), THE CONVICTION FOR POSSESSION OF COCAINE IS IN VIOLATION OF R.C. 2941.25 (ALLIED OFFENSES) AND A DENIAL OF MR. HATCHER'S RIGHTS TO PROTECTION FROM DOUBLE JEOPARDY GUARANTEED BY ART. I, SECT. 10 OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This court must first note that the appellant was convicted of offenses pursuant to R.C. 2925.03(A)(2) and (A)(4), and was not convicted of trafficking in violation of R.C. 2925.03(A)(6).

While the appellant has provided support for his argument that his convictions are allied offenses of similar import pursuant to R.C. 2941.25 and as delineated by the Supreme Court in **Newark v. Vazirani** (1990), 48 Ohio St. 3d 81, 549 N.E.2d 520, this court has previously determined that preparation for shipment, etc. and possession are not allied offenses. See **State v. Williams** (1995), 105 Ohio App. 3d 471, 664 N.E.2d 576.

The appellant's fourth assignment of error raised by counsel is overruled.

The appellant's fifth assignment of error raised by counsel:

> THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ARBITRARILY REFUSED TO CONTINUE SENTENCING, STATED THAT IT WOULD NOT CONSIDER AN AFFIDAVIT OF INDIGENCE BECAUSE THE DECISION

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CONCERNING INDIGENCE FOR PURPOSES OF THE MANDATORY FINE HAD ALREADY BEEN MADE, AND IMPROPERLY CONSIDERING HEARSAY AND OTHER ACTS TESTIMONY IN SENTENCING.

The appellant asserts that the trial court erred in refusing to grant a continuance prior to sentencing so that counsel would be able to secure the appellant's affidavit of indigency. This assignment of error is well taken, and this case must be remanded for resentencing.

The trial court is required to impose a fine in drug trafficking offenses pursuant to R.C. 2925.03(H), **State v. Powell** (1992), 78 Ohio App. 3d 784, 605 N.E.2d 1337; **State v. Cravens** (1988), 42 Ohio App. 3d 69, 536 N.E.2d 686. A court may not withhold imposition of a mandatory fine except when a defendant is indigent and the court determines that he/she is unable to pay the fine.

This court has held, in a case requiring the imposition of a mandatory fine, that it is error for the court to proceed from the trial directly to sentencing when a continuance has been requested for the purposes of obtaining an affidavit of indigency. **State v. Roberts** (Feb. 9, 1995), Cuyahoga App. No. 66692, unreported. The rationale behind finding this ruling by the court to be an abuse of discretion is that, until the verdict is rendered, the appellant has had no need to prepare such an affidavit. **State v. Benedict** (Nov. 3, 1995), 1995 Ohio App. LEXIS 5692, Washington App. No, 94 CA 28, unreported. Therefore, in this instance the trial court abused its discretion in proceeding directly to sentencing without permitting the appellant's requested continuance.

The fifth assignment of error raised by appellant's counsel is well taken.

The first assignment of error raised by the appellant pro se:

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO RULE UPON AN ACTUAL CONFLICT OF LAW, RELATING TO THE CO-COUNSELS FOR THE DEFENSE, BY REMAINING SILENT ON THE RECORD THE TRIAL COURT DEPRIVED APPELLANT OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS GUARANTEED UNDER THE UNITED STATES CONSTITUTION AND THE OHIO CONSTITUTION.

The appellant appears to be arguing that the trial court abused its discretion when, after being informed by the prosecutor that counsel for the appellant and counsel for Michael Robinson are partners in law, it permitted the trial to go forward. The appellant also asserts that the court erred in overruling his motion for a severance of trial.

Any potential error committed by the court in permitting the trial to go forward with co-defendants being represented by law partners was waived by the appellant. Appellant's counsel placed no request before the court that this potential conflict be remedied in any manner, he merely informed the court: "my client understands the potential conflict" (T. 20). When the court asked the appellant personally if he was ready to proceed to trial he answered in the affirmative (T. 24). The appellant bypassed his opportunity to inform the court, at a point where the court could act, that the potential conflict was of concern to him. Further, the appellant has failed to demonstrate that any actual prejudice has resulted.

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The appellant also argues that the court should have granted the request made by his counsel to try him separately from his co-defendants. The Supreme Court has held that the granting of a co-defendant's motion for separate trials is within the discretion of the trial court, and absent an abuse of that discretion, the trial court's determination will not be disturbed. **State v. Daniels** (1993), 92 Ohio App. 3d 473, 636 N.E.2d 336. The test is whether a joint trial is so manifestly prejudicial that the trial judge is required to exercise his or her discretion in only one way, by severing the trial. A defendant must show clear, manifest and undue prejudice and a violation of a substantive right resulting from the failure to sever. **State v. Schiebel** (1990), 55 Ohio St. 3d 71, 564 N.E.2d 54. The burden is upon the appellant to demonstrate prejudice when such a motion is denied. **Id.**

In the case **sub judice,** the motion was made to the court prior to the hearing on the motion to suppress, and prior to Whittsette's plea. The court stated: "I think I should decide now or overrule it for the purposes of the suppression hearing. If you want to bring it up for the purpose of the trial, please feel free." (T. 23.) The issue of severing the co-defendants' trials was not raised prior to trial, thus, the appellant has waived the issue by failing to raise it at time when the court could take action.

Assuming **arguendo,** that the appellant had properly raised the issue prior to trial, it is clear that the appellant has failed to demonstrate any abuse of discretion as required under **Schiebel, supra.**

The appellant's first assignment of error raised **pro se** is overruled.

The appellant's second assignment of error raised **pro se:**

TRIAL COUNSEL WAS INEFFECTIVE WHEN HE CHOSE A TRIAL STRATEGY THAT FORECLOSED UPON A COGNIZANT LEGAL DEPRIVATION RELATING TO THE INVESTIGATORY STOP AND PROFILING USED BY THE STATE WHICH ENDED IN AN ILLEGAL SEARCH AND SEIZURE, A VIOLATION OF THE FOURTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING ARTICLES OF THE OHIO CONSTITUTION.

The appellant argues that he was deprived effective assistance of counsel by counsel's failure to adequately cross-examine the police officers during the motion to suppress. The appellant asserts that he was subject to an investigatory stop based upon a profile used by the police and not based upon any articulable suspicion of criminal behavior.

The tests for determining whether a defendant was rendered ineffective assistance of counsel are set forth in the appellant's third assignment of error raised by counsel, **supra.** The testimony given by Cleveland Police Detective James Kooser during the hearing on the motion to suppress was consistent with the testimony given at trial, and after careful review, this court finds that the appellant was not rendered ineffective assistance of counsel at the hearing on the motion to suppress.

During the hearing, Officer Kooser testified that he has been a police officer in Cleveland for ten years and has made a few hundred arrests. Based upon his training and experience, Officer Kooser believed that a drug transaction was in progress. As the police vehicle rounded the

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corner, Officer Kooser observed the appellant's Blazer, and Whittsette began to yell, "Vice, go, go, get out of here" (T. 29). A man was observed leaning into the window of the Blazer; and the vehicle was parked away from the curb and slightly at an angle. As the police vehicle was arriving, about the time Whittsette began to yell, Officer Kooser observed the appellant holding a brown paper bag which he had been showing to the person at the window of the Blazer. Officer Kooser observed the appellant note the police had arrived, and "go to the floor with the bag." (T. 30.)

Based upon this testimony, the court was entitled to find that the officers had an articulable suspicion of criminal activity which was sufficient upon which to predicate an investigation. Since the court did not err in its findings, the appellant has failed to demonstrate the requisite prejudice necessary to a finding of ineffective assistance of counsel.

The appellant's second assignment of error pro se is overruled.

The appellant's conviction is affirmed, but this case is reversed and remanded for a new sentencing hearing.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for resentencing.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA A. BLACKMON, J., and,

JAMES M. PORTER, J., CONCUR.

JAMES D. SWEENEY

CHIEF JUSTICE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 27. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S. Ct. Prac.R. II, Section 2(A)(1).

DISPOSITION

JUDGMENT: AFFIRMED IN PART AND REVERSED AND REMANDED FOR RESENTENCING.

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STATE OF OHIO, Plaintiff-Appellee -vs- COURTNEY ASHFORD, Defendant-Appellant

NO. 68883
COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY
1997 Ohio App. LEXIS 3522
August 7, 1997, Date of Announcement of Decision

CHARACTER OF PROCEEDING: Criminal appeal from Common Pleas. Court Case No. 317460.

COUNSEL

For Plaintiff-Appellee: STEPHANIE TUBBS-JONES, ESQ., Cuyahoga County Prosecutor, GEORGE RUKOVENA, ESQ., Assistant County Prosecutor, 8th Floor Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.
For Defendant-Appellant: CHARLES H. BRAGG, ESQ., The Courtyard Office Park, 7055 Engle Road, Ste. 1-103 And COURTNEY ASHFORD, Pro Se, P. O. Box 901, Leavittsburg, Ohio 44430.

JUDGES

PATRICIA ANN BLACKMON, JUDGE. JAMES D. SWEENEY, C.J., and PORTER, J., CONCUR.
AUTHOR: BLACKMON

OPINION

JOURNAL ENTRY and OPINION

PATRICIA ANN BLACKMON, J.:

Courtney Ashford, defendant-appellant, appeals a jury's verdict convicting him of aggravated burglary, theft, and receiving stolen property; thereafter, the trial court sentenced him accordingly. Ashford assigns the following two errors for our review:

I. THE CONVICTION OF THE APPELLANT, COURTNEY ASHFORD FOR AGGRAVATED BURGLARY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS INSUFFICIENT TO SUSTAIN HIS CONVICTION AS A MATTER OF LAW.

II. THE OFFENSES OF THEFT AND RECEIVING STOLEN PROPERTY WERE ALLIED OFFENSES OF SIMILAR IMPORT AND THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ENTERING CONVICTIONS AGAINST THE APPELLANT FOR BOTH OF THESE OFFENSES AND IN FAILING TO SENTENCE THE APPELLANT FOR ONLY ONE OF THESE OFFENSES.

Ashford also assigns the following three errors pro se:

III. DEFENDANT/APPELLANT WAS DEPRIVED CONFLICTFREE REPRESENTATION, A VIOLATION OF THE SIXTH AND FOURTEENTH

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AMENDMENT.

IV. THE TRIAL COURT ERRED IT'S (sic) AFFIRMATIVE DUTY TO INQUIRE INTO THE POSSIBLE CONFLICT OF INTEREST AS SET FORTH PURSUANT TO STATE V. GILLARD, (1992) 64 OHIO ST. 3D 304, 595 N.E.2D 878.

V. WHETHER PLAIN ERRORS OF DEFECTS AFFECTED APPELLANT'S SUBSTANTIAL RIGHT TO A FAIR TRIAL PURSUANT TO CRIMINAL RULE 52(3) AND EVID.R. 103(D).

Having reviewed the record and the legal arguments of the parties, we affirm in part the trial court's judgment, reverse it in part, and remand the case for re-sentencing. The apposite facts follow.

On October 10, 1994, Danielle Kawalek returned to her first-floor apartment at approximately 10:30 am. Once inside, she noticed various items were missing in her kitchen: the portable phone, the cable box, the VCR with remote, the Nintendo game, and her camera.

The kitchen window lock was broken and the window shade had been raised. Kawalek went next door and called her boyfriend, Cleveland Narcotics Officer Greg Whitney. Thereafter, her mother called the police.

Whitney, who was off-duty, came to the apartment. Once there, he saw a man standing at the front of the building's driveway pacing back and forth. The man, later identified as Terry Hollins, asked Whitney if he would help him jump start his car. When Whitney replied that he didn't have time, Hollins asked, "are you straight?" Whitney recognized the question as slang for "are you interested in buying cocaine?" Whitney asked Hollins what he was talking about and Hollins told him he had a couple of rocks if Whitney was interested.

Whitney identified himself as a police officer and started to place Hollins under arrest. He obtained his name and address and went to get handcuffs from his car. At that time, Hollins fled. Whitney went into the apartment, observed its condition, and awaited the arrival of the investigating officers.

Once the officers arrived, Whitney told them about the man he had encountered upon arrival at the building. The officers told Whitney they stopped Hollins along with Courtney Ashford earlier that morning about eight blocks away from the apartment. Hollins was holding a Nintendo game. When warrant checks on the pair turned up nothing, they were released.

Police took photographs of the apartment and dusted for fingerprints. Once the apartment was processed, Officer Richard Russell returned to the area where Hollins and Ashford were spotted and found them. After Whitney identified Hollins as the man he saw outside the apartment building, Hollins was arrested for aggravated burglary. Courtney Ashford was released.

Police were able to match a fingerprint taken from the cable box to Courtney Ashford's fingerprints. Ashford was arrested on October 17 and subsequently indicted for aggravated

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burglary with two prior aggravated felony specifications, theft with two prior offense specifications and two violence specifications, and receiving stolen property with prior theft offense specifications and two violence specifications. After a jury trial, Ashford was convicted on all counts and sentenced to fifteen to twenty-five years in prison for aggravated burglary, and two to ten years for each of the remaining two counts. The two to ten year sentences were to be served concurrently along with the aggravated burglary sentence. This appeal followed.

In his first assignment of error, Ashford argues his conviction for aggravated burglary was against the manifest weight of the evidence and based on legally insufficient evidence. Specifically, he argues the state failed to prove any person was likely to be present at Kawalek's home at the time of the crime - an essential element of the crime of aggravated burglary.

R.C. 2911.11 (A) defines aggravated burglary as follows:

> No person, by force, stealth, or deception, shall trespass in an occupied structure *** with purpose to commit a theft offense *** or any felony, when any of the following apply: (1) the offender inflicts, or attempts or threatens to inflict physical harm on another; (2) the offender has deadly weapon or dangerous ordnance *** on or about his person or under his control; (3) the occupied structure involved is the permanent or temporary habitation of any person, in which at the time any person is present or likely to be present.

Ashford suggests that, in order to prove the victim was present or likely to be present, the state had to prove that she was in and out of the house on the day in question.

Although we agree that the work habits of a victim are important in appropriate cases, we conclude they are inapplicable to the facts of this case. The appropriate issue in any of these cases is whether a person is present or whether it is uncertain when the occupier would be present. **State v. Johnson** (Oct. 10, 1991), Cuyahoga County App. No. 59096, citing, **State v. Fowler** (1983), 4 Ohio St. 3d 16, 445 N.E.2d 1119 and **State v. Wilson** (1979), 58 Ohio St. 2d 52, 388 N.E.2d 745. In **Fowler,** the Ohio Supreme Court held that the standard of review is whether the state showed more than that a person dwelled in the structure. In Franklin County, the appellate court in interpreting **State v. Durham** (1976), 49 Ohio App. 2d 231, 360 N.E.2d 743, concluded that the likelihood of being present may be proved by evidence that the residence was regularly inhabited, that the resident was in and out on the day of the crime, and the burglary occurred while the resident was temporarily absent. **State v. Clark** (March 28, 1996), 1996 Ohio App. LEXIS 1338, Franklin App. No. 95APA11-1428.

In this case, there was no evidence that Kawalek was employed or that her work habits regularly took her away from the apartment during certain times of the day. Kawalek testified she had lived in the apartment approximately one year. She stated she left home the previous evening and returned home on the morning of the burglary to walk her dog. There is no evidence that she was working or engaged in any activity that regularly took her away from home during the morning hours. The evidence indicated only a temporary absence from the apartment. Under the circumstances, the state presented sufficient evidence upon which the jury could conclude that she was likely to be present at the time of the burglary. See **State v. Robinson** (1996), 108 Ohio App. 3d 428, 433, 670 N.E.2d 1077.

Additionally, Ashford argues that the weight of the evidence leaned towards an acquittal and not a conviction. Thus, he argues the jury lost its way. Our approach in resolving this issue is

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governed by the recent Ohio Supreme Court decision in **State v. Thompkins** (1997), 78 Ohio St. 3d 380, 678 N.E.2d 541. In **Thompkins,** the court held that a reviewing court may only reverse on an issue of weight when that court, after reviewing the entire record, is convinced that the evidence weighs heavily against the conviction. **Id.** After reviewing this record, we are convinced that the evidence weighed heavily in favor of Ashford's conviction.

His fingerprint was found at the premises. He was seen earlier in the area and his co-defendant stated he had received one of the stolen items from Ashford. When Ashford was arrested, he was found in the vicinity of the crime. In view of these facts, we conclude the jury did not lose its way; justice was served. Consequently, his first assigned error is overruled.

In his second assignment of error, Ashford argues that, under the facts of this case, the crimes of theft and receiving stolen property were allied offenses. Ohio courts have held that receiving stolen property and grand theft are allied offenses of similar import. **State v. Bryant** (December 26, 1996), 1996 Ohio App. LEXIS 5819, Summit App. No. 17618, unreported; **State v. Stone** (1990), 69 Ohio App. 3d 383, 390, 590 N.E.2d 1283. The State concedes this point. In this case, the record is devoid of any evidence that the crimes of theft and receiving stolen property were committed with a separate animus for each offense. Accordingly, Ashford's second assignment of error is sustained and we reverse and remand for the trial court to sentence on the appropriate charge.

In his third assignment of error, Ashford argues **pro se** that he was denied the effective assistance of counsel. He argues that his trial attorney, Kevin McFaul, was ineffective. He claims McFaul failed to investigate the fingerprint taken from the crime scene, failed to object to testimony by three police officers about a statement made by Terry Hollins regarding Ashford's participation in the crime. He furthermore claims a conflict of interest because McFaul was the son of Sheriff Gerald McFaul.

In order to prove his claim of ineffective assistance of counsel, Ashford must prove that trial counsel's representation fell below an objective standard of reasonableness and that the defective performance prejudicially affected the defense. **Strickland v. Washington** (1984), 466 U.S. 668, 693, 80 L. Ed. 2d 674, 104 S. Ct. 2052. Ashford must show that, but for the unprofessional errors, the outcome of the trial would have been different. **Id.** at 698.

Following this standard, we conclude the trial attorney acted reasonably. A representative of the Latent Fingerprint Section of the Scientific Investigation Unit testified that the fingerprint at the scene matched a known print of Ashford from Cleveland Police files as well as a print taken from Ashford during the trial. The state also presented evidence that the print found at the scene was matched by computer analysis with Ashford's via the Automated Fingerprint Identification System.

With respect to the statements made by Hollins, they were clearly admissible pursuant to **State v. Price** (1992), 80 Ohio App. 3d 108, 608 N.E.2d 1088. **Price** held that statements made by a witness to a police officer at the scene of a crime which are offered to explain the conduct of his investigation are not hearsay. **Id.**

As for his argument of conflict of interest, this is merely an unsubstantiated allegation, which lacks merit. Consequently, we overrule his third assignment of error.

We also overrule his fourth assignment of error. Having found no indication of a conflict of interest involving Ashford's trial counsel, we conclude the trial court was under no obligation to inquire as to the existence of such conflict.

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In his fifth assignment of error, Ashford argues that plain errors deprived him of his right to a fair trial. He argues that the prosecutor improperly told jurors in his opening statement that Ashford committed the robbery. Any error in this statement by the prosecutor is harmless in light of the trial court's instruction that the opening statements of counsel are not evidence. With respect to Ashford's arguments about the credibility of the police officers' testimony, we note that the credibility of witnesses is a matter to be determined by a jury. **State v. Dehass** (1967), 10 Ohio St. 2d 230, 231, 227 N.E.2d 212. Accordingly, we overrule Ashford's fifth assignment of error.

Judgment affirmed in part, reversed in part, and remanded for re-sentencing.

This cause if affirmed in part and reversed in part and remanded for re-sentencing.

It is ordered that Appellant and Appellee share the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES D. SWEENEY, C.J., and

PORTER, J., CONCUR.

PATRICIA BLACKMON

JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 27. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A) (1).

DISPOSITION

JUDGMENT: Affirmed in part, Reversed in part.

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COMPUTER COPY

The Supreme Court of Ohio

State of Ohio,
Appellee,

v.

Stanley E. Jalowiec,
Appellant.

To Wit: August 28, 2000

Case No. 98-1074

NOTICE OF HEARING

TO: Jonathan E. Rosenbaum

Patricia A. Millhoff

The Supreme Court of Ohio will hold a hearing on the merits in this case on Tuesday, the 14th day of November, 2000. Time allowed for oral argument shall be 30 minutes per side.

Attorneys who argue before the Court must comply with the provisions of Rule IX of the Rules of Practice of the Supreme Court of Ohio and the instructions that follow. Pursuant to Rule IX, Section 3, counsel for either or both parties may waive oral argument and submit the case upon briefs. The Clerk must be notified in writing of such waiver at least seven days before the date scheduled for the oral argument.

Court convenes promptly at 9 a.m. Counsel in all cases are expected to be present when court convenes. Counsel should register with the assignment clerk **prior to 8:45 a.m.** in front of the attorney waiting room, adjacent to the courtroom on the third floor. Cell phones may not be activated in the courtroom.

An attorney should not begin oral argument until called by the Chief Justice. Counsel for appellant shall argue first. Multiple parties per side should divide the time allocated for argument by agreement if more than one party wishes to argue.

The attorney who opens the argument has the right to close the argument and divide the allocated time at his or her discretion. Any attorney desiring to reserve time for rebuttal shall advise the Chief Justice at the opening of argument of the number of minutes to be reserved. Counsel shall be responsible for timely concluding initial argument so as to reserve the rebuttal time requested.

A white light on the lectern will indicate that there are two minutes of counsel's argument time remaining. A red light on the lectern will indicate that counsel's allotted time has expired and that counsel should end the argument or request permission from the Chief Justice to continue.

Note: Assignments in the Supreme Court take precedence over other assignments.

Assignment Clerk

Clerk

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4058

The Supreme Court of Ohio

FILED
APR 04 2001
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

State of Ohio, Appellee,	:	Case No. 98-1074
v.	:	
Stanley E. Jalowiec, Appellant.	:	MANDATE

To the Court of Common Pleas

Within and for the County of Lorain, Ohio.

COPY

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals is affirmed consistent with the opinion rendered herein.

Furthermore, it appearing to the Court that the date heretofore fixed for the execution of judgment and sentence of the Court of Common Pleas has passed,

IT IS HEREBY ORDERED by this Court that said sentence be carried into execution by the Warden of the Southern Ohio Correctional Facility or, in his absence, by the Deputy Warden on Tuesday, the 3rd day of July, 2001, in accordance with the statutes so provided.

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

COSTS:

Docket Fee, $40.00, paid by Patricia A. Millhoff.

(Lorain County Court of Appeals; No. 96CA006445)

THOMAS J. MOYER
Chief Justice

0018r040401

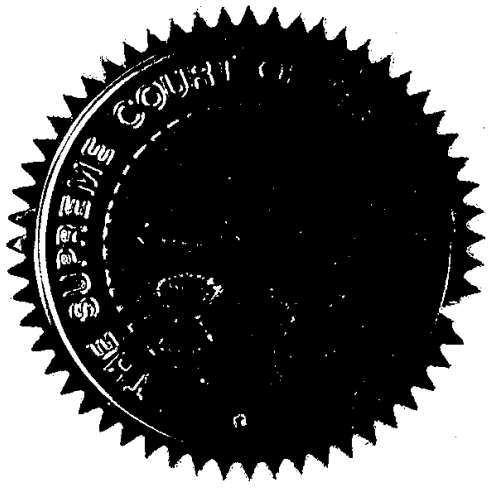
DEATH WARRANT

THE STATE OF OHIO IN THE SUPREME COURT

CITY OF COLUMBUS

TO THE WARDEN OF THE SOUTHERN OHIO CORRECTIONAL FACILITY:

The Supreme Court of Ohio, having affirmed the judgment and sentence of the Court of Appeals for Lorain County, in the case of The State of Ohio vs. Stanley E. Jalowiec, and Stanley E. Jalowiec having been indicted and convicted of the crime of aggravated murder with specification(s) in the Court of Common Pleas, you are hereby commanded to proceed on Tuesday, the 3rd day of July, 2001 (the day fixed by the Supreme Court of Ohio), to carry into execution the sentence of death pronounced on Stanley E. Jalowiec by the Court of Common Pleas for Lorain County, in the manner directed by the statute in such case made and provided, and make due return thereof to the Clerk of the Court of Common Pleas of Lorain County.



Given under my hand and the Seal of the Supreme Court, at Columbus, this 4th day of April, 2001.

Clerk of the Supreme Court

ON COMPUTER-SMW

The Supreme Court of Ohio

FILED
APR 04 2001
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

93-226

State of Ohio, Appellee,	:	Case No. 98-1074
v.	:	JUDGMENT ENTRY
Stanley E. Jalowiec, Appellant.	:	APPEAL FROM THE COURT OF APPEALS

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

Furthermore, it appearing to the Court that the date heretofore fixed for the execution of judgment and sentence of the Court of Common Pleas has passed,

IT IS HEREBY ORDERED by this Court that said sentence be carried into execution by the Warden of the Southern Ohio Correctional Facility or, in his absence, by the Deputy Warden on Tuesday, the 3rd day of July, 2001, in accordance with the statutes so provided.

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

IT IS FURTHER ORDERED by the Court that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Lorain County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lorain County for entry.

COSTS:

Docket Fee, $40.00, paid by Patricia A. Millhoff.

(Lorain County Court of Appeals; No. 96CA006445)

THOMAS J. MOYER
Chief Justice

0018r040401

THE STATE OF OHIO, APPELLEE, v. JALOWIEC, APPELLANT.
No. 98-1074

SUPREME COURT OF OHIO

91 Ohio St. 3d 220; 2001 Ohio 26; 744 N.E.2d 163; 2001 OhioLEXIS 904

November 14, 2000, Submitted
April 4, 2001, Decided

SUBSEQUENT HISTORY: Certiorari Denied October 9, 2001, Reported at: *2001 U.S. LEXIS 9671.* Reconsideration denied by *State v. Jalowiec, 91 Ohio St. 3d 1530, 747 N.E.2d 254, 2001 Ohio LEXIS 1494 (2001)*
Writ of certiorari denied *Jalowiec v. Ohio, 534 U.S. 964, 151 L. Ed. 2d 284, 122 S. Ct. 374, 2001 U.S. LEXIS 9671 (2001)*

PRIOR HISTORY: [***1] APPEAL from the Court of Appeals for Lorain County, No. 96CA006445. *State v. Smith, 87 Ohio St. 3d 424, 2000 Ohio 450, 721 N.E.2d 93, 2000 Ohio LEXIS 2 (2000)*
State v. Jalowiec, 1998 Ohio App. LEXIS 1548 (Ohio Ct. App., Lorain County, Apr. 15, 1998)

DISPOSITION: Judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant was convicted by a jury of killing another person to prevent testimony, in violation of *Ohio Rev. Code Ann. § 2929.04(A)(8)*, and was sentenced to death. The Court of Appeals for Lorain County (Ohio) affirmed the conviction and sentence, and defendant appealed.

OVERVIEW: Defendant and an accomplice killed a person who worked for police as a confidential informant and was about to testify against the accomplice's son. The state supreme court held that (1) although several potential jurors saw defendant in shackles prior to trial, defendant's due process rights were not violated because the trial court allowed defense counsel to inquire about this on voir dire, and counsel did not; (2) defense counsel's failure to object to the prosecutor's assertion during opening statement that an accomplice had implicated defendant waived all but plain error; (3) the prosecution established a prima facie case of conspiracy and early admission of hearsay statements was rendered harmless because evidence of the conspiracy was admitted before the case was submitted to the jury; (4) although the murder occurred in another county, venue was proper because elements of the conspiracy occurred in the county where the case was tried; (5) defendant was not denied effective assistance of counsel; and (6) any prejudice which occurred to the defendant during the sentencing phase of his trial could be cured by the supreme court's independent review.

OUTCOME: The defendant's conviction and sentence to death were affirmed.

CORE TERMS: murder, photograph, juror, mitigation, rebuttal, death sentence, unsworn statement, fight, sentence, detective, mitigating, door, death penalty, drove, aggravated, girlfriend, opened, arson, plain error, prosecutor, cemetery, conspiracy, prejudiced, admissible, aggravating circumstance, felonious assault, gruesome, specification, prejudicial, kill

LexisNexis (TM) HEADNOTES - Core Concepts:

Criminal Law & Procedure: Juries & Jurors: Challenges to Jury Venire: Bias & Prejudice
[HN1] Even if potential jurors see a defendant in handcuffs prior to voir dire, the danger of prejudice is slight if the juror's view of the defendant in custody is brief, inadvertent, and outside the courtroom.

Evidence: Hearsay Rule & Exceptions: Admissions by Coconspirator
[HN2] Ohio R. Evid. 801(D)(2) provides that hearsay does not include a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy. However, the statement of a co-conspirator is not admissible pursuant to Rule 801(D)(2)(e) until the proponent of the statement has made a prima facie

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showing of the existence of the conspiracy by independent proof.

Evidence: Hearsay Rule & Exceptions: Hearsay Rule Components
[HN3] Testimony about threats is not hearsay. Ohio R. Evid. 801(C).

Criminal Law & Procedure: Evidence: Hearsay Rule & Exceptions: Hearsay Rule Components
[HN4] The early admission of statements that could have been deemed hearsay at the time they were elicited is rendered harmless where independent proof of a conspiracy is admitted into evidence before the case is submitted to the jury.

Criminal Law & Procedure: Appeals: Standards of Review: Substantial Evidence Review
[HN5] When reviewing a claim of insufficient evidence, the relevant inquiry is whether any rational factfinder, viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. The verdict will not be disturbed unless the reviewing court finds that reasonable minds could not reach the conclusion reached by the trier of fact.

Criminal Law & Procedure: Jurisdiction & Venue: Venue
[HN6] When an offender commits offenses in different jurisdictions as part of a course of criminal conduct, venue lies for all the offenses in any jurisdiction in which the offender committed one of the offenses or any element thereof. *Ohio Rev. Code Ann. § 2901.12(H).* Venue is not a material element of any crime but is a fact that must be proven beyond a reasonable doubt.

Criminal Law & Procedure: Jurisdiction & Venue: Venue
[HN7] See *Ohio Rev. Code Ann. § 2901.12(G).*

Criminal Law & Procedure: Evidence: Real & Demonstrative Evidence
[HN8] Under Ohio R. Evid. 403, the admission of photographs and similar evidence is left to the sound discretion of the trial court. Nonrepetitive photographs in capital cases, even if gruesome, are admissible if the probative value of each photograph outweighs the danger of material prejudice to the accused.

Criminal Law & Procedure: Evidence: Real & Demonstrative Evidence
[HN9] The fact that a defendant stipulates the cause of death does not automatically render photographs inadmissible.

Criminal Law & Procedure: Evidence: Real & Demonstrative Evidence
[HN10] Any alleged error in the admission of photographs that is not objected to is waived.

Criminal Law & Procedure: Jury Instructions: Particular Instructions
[HN11] A single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge.

Criminal Law & Procedure: Sentencing: Capital Punishment: Mitigating Circumstances
[HN12] Counsel for the State at the penalty stage of a capital trial may introduce evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant.

Criminal Law & Procedure: Evidence: Impeachment Evidence
[HN13] The trial court has discretion to determine what relevant evidence is admissible as proper rebuttal.

Criminal Law & Procedure: Sentencing: Corrections, Modifications & Reductions: Corrections, Modifications & Reductions Generally
[HN14] Any prejudicial impact which evidence has on a defendant during the sentencing phase of trial can be cured by the appellate court's independent review of the sentence.

Criminal Law & Procedure: Sentencing: Capital Punishment
[HN15] The proportionality review which is used in death penalty cases in Ohio entails comparing only cases where a sentence of death is imposed.

Criminal Law & Procedure: Jury Instructions: Objections
[HN16] When a defendant fails to object to an instruction, he waives all but plain error.

Criminal Law & Procedure: Sentencing: Capital Punishment: Mitigating Circumstances
[HN17] A trial court's failure to instruct the jury on all statutory mitigating factors, including factors that are not relevant, does not constitute plain error.

Criminal Law & Procedure: Trials: Defendant's Rights: Right to Counsel: Effective Assistance
[HN18] To gain reversal of a conviction for ineffective assistance of counsel, the defendant must show that counsel's performance was deficient, and that the deficient performance prejudiced the defense.

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Criminal Law & Procedure: Trials: Defendant's Rights: Right to Counsel: Effective Assistance
[HN19] Counsel is in a much better position to determine whether jurors could have been rehabilitated than is a reviewing court.

Evidence: Witnesses: Expert Testimony
[HN20] The appointment of defense experts is within the sound discretion of the trial court.

Criminal Law & Procedure: Sentencing: Capital Punishment: Mitigating Circumstances
[HN21] The absence of instructions on the concept of mitigation does not violate the Eighth and Fourteenth Amendments to the United States Constitution.

Criminal Law & Procedure: Trials: Defendant's Rights: Right to Counsel: Effective Assistance
Criminal Law & Procedure: Appeals: Standards of Review: Standards Generally
[HN22] Appellate courts ordinarily refrain from second-guessing strategic decisions made by counsel at trial, even where counsel's strategy is questionable, and even though appellate counsel essentially argue that they would have defended differently.

Criminal Law & Procedure: Sentencing: Capital Punishment: Cruel & Unusual Punishment
[HN23] Ohio's death-penalty scheme does not violate either the Ohio Constitution or the United States Constitution.

Criminal Law & Procedure: Sentencing: Capital Punishment: Mitigating Circumstances
[HN24] With regard to the statutory mitigating factors of *Ohio Rev. Code Ann. § 2929.04(B)*, the fact that a defendant and his victim were smoking crack cocaine prior to a murder does not place the defendant under duress, coercion, or strong provocation under factor two, and factor four, the youth of the offender, has little weight where the defendant is twenty-three years old at the time of the offense.

Criminal Law & Procedure: Sentencing: Capital Punishment: Mitigating Circumstances
[HN25] With regard to the statutory mitigating factors of *Ohio Rev. Code Ann. § 2929.04(B)*, the love and support that a defendant enjoys from his family is entitled to some weight, a defendant's chronic rheumatoid arthritis is worthy of slight weight in mitigation, and the fact that a defendant was under the influence of crack cocaine at the time of the offense could also be considered a mitigating factor.

Criminal Law & Procedure: Criminal Offenses: Homicide: Murder
[HN26] The killing of a witness to prevent his testimony in another criminal proceeding strikes at the heart of the criminal justice system.

COUNSEL: Gregory White, Lorain County Prosecuting Attorney, and Jonathan E. Rosenbaum, Chief Counsel, Criminal Division, for appellee.

Patricia A. Millhoff and Nathan Ray, for appellant.

JUDGES: MOYER, C.J., DOUGLAS, RESNICK and F.E. SWEENEY, JJ., concur. COOK, J., concurs in judgment. LUNDBERG STRATTON, J., concurs in part and dissents in part.

OPINIONBY: PFEIFER

OPINION: [**168] [*220]

PFEIFER, J. On the morning of January 19, 1994, a partially clad male body was found in Woodland Cemetery in Cleveland. Two weeks later, the body was identified as that of Ronald Lally of Elyria. Over a year later, the grand jury indicted defendant-appellant, Stanley E. Jalowiec, for aggravated murder, with firearm and death-penalty specifications. The indictment alleged that Jalowiec purposely killed Lally to prevent him from testifying in criminal proceedings, which had been scheduled to begin on January 19, 1994. Subsequently, a jury found Jalowiec guilty as charged, and he was sentenced to death.

In June 1993, Ron Lally contacted the Elyria police to volunteer as a police informant. Lally signed an agreement to become a[***2] confidential informant for the Elyria police and agreed to make controlled drug buys. On June 7, 1993, with the assistance of Officer Scott Ashley and Detective Alan Leiby, Lally made a controlled drug buy of crack cocaine from Danny Smith and his father Raymond Smith while wired with a hidden monitoring device. As a result of the controlled buy, police arrested both Raymond Smith and Danny Smith in August 1993 and charged them with aggravated drug trafficking. Both cases were eventually set for trial on January 19, 1994.

On January 18, 1994, the evening before the murder, Brian Howington and Jalowiec went to several bars in downtown Elyria. (Howington knew Jalowiec because Jalowiec used to visit Howington's aunt, Joann Corrine Fike, when Howington lived with her.) Jalowiec then asked Howington to accompany him to a friend's house on Middle Avenue. There, Howington met Ron Lally and

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his roommate, and the four of them smoked crack cocaine. Around 11:30 p.m., Jalowiec, Howington, and Lally went to Fike's house and "shot pool, partied some more."

About an hour later, Jalowiec got a page and asked Howington if he could borrow Fike's car, a Chrysler LeBaron convertible. Though Howington[***3] was hesitant, he relented after Jalowiec persisted. Around 1:00 a.m., Jalowiec and [*221] Lally left Fike's house in the LeBaron. The next time Howington saw the car was around 5:00 a.m. when Jalowiec and Raymond Smith returned it to Fike's apartment. At that time, the car was covered with ice, and Jalowiec and Smith told Howington that the car had been washed. Fike testified that Jalowiec told her that he had washed the car because there was blood on it as a result of a fight he had had with someone at Mom's Open Kitchen.

Sharon Hopkins testified that she was at Razzle's bar in Elyria one night in January 1994 with her brother, Terry Hopkins, Raymond Smith, Danny Smith, Michael Smith (another son of Raymond), and several others, including Jalowiec. The group stayed at Razzle's until it closed and then, without Jalowiec, went to eat at Mom's Open Kitchen until around 2:45-3:00 a.m.

After leaving Mom's, Sharon Hopkins rode in Danny Smith's car with several people including Raymond, Danny, and Michael Smith. They traveled on Middle Avenue past the railroad tracks just outside the Elyria city limits and dropped Raymond and Michael Smith off by a wooded area. They drove back over the tracks [***4]and pulled into a parking lot. Approximately five to ten minutes later, a convertible drove over the tracks to where they had dropped off Raymond and Michael Smith. Danny Smith said, "That is it."

Several minutes later, the convertible drove by again heading toward town, and Danny Smith's car began to follow it. Shortly thereafter, Danny Smith signaled the convertible to pull over and ducked down in the front passenger seat while telling Sharon Hopkins to get out and ask the people in the convertible whether they had picked up Michael Smith. Sharon Hopkins saw Jalowiec get out of the driver's seat of the convertible. Jalowiec responded that Michael Smith was in the [**169] car. Although Sharon Hopkins could not see the other occupants, she could tell that there were four people inside the convertible. Danny Smith then drove Sharon Hopkins home.

Later that morning, at around 3:30-4:00 a.m., Danny Smith arrived back at his apartment. Terry Hopkins arrived a little later and noticed that Danny Smith was "nervous and said he was feeling sick to his stomach." Danny Smith told Hopkins that "they had done it, they did it." Hopkins then went back to his sister's apartment across the street from[***5] Danny Smith's apartment. Later, Hopkins visited Danny Smith again and also saw Jalowiec, Raymond Smith, and Michael Smith. Jalowiec said, "They stomped him and ran him over with a car." The others there indicated that "they shot him and cut him." According to Hopkins, they were "kind of like bragging about it." Danny Smith told Hopkins they wanted this person killed because he had worn "a wire on him on a drug sale."

At approximately 9:55 a.m. on January 19, 1994, Cleveland homicide detective Michael Beaman was summoned to Woodland Cemetery. A male body had been [*222]found on a cemetery roadway. Some of the victim's clothing was nearby in a snow bank. There was no identification on or near the victim and police did not learn the identity of the victim, Lally, until a few weeks later.

Dr. Heather Raaf, a forensic pathologist with the Cuyahoga County Coroner's Office, performed the autopsy on Lally. Dr. Raaf testified that teeth in Lally's mouth had been knocked out by a gunshot. Dr. Raaf estimated that Lally had sustained at least eleven blows to his head and that his injuries were consistent with being stomped or struck by a vehicle several times. Dr. Raaf determined that Lally's death[***6] resulted from a gunshot wound to the head and multiple blunt impacts to the head.

The drug trafficking cases against Danny and Raymond Smith were subsequently dismissed because Lally, the primary witness in both cases, was dead.

After an extensive police investigation, the grand jury indicted Jalowiec on March 8, 1995, for aggravated murder with a firearms specification. In addition, a death-penalty specification alleged that Jalowiec purposely killed Lally in order to prevent his testimony as a witness in a criminal proceeding.

At trial, the key witness for the prosecution was Michael Smith, son of Raymond Smith n1 and brother of Danny Smith. Michael Smith contacted Detective Leiby in April 1994 because he was bothered about having witnessed the Lally murder. During Raymond Smith's murder trial, Michael Smith had been unavailable to testify, and the prosecution proffered testimony from him that had been elicited in a deposition. *State v. Smith (2000), 87 Ohio St. 3d 424, 428, 721 N.E.2d 93, 102.* However, at Jalowiec's trial, Michael Smith testified as a prosecution witness.

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----------Footnotes----------

n1 We affirmed the death sentence of Raymond Smith in *State v. Smith (2000), 87 Ohio St. 3d 424, 721 N.E.2d 93.*

----------End Footnotes---------- [***7]

Michael Smith testified that, purely by chance, he had met his father and brother at Mom's Open Kitchen around 2:30 a.m. on the night of the murder. Raymond Smith had made a phone call and indicated to Michael Smith that he was going to leave. Michael agreed to go with his father and left with him and his brother, Danny Smith. The Smiths and Danny Smith's girlfriend got in Danny Smith's car and both Raymond and Michael Smith were dropped off on Middle Avenue. Raymond and Michael waited outside in the cold, even though Michael had no idea what they were waiting for. The LeBaron driven by Jalowiec with Lally as a passenger pulled up to them and stopped. Raymond Smith told Lally to get in the back [**170] seat, and Michael Smith got in the back seat on the driver's side. Raymond Smith sat in the passenger side front seat and made introductions.

[*223] Shortly thereafter, Raymond Smith brandished a gun and told Lally, "Don't make any sudden moves." The group stopped to buy gas, beer, and cigarettes, then drove on Route 2 toward Cleveland. Raymond Smith asked Lally, "Why did you set my son up?" Lally denied doing so, but appeared to be scared. Smith then told Lally, "We are going to give you some money, [***8] get you a bus ticket, you are going to get out of town."

During the trip into Cleveland, all four men were smoking crack cocaine. Lally agreed to leave town, and they drove to East Cleveland to buy some crack for Lally's trip. However, they saw police cars and fire trucks in the neighborhood and decided to drive back towards downtown Cleveland. As they drove, Raymond Smith directed Jalowiec to pull the LeBaron into a Cleveland cemetery.

Inside the cemetery, Raymond Smith got out of the car, put the gun to Lally's face, and ordered him out of the car. He then told Lally, "You will never snitch on nobody again." Michael Smith heard a gunshot and then heard Lally exclaim: "You shot me in my head, you shot me in my head." Raymond then told Michael and Jalowiec to get out and assist him. Jalowiec got out of the car, but Michael remained inside the car and did not look out. He heard "thumps like hitting" and heard Lally plead, "I won't tell nobody, please don't kill me, please don't kill me."

Michael Smith testified that after about two to five minutes of quiet, he could tell that the trunk had been opened and that his father and Jalowiec were trying to put something in the trunk. He[***9] heard someone say, "He ain't going to fit, * * * he is too stiff," then he heard something drop. Then Raymond Smith and Jalowiec got back in the car, and Jalowiec started the car and put it in reverse. According to Michael Smith, when Lally's body stopped the car from going any further, Jalowiec drove forward a short distance and then put the car into reverse. Michael Smith could feel the car hit something. Jalowiec did this three times and then drove out of the cemetery.

As they drove from the cemetery, Raymond Smith began arguing with Michael Smith: "This is for your brother, why didn't you get out and help?" While driving back to Elyria, Raymond took his gun apart and threw it out the window, piece by piece. Upon arriving in Elyria, they dropped Michael Smith off at Danny Smith's apartment.

Linda Luke, a forensic serologist in the coroner's office, conducted tests on stains found on the trunk liner of the Chrysler LeBaron. Luke testified that the DNA in Lally's blood sample was consistent with the blood found on the trunk liner.

After deliberation, the jury found Jalowiec guilty as charged.

At the mitigation hearing, Jalowiec made an unsworn statement. Other witnesses also testified[***10] on Jalowiec's behalf, including his former live-in girlfriend [*224] and several family members, including both of his parents. The prosecution presented seven witnesses in rebuttal.

The jury recommended death, and the court sentenced Jalowiec to death. The court of appeals affirmed the convictions and death sentence. The cause is now before this court upon an appeal as of right.

Jalowiec has raised thirteen propositions of law. (See appendix.) We have reviewed each and have determined that none justifies reversal of appellant's conviction for aggravated murder. We have also independently weighed the aggravating circumstance against the mitigating factors and reviewed the death penalty for appropriateness and proportionality. For the reasons that follow, we affirm appellant's convictions and death sentence.
[**171]

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VOIR DIRE ISSUES

Defendant in Shackles. In Proposition of Law IV, Jalowiec argues that his conviction must be reversed because the trial court failed to remedy or address the issue of prospective jurors' viewing him in shackles during voir dire. Jalowiec relies on *Holbrook v. Flynn (1986), 475 U.S. 560, 568-569, 106 S. Ct. 1340, 1345-1346, 89 L. Ed. 2d 525, 534,*[***11] for the proposition that due process is violated when jurors view restraints on a defendant absent some essential state interest. Jalowiec further asserts that both the court and the prosecutor displayed a "cavalier attitude" to the incident.

Defense counsel brought the matter to the court's attention at the beginning of voir dire, stating, "There were several potential jurors standing in the hall going to and out of the restrooms and they did see Mr. Jalowiec handcuffed." Defense counsel moved for a mistrial. The prosecutor suggested that some sort of voir dire should take place before the court ruled on the motion. The trial court overruled the mistrial motion and told defense counsel: "Certainly you have the opportunity to inquire of the prospective jurors as to whether or not they have been prejudiced because of this, okay?"

In his original brief to the court of appeals, Jalowiec did not raise this issue. Subsequently, defense counsel filed a lengthier brief to proffer issues they would have raised had the court granted their motion to exceed the page limit. The court of appeals ordered it stricken. Within the stricken brief, Jalowiec raised the issue that prospective jurors[***12] observed shackles on him. We conclude that this issue was waived because it was not properly raised before the court of appeals. *State v. Williams (1977), 51 Ohio St. 2d 112, 5 Ohio Op. 3d 98, 364 N.E.2d 1364,* paragraph two of the syllabus.

[*225] Additionally, we conclude that Jalowiec has failed to demonstrate prejudicial error. Defense counsel asserted that some prospective jurors saw Jalowiec handcuffed, but never followed up on it. The court suggested that defense counsel use voir dire to discover any possible prejudice, but counsel failed to do so. Thus, no prejudice is demonstrated on the record.

[HN1] Even if some potential jurors saw Jalowiec handcuffed on the first day of voir dire, the danger of prejudice to Jalowiec was slight, since the juror's view of Jalowiec in custody was brief, inadvertent, and outside the courtroom. See *State v. Kidder (1987), 32 Ohio St. 3d 279, 285-286, 513 N.E.2d 311, 318;* and *State v. Landrum (1990), 53 Ohio St. 3d 107, 118, 559 N.E.2d 710, 724.* See, also, *State v. Richey (1992), 64 Ohio St. 3d 353, 358, 595 N.E.2d 915, 921.* Finally, nothing in the record suggests that the court or prosecutor treated[***13] this matter with a "cavalier attitude." Accordingly, we reject Proposition of Law IV.

Improper Exclusion of Jurors. In Proposition of Law VI, Jalowiec argues that he was deprived of a fair trial and an impartial jury because several jurors were improperly excused based on their views of the death penalty. Specifically, Jalowiec claims that the court improperly excluded prospective jurors Porter, Eubanks, Kowalski, Fobell, and Buck.

In the court of appeals, Jalowiec raised the issue of improper excusal only for prospective jurors Porter and Eubanks. Therefore, Jalowiec has waived claims of error concerning Kowalski, Fobell, and Buck. *Williams, 51 Ohio St. 2d 112, 5 Ohio Op. 3d 98, 364 N.E.2d 1364,* paragraph two of the syllabus.

Prospective juror Porter questioned the ability of anyone to impose a death sentence, based on the Bible. She first indicated that she could not consider death as a sentencing option. Porter later said several times, unequivocally, that she could vote for a death sentence but then said she could not sign a death warrant. The trial court did not abuse its discretion [**172] in excusing Porter, since her views on the death penalty would have substantially [***14]impaired her performance as a juror. *State v. Rogers (1985), 17 Ohio St. 3d 174, 17 Ohio B. Rep. 414, 478 N.E.2d 984,* paragraph three of the syllabus.

Prospective juror Eubanks initially indicated that he could "probably" sign a death verdict. Upon further questioning, he equivocated, then indicated that his death-penalty views would substantially impair his ability to fairly consider a death sentence, then equivocated again. The excusal for cause of prospective juror Eubanks was not an abuse of discretion.

Based on the foregoing, we reject Proposition of Law VI.

GUILT-PHASE ISSUES

Coconspirators' Extrajudicial Statements. In the first part of Proposition of Law I, Jalowiec argues that under *Bruton v. United States (1968), 391 U.S. 123, [*226] 88 S. Ct. 1620, 20 L. Ed. 2d 476,* he was prejudiced and denied his right to confront and cross-examine witnesses when the prosecutor mentioned during opening statement that Raymond Smith had implicated Jalowiec in the Lally murder. While Jalowiec concedes that counsel failed to object to the statement, he asserts that it was plain error under Bruton.

Jalowiec's failure to object waived all but plain error.[***15] See, e.g., *State v. Slagle (1992), 65 Ohio St. 3d 597, 604, 605 N.E.2d 916, 925.* In addition, the issue was not raised before the court of appeals. *Williams, 51 Ohio St. 2d 112, 5 Ohio Op. 3d 98, 364 N.E.2d 1364.*

The prosecutor's brief reference to Raymond Smith's statement did not constitute plain error. It does not appear that "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long (1978), 53 Ohio St. 2d 91, 7 Ohio Op. 3d 178, 372 N.E.2d 804,* paragraph two of the syllabus. The trial court instructed the jury at the outset that opening statements are not evidence. Unlike the situation in Bruton, the statement in issue was not elicited during testimony. The remark, which was not even objected to, did not deny Jalowiec a fair trial. See *State v. Wade (1978), 53 Ohio St. 2d 182, 7 Ohio Op. 3d 362, 373 N.E.2d 1244,* paragraph one of the syllabus. Accordingly, we reject this portion of Proposition of Law I.

Under Proposition of Law II, Jalowiec asserts that the state failed to make a prima facie case of a conspiracy in the Lally murder independent of out-of-court statements by alleged coconspirators. [***16] Therefore, he contends that the court erred in failing to exclude, over defense objections, several out-of-court statements made by Danny Smith.

The trial court overruled Jalowiec's objections, based on [HN2] Evid.R. 801(D)(2), which provides that hearsay does not include "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy." We recognized in *State v. Carter (1995), 72 Ohio St. 3d 545, 651 N.E.2d 965,* paragraph three of the syllabus, that "the statement of a co-conspirator is not admissible pursuant to Evid.R. 801(D)(2)(e) until the proponent of the statement has made a prima facie showing of the existence of the conspiracy by independent proof." See, also, *State v. Lindsey (2000), 87 Ohio St. 3d 479, 481, 721 N.E.2d 995, 1000-1001.*

Independent evidence established that a conspiracy to kill Lally existed on the night of his murder based on the testimony of Michael Smith and on Sharon Hopkins's and Howington's testimony that Jalowiec arranged to get Lally in the car with Raymond Smith. Sharon Hopkins testified about events that occurred within hours of the murder, including[***17] where she was with Raymond, Danny, and Michael Smith, and that she heard from Jalowiec that Michael Smith was in the LeBaron. Brian Howington testified that he was with Jalowiec and Lally on the [*227] night of the murder, and that Jalowiec and Lally left in [**173] the LeBaron around 1:00 a.m. Michael Smith's testimony implicated Jalowiec, Raymond Smith, and Danny Smith in the Lally murder. Michael Smith confirmed that Jalowiec, Raymond Smith, and Danny Smith made arrangements to get Lally into the car, before Lally would have a chance to testify against them.

Evidence at trial also indicated that the conspiracy began as early as September 15, 1993. Lally told Elyria police officer Homoki at Mr. Hero's in Elyria that both Jalowiec and Danny Smith had threatened him. This occurred a month after Raymond Smith and Danny Smith had been arrested as a result of Lally's controlled drug buy. While at Mr. Hero's, Lally told Officer Homoki that "these individuals" had threatened his life because he was going to testify against them. Danny Smith had also pointed to Lally at that time and said: "That snitch will get his."

Accordingly, the following statements by Danny Smith were made in the course of, and[***18] in furtherance of, the conspiracy. Lynne Altpater testified that Danny Smith asked her, about a month before Lally's murder, for some poison for someone who was "going to testify against him." Carl Hartman testified that in November 1993, Danny Smith offered him a BMW and cash to make sure "Ron didn't make it to the stand," but when Hartman refused, Danny Smith told him that "Stanley and his dad" would do it for him.

Sandra Williams testified that Danny Smith told her that "it would be a shame if anything happened to [Lally's] family" or to her. He also said that he knew that Lally's family "lived in a trailer and it would be a shame if it got blowed up." [HN3] Testimony about threats is not hearsay. Evid.R. 801(C) and Comment.

Terry Hopkins testified that on the morning of the murder, Danny Smith told him "they did it" and that Jalowiec told him, "They stomped him and ran him over with a car." Further, he testified that Jalowiec and Raymond and Danny Smith were "kind of like bragging about" murdering Lally and that Danny Smith stated that he wanted the person killed because "he had wore a wire on him on a drug sale." Testimony of bragging by the Smiths tended to implicate them, not [***19] Jalowiec, and thus was harmless, even if not admissible as statements against interest or statements of coconspirators.

We find that the prosecution established a prima facie case of conspiracy. [HN4] The early admission of statements that could have been deemed hearsay at the

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time they were elicited was rendered harmless, since independent proof of the conspiracy was admitted into evidence before the case was submitted to the jury. *Carter, 72 Ohio St. 3d at 550, 651 N.E.2d at 972;* see, also, *Smith, 87 Ohio St. 3d at 433-435, 721 N.E.2d at 106-107.* We reject Proposition of Law II.

Sufficiency of Evidence. In Proposition of Law III, Jalowiec contends that the trial court erred in failing to grant his motion for acquittal under Crim.R. 29. [*228] Specifically, Jalowiec asserts that there was no evidence that any element of the crime was committed in Lorain County and that venue in Lorain County was therefore improper. Jalowiec also argues that there was insufficient evidence to prove prior calculation and design.

[HN5] When reviewing a claim of insufficient evidence, the relevant inquiry is whether any rational factfinder, viewing the evidence in a light most [***20] favorable to the state, could have found the essential elements of the crime proven beyond a reasonable doubt. *Jackson v. Virginia (1979), 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573; State v. Jenks (1991), 61 Ohio St. 3d 259, 574 N.E.2d 492,* paragraph two of the syllabus. The verdict will not be disturbed unless the reviewing court finds that reasonable minds could not reach the conclusion reached by the trier of fact. *Id. at 273, 574 N.E.2d at 503.*[**174]

With regard to Jalowiec's claim of improper venue, we held in *State v. Beuke (1988), 38 Ohio St. 3d 29, 526 N.E.2d 274,* paragraph one of the syllabus: [HN6] "When an offender commits offenses in different jurisdictions as part of a course of criminal conduct, venue lies for all the offenses in any jurisdiction in which the offender committed one of the offenses or any element thereof. (*R.C. 2901.12*[H].)" Venue is not a material element of any crime but is a fact that must be proven beyond a reasonable doubt. *State v. Headley (1983), 6 Ohio St. 3d 475, 477, 6 Ohio B. Rep. 526, 528, 453 N.E.2d 716, 718.* However, [HN7] *R.C. 2901.12(G)* [***21] provides: "When it appears beyond a reasonable doubt that an offense or any element of an offense was committed in any of two or more jurisdictions, but it cannot reasonably be determined in which jurisdiction the offense or element was committed, the offender may be tried in any such jurisdiction." (Emphasis added.)

The testimony by Officer Homoki concerning the threats made to Lally by Jalowiec and Danny Smith and the events culminating in Lally's being taken out of Lorain County with Jalowiec and Raymond and Michael Smith indicate that a conspiracy had been formed prior to the murder. The evidence shows that those events were orchestrated and supports the prosecution's claim that prior calculation and design occurred in Lorain County.

Michael Smith testified that after he and his father got in the LeBaron driven by Jalowiec, Raymond Smith brandished a gun and told Lally not to make any sudden moves. As they drove toward Cleveland, Raymond Smith repeatedly asked Lally why he "set my son up."

Yet Michael Smith also testified that Smith told Lally that they were going to put him on a bus to leave town and that "everything got a little more comfortable" in the car while the four[***22] of them drank beer and smoked crack. Michael Smith testified that they drove to East Cleveland to buy crack for Lally to take on his trip. Although this evidence could be considered to somewhat negate the [*229] state's argument that prior calculation and design was formed in Lorain County, the trier of fact could have concluded that the conspirators were simply engaged in a subterfuge to relax Lally.

Subsequently, Raymond Smith directed the car into Woodland Cemetery in Cleveland and told Lally: "You will never snitch on nobody again." After Raymond Smith shot Lally, Jalowiec got out of the car and helped him beat Lally. After leaving Lally in the cemetery road, Jalowiec attempted to drive the LeBaron over Lally's body several times.

In our view, the evidence at trial indicated that the whole sequence of events leading up to Lally's murder, including prior calculation and design, occurred in both Lorain and Cuyahoga Counties. As was true in the case involving Jalowiec's coconspirator, see *State v. Smith, 87 Ohio St. 3d at 435-436, 721 N.E.2d at 107-108,* the jury could have reasonably found that prior calculation and design by Jalowiec took place in Lorain County. As in[***23] Smith, the jury could have reasonably concluded that getting Lally in the car ostensibly to ride to Cleveland to buy crack, as well as the plan to have Lally take a bus out of town, was merely a ruse to enable them to kill him in an area where his corpse could not be identified. In sum, we find that the trial court did not err in denying Jalowiec's Crim.R. 29 motion for acquittal on grounds of improper venue or in failing to demonstrate prior calculation and design. Therefore, we reject Proposition of Law III.

Gruesome Photographs. In Proposition of Law XI, Jalowiec asserts error in the admission of gruesome, prejudicial, and cumulative photographs.

[HN8] Under Evid.R. 403, the admission of photographs and similar evidence is left to the sound

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discretion of the trial court. *State v. Maurer (1984), 15 Ohio St. 3d 239, 264, 15 Ohio B. Rep. 379, 401, 473 [**175] N.E.2d 768, 791.* Nonrepetitive photographs in capital cases, even if gruesome, are admissible if the probative value of each photograph outweighs the danger of material prejudice to the accused. Id. at paragraph seven of the syllabus.

Jalowiec does not specify that any particular photographs were cumulative. He merely[***24] argues that since there was no dispute as to the cause of death, the gruesome photographs, as a whole, were inadmissible. However, [HN9] "the fact that appellant stipulated the cause of death does not automatically render the photographs inadmissible." *Maurer, 15 Ohio St. 3d at 265, 15 Ohio B. Rep. at 401, 473 N.E.2d at 792.*

State exhibits 1-A through 1-Q are photographs of the crime scene where Lally's body was discovered. Several were admitted into evidence without objection. State exhibits 1-G and 1-I through 1-M were admitted over defense objections. [HN10] Any alleged error in the admission of the photographs that were not objected to is waived.

[*230] Of the seventeen crime scene photographs, only three appear to be grisly. Each of these photographs corroborated the testimony of Cleveland detective Michael Beaman, who investigated the Lally homicide on the extremely cold morning of January 19, 1994. These photographs also helped to establish the intent of the killers and the "nature and circumstances of the crimes." *State v. Reynolds (1998), 80 Ohio St. 3d 670, 677, 687 N.E.2d 1358, 1367.* State exhibit 1-F shows the victim lying face down on the cemetery road with a wound [***25]to his left shoulder. State exhibit 1-G, which the court warned the jury was gruesome, shows the victim's face covered with blood and snow and a large wound on his neck. State exhibit 1-H depicts Lally's chest covered with blood.

The other crime scene photographs show various items of evidence found at the scene. State exhibits 1-L and 1-M depict tire tracks running through a large bloodstain. The photographs also corroborate the testimony of Michael Smith, who was a witness to the murder. Four photographs showing the body lying across the road are repetitive but are not gruesome, so there is no prejudice. None of the rest of these crime scene photographs is repetitive.

State exhibits 2-A through 2-CC are twenty-seven photographs taken around the time of Lally's autopsy. n2 Jalowiec objected to the admission of all autopsy photographs because of their gruesome and repetitive nature. The trial court overruled his objections and admitted them into evidence.

----------Footnotes----------

n2 There are no photographs in the record marked state exhibits 2-D or 2-V.

----------End Footnotes---------- [***26]

Admittedly, several of these photographs are gruesome. Each one corroborates the testimony of Dr. Raaf, who performed the autopsy on Lally. The cumulative effect of several repetitive autopsy photographs was harmless. In addition, the photographs illustrated the extent of the beating that Lally sustained and the attempts made by Jalowiec to run over his body with a car, and the photographs were relevant by illustrating witness testimony and forensic evidence. *Maurer, 15 Ohio St. 3d at 265-266, 15 Ohio B. Rep. at 401-402, 473 N.E.2d at 791-792.* Accordingly, we overrule Proposition of Law XI.

Jury Instructions. In Proposition of Law XIII, Jalowiec argues that it was impossible to reconcile the specific-intent requirement of former *R.C. 2903.01(D)*, 139 Ohio Laws, Part I, 3-4, and the charge given to the jury. He asserts that the overall jury charge was so confusing that one simply cannot find that the jury was clearly instructed. However, Jalowiec's failure to object to the instruction waived all but plain error.

The portion of the jury charge that Jalowiec claims is in conflict with former *R.C. 2903.01(D)* provided: [***27] [**176]

" 'Cause' is an essential element of the offense charged in Count One.

[*231] " 'Cause' is an act, or a failure to act, which in the natural and continuous sequence directly produces the death, and without which it would not have occurred.

" 'Cause' occurs when the death is the natural and foreseeable result of the act, or the failure to act.

"The Defendant's responsibility is not limited to the immediate or most obvious result of the Defendant's act, or failure to act.

"The Defendant is also responsible for the natural and foreseeable consequences or results that follow, in the ordinary course of events, from the act or failure to act."

We have stated that [HN11] "[a] single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge." *State v. Price (1979), 60 Ohio St. 2d 136, 14 Ohio Op. 3d 379, 398 N.E.2d 772,* paragraph four of the syllabus. Here, the overall charge indicated that the jury was required to find specific intent to kill and prior calculation and design before it could convict Jalowiec of aggravated murder. The instruction on foreseeable consequences does not constitute error, let alone plain error, since[***28] other instructions given by the court limited any prejudicial effect. *State v. Getsy (1998), 84 Ohio St. 3d 180, 196, 702 N.E.2d 866, 883.* Accordingly, Proposition of Law XIII is overruled.

SENTENCING ISSUES

Rebuttal Testimony. In Proposition of Law XII and in the second part of Proposition of Law I, Jalowiec asserts that he was prejudiced by the state's presentation of rebuttal witnesses during the mitigation phase. Jalowiec contends that under the guise of rebuttal, the state presented numerous witnesses who testified as to other crimes committed by Jalowiec. Jalowiec submits that this testimony was essentially evidence of nonstatutory aggravating circumstances.

At the mitigation hearing, Jalowiec gave an unsworn statement, during which he also responded to questions from defense counsel. During his unsworn statement, Jalowiec chronicled his problems with rheumatoid arthritis, its effects on him, and how it prevented him from holding a job for very long. He spoke about the relationship he had with the children of his girlfriend and how he had developed a father-son relationship with her son, Derrick. Jalowiec denied being involved with threatening or[***29] wanting to kill Lally, stating, "I had nothing to do with this." He also denied having a crack problem and asserted that there were no pending drug cases against him.

[*232] At that point, away from the jury, the defense indicated that it was going to rest if the trial court thought it had not opened the door for rebuttal by the prosecution. The court overruled the defense motion to prevent rebuttal by the state on the grounds that Jalowiec had brought out a character trait, that "he is a great guy," that could be rebutted under Evid.R. 404(A)(1), in particular with evidence of prior crimes of violence.

After this, the court permitted Jalowiec to continue with his unsworn statement. Jalowiec then admitted that he had pending charges brought against him for felonious assault, menacing, arson, aggravated drug trafficking, and possessing drug paraphernalia. The first three charges related to bar fights in which Jalowiec was involved, but he denied any guilt. With regard to the charges of drug trafficking, Jalowiec claimed that he did not "know, really know, what this is all about" and further claimed that the drug charges had been brought in an attempt to compel him to testify against others[***30] in the homicide investigation.

The defense then called a number of other witnesses, including relatives, who testified that Jalowiec was "great" with children, that he fainted at the sight of [**177] blood, that he "loved kids," that he would not go hunting and "wouldn't kill a thing," that he did not start the bar fight that led to the menacing charge or fight back, and that he was a "fun loving kid" who "loved animals" and loved kids and people.

In response, the state produced seven rebuttal witnesses who testified that Jalowiec sold crack cocaine, that he had a crack pipe that fell out of his pants leg when he was pulled over on a traffic stop, that he hit someone with a baseball bat outside a bar, causing almost $20,000 in medical bills to the victim, that he bragged about kicking the same bar-fight victim in the face, and that he caused injuries to another victim of the same bar fight, resulting in hospitalization and $10,000 worth of medical bills.

In *State v. Gumm (1995), 73 Ohio St. 3d 413, 653 N.E.2d 253,* syllabus, we held that [HN12] "counsel for the state at the penalty stage of the capital trial may introduce * * * (3) evidence rebutting the existence of any statutorily[***31] defined or other mitigating factors first asserted by the defendant." Accord *State v. Raglin (1998), 83 Ohio St. 3d 253, 261, 699 N.E.2d 482, 490.*

Here, Jalowiec denied knowledge of any legitimate basis as to why particular drug trafficking charges had been brought against him. He called several witnesses to testify about what a good person he was.

[HN13] The trial court has discretion to determine what relevant evidence is admissible as proper rebuttal. *State v. Dunlap (1995), 73 Ohio St. 3d 308, 316, 652 N.E.2d 988, 996.* In discharging its burden to prove that the aggravating circumstance outweighs the mitigating factors, the prosecution may rebut mitigation evidence. *State v. DePew (1988), 38 Ohio St. 3d 275, 285-286, 528 N.E.2d 542, 554.*

[*233] Similar to the situation in *State v. McNeill (1998), 83 Ohio St. 3d 438, 446-447, 700 N.E.2d 596, 605-606,* Jalowiec opened the door to rebuttal. This rebuttal evidence tended to show that Jalowiec was capable of strenuous physical activity, that he sold drugs,

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and that he severely beat victims in the bar fights that led to the charges against him. The trial court did not err in permitting[***32] the prosecution to rebut Jalowiec's unsworn statement or witnesses. The rebuttal testimony did not amount to the introduction of nonstatutory aggravating circumstances. See *Gumm, 73 Ohio St. 3d 413, 653 N.E.2d 253,* syllabus.

Jalowiec argues under the second part of Proposition of Law I that the out-of-court statements of Raymond Smith, which were elicited during the rebuttal testimony of Detective Alan Leiby in the mitigation phase, prejudiced him. Jalowiec also contends that the trial court improperly admitted two taped confessions of Smith, the second one implicating Jalowiec, at the mitigation phase.

During his unsworn statement, Jalowiec testified, "I had no reason to kill that man." He stated, "Detective Leiby specifically set me up and he made some comments in the newspaper, to the Chronicle, and one of the comments was that it was impossible for him to get 15 people to lie against us." Jalowiec also stated, "I really didn't have nothing to do with this, that it was a family thing and I am not part of the Smith family."

In rebuttal, Detective Leiby testified that Raymond Smith told him on the telephone that Jalowiec was involved in the Lally murder. Smith was[***33] trying to help his son Danny Smith work out a deal to avoid six counts of drug trafficking. Smith gave a taped statement at police headquarters describing the events leading up to Lally's death at the cemetery. He claimed that Lally had the gun and that Lally had kidnapped him. He did not mention Jalowiec's name at that time. Later, Smith phoned Detective Leiby and told him that the other person in the cemetery was Jalowiec.

Given the case law cited in our discussion of Proposition of Law XII, DePew and [**178] McNeill, supra, Jalowiec's mitigation evidence, especially his denials of involvement in the Lally murder, opened the door to this rebuttal evidence.

However, the admission of the two taped statements of coconspirator Raymond Smith was erroneous, since both tapes constituted inadmissible hearsay. Jalowiec's failure to object to their admission waived all but plain error. In this instance, no plain error occurred, since the improper admission of the tapes was not outcome-determinative in light of the abundant evidence presented against Jalowiec. [HN14] Any prejudicial impact this evidence may have had on the sentencing phase can be cured by our independent review of the sentence. [***34]*State v. Dennis (1997), 79 Ohio St. 3d 421, 432, 683 N.E.2d 1096, 1106.* Therefore, we reject the second part of Proposition of Law I.

[*234] Sentence Appropriateness. In Proposition of Law VII, Jalowiec challenges the appropriateness of his death sentence. The appropriateness of this sentence will be evaluated in connection with our independent sentence evaluation.

Proportionality Review. In Proposition of Law VIII, Jalowiec argues that the proportionality review that we conduct is not the one established in *R.C. 2929.05* and is fatally flawed, since it does not include cases where a life sentence was imposed. We disagree. [HN15] Proportionality review entails comparing only cases where a sentence death is imposed. *State v. Steffen (1987), 31 Ohio St. 3d 111, 123-124, 31 Ohio B. Rep. 273, 284, 509 N.E.2d 383, 395.* Accordingly, we reject Proposition of Law VIII.

Jury Instructions. In Proposition of Law IX, Jalowiec criticizes the trial court's penalty-phase jury instructions. Jalowiec essentially argues that the following instruction required that the jury reject the death penalty before it considered the life sentences, an[***35] instruction proscribed in *State v. Brooks (1996), 75 Ohio St. 3d 148, 160, 661 N.E.2d 1030, 1041:*

"You should recommend the sentence of death if you unanimously, that is, all twelve of you, find by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors.

"If you do not so find, you shall unanimously (all twelve) recommend either a life sentence with parole eligibility after serving twenty years of imprisonment, or a life sentence with parole eligibility after serving thirty years of imprisonment."

[HN16] Jalowiec's failure to object to this instruction waived all but plain error. *State v. Underwood (1983), 3 Ohio St. 3d 12, 3 Ohio B. Rep. 360, 444 N.E.2d 1332,* syllabus. The instruction does not constitute plain error. See *State v. Bey (1999), 85 Ohio St. 3d 487, 498, 709 N.E.2d 484, 496; State v. Goff (1998), 82 Ohio St. 3d 123, 128-129, 694 N.E.2d 916, 921-922; State v. Mitts (1998), 81 Ohio St. 3d 223, 233, 690 N.E.2d 522, 531.* Unlike in *Brooks, 75 Ohio St. 3d at 159, 661 N.E.2d at 1040,* the jury in this case was not told that it had "to determine unanimously[***36] that the death penalty was inappropriate before you can consider a life sentence." Instead, "the jury was free to consider a life sentence even if jurors had not unanimously rejected the death penalty." *State v. Taylor (1997), 78 Ohio St. 3d 15, 29, 676 N.E.2d 82, 95.*

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Jalowiec complains that the court referred to aggravating circumstances (plural) when he was charged with only one aggravating circumstance. However, the state moved the trial court to correct the transcript because the court reporter had informed the prosecutor that "in computerized transcription, the word circumstance is automatically typed in as circumstances." On June 24, 1997, the trial court granted the state's motion to correct the record. But the transcript itself was not corrected, and the plural appears throughout. The plural noun often has a singular verb, however, corroborating the claim of error in transcription. [*235] Moreover, the trial court instructed the jury on only one [**179] aggravating circumstance, and the verdict forms set forth only one aggravating circumstance for the jury to consider.

[HN17] Jalowiec points out that the trial court erred in instructing the jury on all statutory mitigating factors, [***37] including factors that were not relevant. See *State v. Hicks (1989), 43 Ohio St. 3d 72, 77, 538 N.E.2d 1030, 1036, fn. 3,* and *State v. DePew, 38 Ohio St. 3d at 289, 528 N.E.2d at 557.* This did not, however, constitute plain error. See *Bey, 85 Ohio St. 3d at 498, 709 N.E.2d at 496.*

Last, Jalowiec argues that the jury was provided no guidance on how to proceed. Specifically, Jalowiec contends that the court's instruction on weighing essentially compelled a death sentence. The trial court instructed:

"The Prosecutor has the burden to prove, beyond a reasonable doubt, that the aggravating circumstances [sic] which the Defendant was found guilty of outweighs the factors in mitigation of imposing the death sentence.

" 'To outweigh' means to weigh more than, to be more important than.

"The existence of mitigating factors does not preclude or prevent the death sentence if the aggravating circumstances [sic] outweighs the mitigating factors."

We conclude that the instruction complies with *R.C. 2929.03.* Based on all the foregoing, we reject Proposition of Law IX.

Effective Assistance. In Proposition[***38] of Law V, Jalowiec claims that he was denied effective assistance of trial counsel. [HN18] To gain reversal of a conviction for ineffective assistance, "first, the defendant must show that counsel's performance was deficient. * * * Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693.* Accord *State v. Bradley (1989), 42 Ohio St. 3d 136, 538 N.E.2d 373.*

The record does not support a finding that Jalowiec was prejudiced, that is, that there was "a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." Id. at paragraph three of the syllabus.

Jalowiec identifies five areas where counsel were allegedly deficient.

First, Jalowiec complains that "during voir dire counsel failed to rehabilitate favorable jurors and failed to timely object to unfounded challenges by the State." Although Jalowiec does not provide any specific examples or citations to the record, he is apparently referring to the excused jurors mentioned under Proposition of Law VI. As previously discussed, [***39]none of the juror excusals challenged in that proposition was improper. Moreover, we have repeatedly held that [HN19] counsel is in a much better position to determine whether jurors could have [*236] been rehabilitated than can a reviewing court. E.g., *State v. Phillips, 74 Ohio St. 3d 72, 85-86, 656 N.E.2d 643, 659; Bradley, 42 Ohio St. 3d at 143, 538 N.E.2d at 381.*

Second, Jalowiec claims that he was prejudiced because counsel failed to object to the admission of his coconspirator's statements on tapes that implicated him in the murder. Defense counsel specifically declined to object to this evidence at the close of the mitigation phase. As discussed under Proposition of Law XII, the admission of the two taped statements of Raymond Smith was improper. Counsel should have objected to these tapes. However, their admission did not affect the outcome of Jalowiec's sentencing determination. *Bradley, 42 Ohio St. 3d 136, 538 N.E.2d 373,* paragraph two of the syllabus.

Third, Jalowiec argues that he was prejudiced by counsel's failure to request an expert to assist them in determining the cause of death. The deputy coroner, Dr. Heather Raaf, testified that Lally's[***40] injuries were consistent with being [**180] stomped or struck by a vehicle several times. On cross-examination, Dr. Raaf stated that she did not find any tire or boot tread markings on Lally's corpse. Because of this, Jalowiec claims that counsel were deficient in failing to request their own expert witness.

However, Dr. Raaf did not testify that there were no markings on Lally's body; rather, she testified that there

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were no tread markings found on the body. Had counsel requested an expert on cause of death, the request might not have been granted. [HN20] The appointment of defense experts is within the sound discretion of the trial court. See *State v. Jenkins (1984), 15 Ohio St. 3d 164, 15 Ohio B. Rep. 311, 473 N.E.2d 264,* paragraph four of the syllabus. Jalowiec has failed to demonstrate how such an expert would have aided his defense or that there was a basis for requesting an expert. See *State v. Mason (1998), 82 Ohio St. 3d 144, 150, 694 N.E.2d 932, 943-944.* In sum, Jalowiec has not demonstrated how he was prejudiced by counsel's failure to seek expert assistance.

Fourth, Jalowiec claims deficient representation because counsel (1) failed to object to the instruction[***41] on all statutory mitigating factors, (2) failed to object to the lack of a sympathy instruction, (3) failed to object to the instruction on consideration of life sentences, (4) failed to request a definition of the term "mitigation" at the penalty phase, and (5) failed to object to the guilt phase instruction that the "Defendant is charged as a principal offender."

The decision not to request a sympathy instruction was appropriate, since sympathy is irrelevant to sentencing and no instruction on it need be given. See *State v. Allen (1995), 73 Ohio St. 3d 626, 638, 653 N.E.2d 675, 687.* Counsel did not err in failing to object to the instruction supposedly requiring consideration of the death penalty before life sentences, because, as discussed under Proposition of Law IX, the instruction did not violate *Brooks, 75 Ohio St. 3d at 160, 661 N.E.2d at 1041.*

[*237] The failure to request an instruction defining the term "mitigation" did not prejudice Jalowiec. [HN21] The absence of instructions on the concept of mitigation does not violate the Eighth and Fourteenth Amendments to the United States Constitution. *Buchanan v. Angelone (1998), 522 U.S. 269, 275-277, 118 S. Ct. 757, 761-762, 139 L. Ed. 2d 702, 709-710.* [***42]The instructions here did not foreclose the jury's consideration of any mitigating evidence, since the court directed the jury to "consider all of the evidence." *Id., 522 U.S. at 277, 118 S. Ct. at 762, 139 L. Ed. 2d at 710; Goff, 82 Ohio St. 3d at 131, 694 N.E.2d at 923.*

Counsel's failure to object to the instruction on Jalowiec's being charged as a principal offender was harmless. The court properly defined principal offender as part of the complicity instruction. This case involved the specification of killing to prevent testimony under *R.C. 2929.04(A)(8)*; it did not involve the felony-murder specification of *R.C. 2929.04(A)(7)*, where determination of principal-offender status may be critical. See *State v. Taylor (1993), 66 Ohio St. 3d 295, 612 N.E.2d 316.*

Fifth, Jalowiec contends that counsel were ineffective in permitting the defendant to make an unsworn statement, which resulted in a ruling that the prosecutor could rebut it. However, counsel's decision to have Jalowiec make an unsworn statement did not fall "below an objective standard of reasonable representation." *Bradley, 42 Ohio St. 3d 136, 538 N.E.2d 373,*[***43] paragraph two of the syllabus. Counsel's decision was in the nature of trial strategy. With little mitigating evidence to offer, counsel decided to let Jalowiec speak to the jury in the hope of avoiding the death penalty. [HN22] We ordinarily refrain from second-guessing strategic decisions made by counsel at trial, even where counsel's strategy was questionable, *State v. Clayton (1980), 62 Ohio St. 2d 45, 49, [**181] 16 Ohio Op. 3d 35, 37, 402 N.E.2d 1189, 1192,* and even though appellate counsel essentially argue that they would have defended differently. *Mason, 82 Ohio St. 3d at 169, 694 N.E.2d at 956.*

Based on the foregoing, we reject Proposition of Law V.

Constitutionality. [HN23] In Proposition of Law X, Jalowiec argues that Ohio's death-penalty scheme violates both the state and federal Constitutions on numerous grounds. As we have before, we summarily reject these arguments. *State v. Poindexter (1988), 36 Ohio St. 3d 1, 520 N.E.2d 568,* syllabus. See *Jenkins, 15 Ohio St. 3d 164, 15 Ohio B. Rep. 311, 473 N.E.2d 264; State v. Sowell (1988), 39 Ohio St. 3d 322, 336, 530 N.E.2d 1294, 1309;* [***44] *Steffen, 31 Ohio St. 3d at 125, 31 Ohio B. Rep. at 285-286, 509 N.E.2d at 396; State v. Grant (1993), 67 Ohio St. 3d 465, 483, 620 N.E.2d 50, 69; Maurer, 15 Ohio St. 3d 239, 15 Ohio B. Rep. 379, 473 N.E.2d 768,* paragraph six of the syllabus; *State v. Lewis (1993), 67 Ohio St. 3d 200, 206, 616 N.E.2d 921, 926; State v. Buell (1986), 22 Ohio St. 3d 124, 22 Ohio B. Rep. 203, 489 N.E.2d 795;* and *State v. Coleman (1989), 45 Ohio St. 3d 298, 308, 544 N.E.2d 622, 633.*

[*238] INDEPENDENT REVIEW AND PROPORTIONALITY

In Proposition of Law VII, Jalowiec asserts that his death sentence should be reversed as inappropriate, especially since during mitigation the state was able to introduce evidence of other crimes of which he had been accused. As discussed under Propositions of Law I and XII, Jalowiec opened the door to this rebuttal testimony when he denied his guilt, denied having any drug charges pending against him, and generally portrayed himself as a good person.

Among other evidence, the testimony that Jalowiec and Danny Smith threatened Lally at the Mr. Hero's restaurant, that Danny Smith secured his father and Jalowiec to[***45] ensure that "somebody didn't make it to the stand," and that Jalowiec participated in the murder of Lally to prevent him from testifying in the Smith drug trials, combined to prove the single aggravating circumstance beyond a reasonable doubt. Upon independent assessment, we conclude that the evidence supports beyond a reasonable doubt the aggravating circumstance of *R.C. 2929.04(A)(8)*.

The nature and circumstances of the offense provide nothing in mitigation. Jalowiec and Raymond Smith beat Ron Lally to death. That Smith participated and shot Lally does not mitigate the appropriate punishment.

Jalowiec's history, character, and background provide some mitigating features. Several witnesses testified on Jalowiec's behalf, including his parents, sister, and grandfather, and a former girlfriend. Ray Pasterczyk told how Jalowiec helped him do odd jobs around his house while he recuperated from knee-replacement surgery. Jackie Chaffin, Jalowiec's former live-in girlfriend, stated that Jalowiec was her oldest son Derrick's "best friend" and that Jalowiec continued to give him presents and cards, even when she and Jalowiec were not living together. Chaffin recounted[***46] how Jalowiec regularly took Chaffin's youngest son, Cody, who had numerous medical problems, to therapy, and that he would baby-sit Derrick too. Chaffin described Jalowiec as "great with my children" and stated that he "never caused trouble for me."

Nancy Morrison, a friend of Jalowiec and his family, testified that Jalowiec "loved kids" and was always courteous and nice to her. Jalowiec's grandfather, Edward Jalowiec, recounted how Jalowiec worked at his golf course and would help him do other chores. He stated that Jalowiec "wouldn't go hunting with us. He wouldn't kill a thing * * *." He further noted Jalowiec's problems with arthritis and hoped that the jury would spare his life. [**182]

Jalowiec's younger sister, Tammy Jalowiec, stated that she had a good relationship with her brother and never had any problems with him. She also spoke of Jalowiec's problems with arthritis and claimed that Jalowiec was the victim in the [*239] bar fight that resulted in criminal charges brought against him. She pleaded with the jury not to sentence Jalowiec to death.

Jalowiec's father, Edward Jalowiec, testified that he got along "real good" with his son. He denied his son's guilt in the arson charge that [***47]followed a bar fight. Jalowiec's father also expressed disbelief that his son could have killed anyone, since "he wouldn't even shoot a rabbit."

Jalowiec's mother, Sarah Jalowiec, described her son as someone who always had been "a fun loving kid" and stated that he "loved animals." She confirmed that Jalowiec's rheumatoid arthritis prevented him from holding down a job. Mrs. Jalowiec stated that he "loves people" and asked the jury to spare her son's life.

Jalowiec gave an unsworn statement in which he denied killing Lally and claimed that he and Lally had been friends. He gave a brief life story that included the chronology of his arthritis. He claimed that it prevented him from writing continuously, and that, as a result, he had had to quit high school. He admitted that other criminal charges had been brought against him, which were still pending. In general, Jalowiec denied that he had committed the various crimes alleged in the pending charges and cast himself as a victim who had acted in self-defense.

[HN24] With regard to the statutory mitigating factors of *R.C. 2929.04(B)*, the fact that the killers and victim were smoking crack cocaine prior to the murder[***48] did not place Jalowiec under duress, coercion, or strong provocation under factor two. Factor four, the youth of the offender, has little weight, since Jalowiec was twenty-three years old at the time of the offense. Factor five is relevant, since Jalowiec lacked a significant history of prior criminal convictions or delinquency adjudications. Factor six is not implicated, since Jalowiec participated directly in the killing when he and Raymond Smith beat Lally and when he attempted to drive over Lally's body several times before fleeing the cemetery.

Under factor seven, the catchall factor, several aspects are worthy of weight in mitigation. [HN25] The love and support that Jalowiec enjoys from his family is entitled to some weight. See, e.g., *Mason, 82 Ohio St. 3d at 170, 694 N.E.2d at 957*. Jalowiec's chronic rheumatoid arthritis is worthy of slight weight in mitigation. The fact that Jalowiec was under the influence of crack cocaine at the time of the offense could also be considered mitigating under this factor. See *Sowell, 39 Ohio St. 3d at 324-326, 530 N.E.2d at 1299-1300.*

Upon independent weighing, we conclude that the aggravating circumstance outweighs[***49] the mitigating factors beyond a reasonable doubt. [HN26] The killing of a witness to prevent his testimony in another criminal proceeding strikes at the heart of the

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criminal justice system. See *State v. Keene (1998), 81 Ohio St. 3d 646, 671, 693 N.E.2d 246, 266-267.*

[*240] The death penalty imposed in this case is both appropriate and proportionate with the death sentence imposed on Jalowiec's fellow murderer, Raymond Smith, in *Smith, 87 Ohio St. 3d 424, 721 N.E.2d 93,* and the sentence given in *Coleman, 85 Ohio St. 3d 129, 707 N.E.2d 476.* Both cases involved the single specification of murdering a witness to prevent his testimony in a criminal proceeding. The sentence is also appropriate and proportionate to the sentence imposed in cases with capital specifications in addition to the (A)(8) specification. See *State v. Lawson (1992), 64 Ohio St. 3d 336, 595 N.E.2d 902; State v. Hooks (1988), 39 Ohio St. 3d 67, 529 N.E.2d 429.* For these reasons, the judgment of the court of appeals is hereby affirmed.

Judgment affirmed.

[**183]

MOYER, C.J., DOUGLAS, RESNICK and F.E. SWEENEY, JJ., concur.

COOK, J., concurs in judgment. [***50]

LUNDBERG STRATTON, J., concurs in part and dissents in part.

APPENDIX

Proposition of Law I: Appellant Jalowiec's sixth, eight and fourteenth amendment rights as guaranteed by U.S. CONST. were violated by the admission at trial of a co-defendant's confession inculpating the defendant.

Proposition of Law II: Appellant Jalowiec was denied his fifth, sixth, eighth and fourteenth amendment rights as guaranteed by the U.S. Constitution by the admission of statements of a co-conspirator which did not meet the requirements of 801(D)(2)(e) of the Ohio Rules of Evidence.

Proposition of Law III: U.S. CONST., amendments five, six, eight, and fourteen and Article I, Sections 10 and 16 of the OHIO CONST. require that a court grant a motion for judgment of acquittal when the evidence is insufficient to sustain a conviction.

Proposition of Law IV: Jurors viewing a defendant in shackles is a violation of the U.S. CONST., 14th amendments [sic] and Article I, Section 10 of the OHIO CONST.

Proposition of Law V: The ineffective assistance of counsel provided to Appellant violated his rights to a fair and impartial jury trial and sentence, as guaranteed by the fifth, sixth, eighth and fourteenth[***51] amendments to the U.S. CONST. and the OHIO CONST.

Proposition of Law VI: The 6th and 14th amend. to the U.S. CONST. and Sections

[**187] contd

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published documents.] 10 and 16 of the OHIO CONST. guarantee an accused a fair trial and an impartial jury. The improper exclusion for cause of potential jurors because of their views on the death penalty denied appellant Jalowiec these constitutional guarantees.

Proposition of Law VII: The death sentence in appellant Jalowiec's case is unreliable and inappropriate under the 8th and 14th amend. to the U.S. CONST. and Sections 9, 10, and 16, Article I of the OHIO CONST. and *R.C. 2929.05.*

Proposition of Law VIII: The proportionality review that this court must conduct in the present capital case pursuant *R.C. 2929.05* is fatally flawed and, therefore, the present death sentence must be vacated pursuant to the 5th, 8th, and 14th amend. to the U.S. CONST. and Sections 5 and 10, Article I of the OHIO CONST. and *R.C. 2929.05.*

Proposition of Law IX: Improper penalty phase jury instructions violate an individuals [sic] rights as guaranteed by the U.S. CONST., amend. 5, 6, 8, and 14 and Ohio Const. Article[***52] I Section 10.

Proposition of Law X: Ohio's death penalty law, *OHIO REV. CODE 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.04* and *2929.05* violate U.S. CONST. amend. V, VI, VIII, and XIV and Article I, Sections 1, 2, 5, 9, 10 and 16.

Proposition of Law XI: Appellant Jalowiec was denied his 6th, 8th, and 14th amendment rights as guaranteed by the U.S. CONST. and Sections 8 and 10, Article I of the OHIO CONST. to a fair trial, due process and a reliable determination of his guilt and sentence when gruesome, prejudicial and cumulative photographs were admitted into evidence even though their prejudicial effect outweighed their probative value.

Proposition of Law XII: To allow evidence of nonstatutory aggravating factors during the sentencing phase of appellant's trial violated his rights guaranteed by

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the U.S. CONST. amend. 6, 8, and 14 and OHIO CONST. Article I, Section 10.

Proposition of Law XIII: The trial court's jury instruction in the fact-finding phase denied petitioner his rights to be free from cruel and unusual punishment, to a fair trial, to the effective assistance of counsel, to a fair and impartial jury and the due process of law under[***53] the Fifth, Sixth, Eighth and Fourteenth Amend. to the U.S. CONST. and Article I, Section 10 of the OHIO CONST.

CONCURBY: Lundberg Stratton (In Part)

DISSENTBY: Lundberg Stratton (In Part)

DISSENT: Lundberg Stratton, J., concurring in part and dissenting in part.

While I concur in the portion of the majority's opinion affirming defendant's convictions, I dissent from the decision to uphold the sentence of death because I do not believe that defendant's unsworn statement opened the door to all of the prejudicial information presented by the prosecution in rebuttal.

At the mitigation hearing, defendant made an unsworn statement. Defendant stated that he had a good grade school record and had perfect attendance until he was diagnosed with rheumatoid arthritis when he was twelve or thirteen years old. He told of several odd jobs that he held intermittently when he was able to work.

Defendant told the jury that eventually he met a single mother with one son, and the three moved in together. When defendant's arthritis became so severe that he could no longer work, he stated, he stayed home and took care of his girlfriend's son while she worked. He told the jury that he would clean the house, go[***54] for walks with her son and the dog, and spend time with the child, flying kites and doing other activities. Defendant and his girlfriend broke up for a period of time, and she became pregnant while they were apart. Ultimately, defendant and his girlfriend got back together, and he accepted her new baby and helped raise the baby as well. For a short time, defendant went back to work in order to help support both children. However, when it was discovered that the baby was deaf, defendant stated, he quit his job in order to take the baby to various therapy appointments. In general, defendant maintained his innocence of [*241] the murder. Defendant stated that although Danny Smith "caught some drug cases, you know, I didn't catch no drug cases."

Following defendant's unsworn statement, his attorney approached the bench and stated that he was unsure how the court intended to proceed. Counsel stated that if the court felt that he had not opened the door for rebuttal by the prosecution, then that was all that counsel would present in mitigation. When the trial court stated that the prosecutor was entitled to some rebuttal, the prosecuting attorney said that he would rebut defendant's portrayal[***55] of himself as a "caring individual who wanted to work, but could not, and cares for these kids." He explained, "I think since he has chosen to put that trait into evidence, it is not a 404(B) or 404(A) problem as much as it is straight out rebuttal of an issue that he chose to put in effect and not in the case in chief."

After the trial court ruled that defendant's unsworn statement could be rebutted under Evid.R. 404(A)(1) and defense counsel knew that the prosecutor would be allowed to bring in evidence of other crimes, counsel decided to put the defendant back on the stand in an attempt to minimize the impact of the evidence by allowing defendant to deliver some of the information himself.

Defendant took the stand for a second time and revealed that although he had no prior criminal felony convictions as an adult, he had been charged with other felonies. Defendant then described that he had been charged with felonious assault in conjunction with a bar fight in 1994. Defendant explained the circumstances of the bar fight and his involvement. He maintained his innocence, stating that he was at a bar in Elyria with a group of people celebrating his sister's friend's birthday when[***56] five men in the bar attempted to pick a fight. He claimed that when the bar closed, he and his group left and were outside when he was jumped and assaulted by the men who had bothered him earlier inside the bar. He further [**184] opined that the only reason he had been charged was because of the current homicide case.

Defendant further revealed that he had been charged with drug abuse, possession of drug paraphernalia, and aggravated drug trafficking, and he explained the nature of his involvement. Further, defendant stated that he had been charged with menacing and arson. The menacing and arson charges resulted from an incident in which defendant was shooting pool at a bar in Cleveland with some friends. Defendant stated that he approached a young lady and offered to buy her a drink when her boyfriend grabbed him by the throat and choked him until he passed out. Defendant's party was asked to leave, and defendant claims that they went to another bar, where he was again assaulted on the street. A police car pulled up, and the officers ran defendant's name through the

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computer. They told defendant that someone had pressed charges against him that night for menacing and arson. Defendant explained[***57] that the man who [*242]had choked him earlier alleged that when he left the bar, he found his car on fire and accused defendant of setting the fire. Defendant maintained his innocence relating to both the menacing and the arson.

Before defendant left the stand, he asked the jurors not to consider these alleged crimes in their deliberations. He pleaded with them that these were only charged crimes and that the state had not proven that he had committed them. He further reiterated his belief that the reason none of these charged crimes had been brought to trial was that the state had been using the charges as leverage, waiting to see if he would be convicted of the aggravated murder charges. At the conclusion of his remarks, defendant asked the jury to spare his life.

Following defendant's statement, the defense called seven witnesses to testify about defendant's childhood, medical problems, and relationships with the witnesses. Several of the defense witnesses also asked the jury to spare defendant's life. In particular, defendant's mother, father, sister, grandfather, former girlfriend, friend, and former employer testified. Throughout the testimony, the state was permitted to cross-examine[***58] the witnesses relentlessly regarding their knowledge or lack thereof regarding the felonious assault, arson, drug, and other charges.

After the extensive cross-examination, the state called seven witnesses in rebuttal. Dennis Cavanaugh, the head of the Lorain County Drug Task Force, testified at length regarding two alleged undercover sales of controlled drugs to the defendant in 1994. Charges related to these sales had been filed against the defendant but had not been brought to trial. Further, Scott Bohac, an informant, testified that he had purchased crack cocaine from defendant in 1994. Detective Scott Sargent testified that in 1994, he observed a crack pipe fall out of defendant's pant leg when he was pulled over for a traffic stop.

Jeff Hicks testified at length about the bar incident that led to the felonious assault charges against defendant. When asked how he knew defendant, Hicks stated that defendant "is the one that took a baseball bat to my face." Hicks testified that he had been hospitalized for three months with an infected jaw as a result of injuries sustained during the bar fight and that his medical bills totaled $20,000. Deanna Butler testified that she heard[***59] about the details of the alleged bar fight from a cousin of Jeff Hicks (which was pure hearsay that should not have been admitted), and that later that day she heard defendant bragging about kicking Hicks. Kenneth Roland testified that he was also injured in the 1994 incident in which defendant was alleged to have picked a fight at an Elyria bar. Roland testified that he was in the hospital for three days and sustained medical bills of $10,000. Amazingly, Roland was permitted to testify regarding this alleged incident even though he was unable to positively identify defendant as the man who struck him.

[*243] [**185] Finally, Detective Alan Leiby testified about investigating the murder. In particular, he testified about plea offers and witnesses. After defense counsel suggested in cross-examination that these charges without convictions were not relevant to the penalty phase and were highly prejudicial, the state on redirect asked Detective Leiby, "Were what he calls the other acts or the mere allegations even relevant until the Defendant took the stand and stated that he loves animals and he hates blood, he is a great guy and he likes kids?" The detective answered, "No." But he admitted on cross-examination [***60]that the felonious assault, the drug possession, and the arson charges had nothing to do with the way defendant was alleged to have dealt with children and animals, since those charged crimes all involved adults.

Further, defendant himself did not state that he was a good guy, could not stand the sight of blood, or loved animals, the statements supposedly rebutted with evidence of other charges. These statements came from mitigation witnesses that the defense put on the stand only after the judge ruled that defendant had opened the door to evidence of other crimes and the defense was forced to present testimony regarding those pending charges.

The majority concludes that defendant opened the door to this rebuttal testimony and that the rebuttal testimony did not amount to the introduction of nonstatutory aggravating circumstances as proscribed in *State v. Gumm (1995), 73 Ohio St. 3d 413, 422, 653 N.E.2d 253, 263.* Specifically, the majority agrees with the trial court's assessment that this other-acts evidence regarding prior crimes of violence was admissible under Evid.R. 404(A)(1) because defendant brought out a character trait and, in the trial court's opinion, [***61] the defendant had portrayed himself as a "great guy" even though defendant never used those words. I strongly disagree.

Evid.R. 404(A)(1) provides:

"(A) 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:

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"(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 * * *."

Because defendant initially stated that he had never had any drug charges, I agree that the defense opened the door to evidence relating to the drug charges. Further, the rebuttal testimony of Detective Leiby was admissible because it primarily covered the murder investigation itself. But I fail to see how the trial court could conclude that defendant had opened the door to the blatantly prejudicial evidence of the felonious assault and arson charges simply by portraying himself, in the court's words, as "a great guy."

[*244] I would find that the content of defendant's unsworn statement did not warrant seven rebuttal witnesses testifying with virtually no limitation about crimes[***62] of which defendant has never been convicted and which defendant hotly contested. If portraying oneself as a good person can open the door to witness after witness and page after page of such speculative and damaging testimony, then I cannot imagine any case that would not open the door to such evidence. Under the standard used in this case, almost any positive comment a defendant could make about himself or herself would open the door to every possible or even speculative misdeed he or she ever committed or was even alleged to have committed.

The other-acts evidence relating to the felonious assault and arson charges amounted to nothing more than a blatant attempt to discredit a person who up until this point in his life was without a criminal record. In mitigation, defendant's mother, father, grandfather, and sister all testified that they had good relationships with the defendant. Defendant worked until his arthritis prohibited him from doing so. Defendant [**186] had a relatively clean background before he was charged with aggravated murder. Moreover, the family vendetta involved the Smiths, not the defendant, and there was no evidence that the victim had ever snitched on defendant. Rather[***63] than being an instigator, defendant appeared to have been recruited for the crime. These are all mitigating factors.

Certainly I do not condone defendant's actions in the underlying case. Obviously, he is still just as guilty of murder as Raymond Smith. Thus, he was properly convicted of aggravated murder in the guilt phase of the trial. However, in the mitigation phase of the trial, the jury weighs evidence relating to whether the defendant's life is worth sparing or whether he deserves the death penalty. Therefore, every piece of evidence or testimony, either sympathetic or prejudicial, affects the jury.

Again, while not excusing the murder itself, the fact that defendant was not the leader in the murder could have an impact on the jury. In addition, defendant had a relatively uneventful history prior to the murder. These factors make the evidence of other criminal charges so prejudicial to this defendant. If defendant's background prior to the murder had already seemed to mirror the challenged testimony, the effect would not have been as great. But, in this case, the prejudicial other-acts evidence may have influenced the jury to vote for the death penalty. I would find that these[***64] trials within the trial were so prejudicial that they probably affected the jury's decision regarding the sentence and tipped the scale toward death.

None of the testimony rebutted defendant's work history or his claim of inability to hold a job. The prosecution presented no evidence of a false workers' compensation claim. No rebuttal witness testified that he was abusive to his girlfriend or her children or otherwise disputed his caring nature toward his [*245] girlfriend's children or his assistance to her deaf child. Other than testimony relating to defendant's drug charges, none of the testimony was rebuttal at all--it was all new "other acts" which were all only at a "charge" stage--none even reduced to a conviction so as to lend them reliability.

If this type of testimony is allowed, I fear the protections of the Constitution will be irreparably eroded. I respectfully dissent and would vacate the sentence of death and remand to the trial court for a new mitigation hearing that would exclude the testimony relating to the felonious assault and arson charges.

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ORIGINAL

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO	*	CASE NO. 98 1074
Plaintiff/Appellee	*	
-vs-	*	
STANLEY E. JALOWIEC	*	
Defendant/Appellant	*	MOTION FOR RECONSIDERATION

* * *

On April 4, 2001, this Court decided Mr. Jalowiec's case. Mr. Jalowiec would respectfully request that this Court reconsider its decision in the Twelfth Proposition of Law, wherein this Court found that the introduction of rebuttal evidence at the mitigation phase was proper. Mr. Jalowiec supports his motion for reconsideration with the attached Memorandum in Support of Reconsideration.

Respectfully submitted,

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SUPREME COURT OF OHIO

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MEMORANDUM IN SUPPORT OF MOTION OF RECONSIDERATION

In overruling Mr. Jalowiec's Twelfth Proposition of Law, this Court noted that "[t]he court (trial court below) overruled the defense motion to prevent rebuttal by the state on the grounds that Jalowiec had brought out a character trait, that '[h]e is a great guy', that could be rebutted under Evid. R. 404(A)(1), in particular with evidence of prior crimes of violence." *State v. Jalowiec* (2001), 91 Ohio St.3d 220, 232.

In order to understand how trial court's ruling is clearly erroneous, it is important to look at the full colloquy that took place between the court and counsel below:

> MR. CLEARY: I fail to understand what the pertinent trait of his character is that we are talking about.
>
> THE COURT: He is a great guy.
>
> MR. CLEARY: He never said that.
>
> THE COURT: What did he say, couldn't work, wanted to work, he has water of knees, he can't work, he tried to, couldn't, he worked at the golf course for the grandfather.
>
> MR. CLEARY: Every single point of this could be rebutted, Your Honor, but not with this. There is a rebuttal of these statements.
>
> THE COURT: He didn't work.
>
> MR. CLEARY: They can't rebut that.
>
> THE COURT: I have no reason to doubt he did that.
>
> MR. CLEARY: If they brought in evidence that he watched kids. that would be relevant to this.
>
> THE COURT: Now, I think if you can bring in the walking, you can bring in the other part. Overruled.

(Mitigation Tr. p.55-56)

In finding that the trial court did not error in admitting evidence of prior crimes of violence under Evid.R.404(A)(1), this Court relied on its previous decision in *State v. Gumm* (1995), 73 Ohio St.3d 413, syllabus, wherein this Court held that "counsel for the state at the penalty stage of the capital trial may introduce . . . (3) evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant." *State v. Jalowiec* (2001), 91 Ohio St.3d at 232, Accord *State v. Raglin* (1998), 83 O.S.3d 253, 261 This language would indicate that the Court was limiting its holding to those factors which a defendant raised under 2929.04(B). However, with the ruling in the case *sub justice*, this court has expanded the scope of what evidence can be rebutted. Specifically, in this case the trial court made a finding that the unsworn statement could be rebutted, not because of what Mr. Jalowiec said but rather because the trial court *thought* that the defendant had said it, that the defendant had characterized himself as a good guy. Based upon this, the trial court permitted the introduction of crimes of violence. In finding as it has in this case, this Court has defeated the purpose of the unsworn statement.

In *Raglin*, supra, this Court noted that the testimony of the state's rebuttal witness was indeed relevant to rebut mitigating evidence that had been offered by the defense that the defendant was remorseful for the killing, that he would help or benefit others while serving a term of life imprisonment, and that his life should therefore be spared. *Raglin*, at 261. Thus, the Court in *Raglin* limited rebuttal evidence to the existence of the statutorily defined or other mitigating factors presented by the defense. In the case *sub justice*, the testimony upon which the trial court was relying was not the statutorily defined or mitigating factor which Mr. Jalowiec was asserting. Rather Mr. Jalowiec was giving a factual background as to his work traits, his arthritis and other family history.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4082

In its decision in this case, this Court has expanded its findings in *Gumm* and *Raglin* to include not only statutorily defined or other mitigating factors, but it has now found that any comment or statement by a defendant can be rebutted. This Court has even expanded this so far as to find that a trial courts belief that a defendant implied that he was a good guy can open the door to include rebuttal evidence of violence, upon which the defendant has not even been convicted. The prosecution then took this evidence and turned it into the nature and circumstances of the case creating aggravating circumstance, something that this Court has specifically prohibited prosecutors from doing.

After this Court's decision in *State v. Gumm*, the court revisited *Gumm* in *State v. Wogenstahl* (1996), 75 Ohio St.3d 344. In *Wogenstahl*, this Court noted that "...upon a careful review of *Gumm*, we find certain errors in the body of that decision that seemingly cut across the grain of Ohio's death penalty scheme." *Wogenstahl* at 356. What troubled the *Wogenstahl* court about the *Gumm* decision was the use of the nature and circumstances of the crime as an aggravating circumstance. The *Wogenstahl* Court noted as follows:

> We now recognize that this language in *Gumm* might be construed to suggest that the nature and circumstances of an offense (such as the cruel heinous manner in which it was committed) can be included on the *aggravation* side of the statutory weighing process. However, as we have pointed out, the nature and circumstances of the offense may only enter into the statutory weighing process on the side of *mitigation*. See R.C. 2929.04(B). Thus, we modify *Gumm* to the extent that that opinion indicates anything to the contrary.
>
> Again and again and again, we hold that in the death penalty phase of the capital trial, the "aggravating circumstances" against which the mitigating evidence is to be weighed are limited to the specifications of aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8) and that have been alleged in the indictment and proved beyond a reasonable doubt. In this regard, it is improper for prosecutors in the penalty phase of a capital trial to make any comment before a jury that the nature and circumstances

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of the offense are "aggravating circumstances".

Id. at 356.

In the case *sub justice*, the state took the nature and circumstances of this case and turned them into aggravating circumstances. This is evidenced by the comments of the prosecution during the penalty phase closing argument, wherein the prosecutor argued that:

> The aggravating circumstances you found at the guilt phase was that Ron Lally was killed to silence his testimony as a government witness and we all know that it was done on the morning of the trial that Raymond Smith and Danny Smith were facing.
>
> That is not a coincidence. We know that it was a planned, calculated, assassination of a witness. That is the aggravating circumstances.
>
> Now, you are entitled to consider the nature and circumstances of that. It is really kind of confusing, but you are not able to entirely consider everything that was brought forth in the guilt phase, but you can consider the nature and circumstances of the aggravating circumstances.
>
> In other words, how did they kill a government witness and I think you will find that is very instrumental in deciding whether or not this person is, as he represents himself to be in this penalty phase.
>
> In other words, is he really afraid of blood?
>
> Would he harm somebody or do anything like that?
>
> Before I get to that, I want to emphasize that it is not the words that he killed a witness, it is the nature and circumstances of what he did, much of which has been proven to you in the prior trial as you heard. I incorporate here by reference and you are not to forget that, you are to consider that.

(Mitigation Tr. at 301-302).

The prosecution has done exactly what this Court has required prosecutors not to do. Further, the prosecution went on to take Mr. Jalowiec's unsworn statement and turn it into aggravating circumstances, which the prosecution specifically told the jury to consider in determining the sentence. (Mitigation Tr. at 299-310 and 327-334).

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Jalowiec v. Bradshaw
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In its decision this Court has relied upon *Gumm* in reaching the determination that the trial court was correct that Mr. Jalowiec opened the door to all of the rebuttal evidence that was presented. However, the *Gumm* decision must be read together with this Courts decision in *Wogenstahl*. If that is done then it becomes apparent that the prosecution took the nature and circumstances of the case and all of the rebuttal evidence that was presented and turned them into aggravating circumstances, not for mitigation, but rather to support the imposition of the death penalty.

Mr. Jalowiec would respectfully request that this Court reconsider its position in the Twelfth Proposition of Law. Should this Court determine that it's ruling was correct, Mr. Jalowiec would request that this Court give guidance to the lower courts as to what can and cannot be said by a defendant in an unsworn statement that would open the door to the damaging and prejudicial information presented in this case. Given the factual background of this case and this Court's language in its decision, there appears to be no limit on what the prosecution can present as rebuttal evidence if a defendant indicates that he has a good trait.

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CONCLUSION

Based upon the foregoing Mr. Jalowiec respectfully requests that this Court reconsider its position in the Twelfth Proposition of Law dealing with rebuttal testimony at the mitigation phase of a hearing and find that the door was not opened by Mr. Jalowiec so as to support the unduly prejudicial rebuttal testimony presented by the state.

Respectfully submitted,

NATHAN A. RAY #0041570
Attorney for Appellant
137 South Main Street, Suite 201
Akron, Ohio 44308
(330) 253-7171
burdon-merlitti@neo.rr.com

PROOF OF SERVICE

I hereby certify that a copy of the foregoing has been mailed by regular U.S. Mail this 13th day of April, 2001, to Jonathan Rosenbaum, Assistant Prosecuting Attorney, Lorain County, 226 Middle Avenue, Elyria, Ohio 44035.

NATHAN A. RAY
Attorney for Appellant

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4086

ON COMPUTER-SCAN

The Supreme Court of Ohio

FILED
MAY 23 2001
JAMES J. MENGEL, CLERK
SUPREME COURT OF OHIO

93-373

State of Ohio, Appellee,	:	Case No. 98-1074
v.	:	RECONSIDERATION ENTRY
Stanley E. Jalowiec, Appellant.	:	(Lorain County)

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. 96CA006445)

THOMAS J. MOYER
Chief Justice

0014r052301

ORIGINAL
ON COMPUTER - TM

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	*	CASE NO. 98 1074
Appellee	*	
-vs-	*	
STANLEY E. JALOWIEC	*	THIS IS A DEATH PENALTY CASE EXECUTION IS SCHEDULED FOR JULY 3, 2001
Appellant	*	

* * *

MOTION FOR STAY OF EXECUTION PENDING THE UNITED STATES SUPREME COURT'S DECISION ON PETITION FOR WRIT OF CERTIORARI AND DISPOSITION OF ALL AVAILABLE STATE REMEDIES

NATHAN A. RAY
Reg. No. #0041570
137 South Main Street, Suite 201
Akron, Ohio 44308
(330) 253-7171

Counsel for Appellant

GREGORY WHITE
Lorain County Prosecutor
226 Middle Avenue
Lorain, Ohio 44035
(440) 329-5375

Counsel for Appellee

FILED
MAY 04 2001
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	*	CASE NO. 98 1074
Appellee	*	
-vs-	*	
STANLEY E. JALOWIEC	*	THIS IS A DEATH PENALTY CASE EXECUTION IS SCHEDULED FOR
Appellant	*	JULY 3, 2001

MOTION FOR STAY OF EXECUTION PENDING THE UNITED STATES SUPREME COURT'S DECISION ON PETITION FOR WRIT OF CERTIORARI AND DISPOSITION OF ALL AVAILABLE STATE REMEDIES

Now comes the Appellant, STANLEY E. JALOWIEC, by and through undersigned counsel, Nathan A. Ray, and respectfully moves this Honorable Court for an order staying his execution pending the filing and final disposition of a Petition for Writ of Certiorari in the United States Supreme Court. Appellant JALOWIEC further requests an Order staying his execution pending the exhaustion of his available state remedies. Appellant has filed a petition for post-conviction relief in the Lorain County Court of Common Pleas. This matter is still pending in the court's below. The reasons for these requests are explained in the attached Brief in Support.

Respectfully submitted,

NATHAN A. RAY #0041570
Attorney for Appellant
137 South Main Street, Suite 201
Akron, Ohio 44308
nray@neo.rr.com

BRIEF IN SUPPORT

This Honorable Court affirmed STANLEY JALOWIEC's convictions and death sentence on April 4, 2001. Mr. Jalowiec has timely filed a motion for reconsideration with this court on April 13, 2001. Mr. Jalowiec, through undersigned counsel, will then file a petition for Writ of Certiorari with the United States Supreme Court (Please see attached Exhibit A).

This Court should grant Mr. Jalowiec a stay of execution to file his Petition for Writ of Certiorari in the United States Supreme Court. Under the Rules of Practice of the United States Supreme Court, a Petition for Writ of Certiorari must be filed within ninety (90) days of this Court's final judgment. However, the United States Supreme Court Rule 13(3) specifically provides that the ninety (90) day time period begins to run after this Court rules on a timely filed petition for rehearing. Having timely filed a motion for reconsideration in this case, the ninety (90) day time period will begin to run once this Court rules on said motion. Accordingly, a stay is warranted to allow this Court adequate time to review and rule on the motion for reconsideration, and then allow Mr. Jalowiec adequate time to seek direct review of his convictions and sentences. [See *State v. Steffen* (1994), 70 Ohio St.3d 399, finding that a capital defendant is entitled to a stay of execution to seek both direct review and state post-conviction remedies].

The United States Supreme Court has held that the opportunity for direct review is required before an execution. In *McDonald v. Missouri* (1984), 464 U.S. 1306, four capital defendants had their convictions and sentences affirmed on appeal in state court. Execution dates were set before the defendants had the opportunity to file petitions for writ of certiorari

in the Supreme Court. Justice Blackmun, as Circuit Justice, granted each defendant a stay of execution pending direct review by the Court. Justice Blackmun explained:

> *Every defendant in a state court of this Nation who has a right of direct review from a sentence of death, no matter how heinous his offense may appear to be, is entitled to have that review before paying the ultimate penalty. The right of review otherwise is rendered utterly meaningless. It makes no sense to have the execution set on a date within the time specified for that review, see this Court's Rule 20.1, and before the review completed.*
>
> I thought I had advised the Supreme Court of Missouri once before, in *Williams*[1] that, as Circuit Justice of the Circuit in which the State of Missouri is located, I, upon proper application, shall stay the execution of any Missouri applicant whose direct review of his conviction and death sentence is being sought and has not been completed. I repeat the admonition to the Supreme Court of Missouri, and to any official within the State's chain of responsibility, that I shall continue that practice. The stay, of course, ought to be granted by the state tribunal in the first instance, but, if it fails to fulfill its responsibility, I shall fulfill mine.

Id. at 1307 (emphasis added).

This reasoning was confirmed by Justice Scalia, Circuit Justice, in *Cole v. Texas* (1991), 499 U.S. 1301:

> I will in this case, and in every capital case on direct review, grant a stay of execution pending disposition by this Court of the petition for certiorari. While I will not extend the time for filing a petition beyond an established execution date, . . ., *neither will I permit the State's execution date to interfere with the orderly processing of a petition on direct review by this Court.*

Id. (emphasis added).

Pursuant to *McDonald* and *Cole*, this Honorable Court should grant a stay of execution in this case. The opportunity for direct review of a capital case by the United States Supreme Court before an execution is a necessity. Moreover, it makes no sense to encourage a profligate motions practice in the Supreme Court because ". . . the State tribunal in the first

[1] *Williams v. Missouri*, 463 U.S. 1301 (1983).

instance . . ." should grant the stay of execution. See *McDonald* at 1307. Thus, fundamental fairness and judicial economy require that this Court "fulfill its responsibility" and grant Mr. Jalowiec's motion for a stay of execution. *Id.*; See also *State v. Webb* (1994), 70 Ohio St.3d 1472 (United States Supreme Court granted Webb's stay of execution to file Petition for Writ of Certiorari after this Court refused to grant the stay).

Appellant Jalowiec also moves this Honorable Court for an order staying his execution pending the exhaustion of available state post-conviction remedies, including any appeals. Pursuant to *State v. Steffen* (1994), 70 Ohio St.3d 299, Mr. Jalowiec is entitled to a stay of execution until he has "exhausted . . . one round of post-conviction relief, and one motion for delayed reconsideration in the court of appeals . . ."

Mr. Jalowiec has timely filed his Petition to Vacate or Set Aside Sentence, pursuant to R.C. 2953.21, in the Lorain County Court of Common Pleas. Thus, a stay is needed to insure that the issues raised in this petition for post-conviction relief are resolved prior to the execution of sentence.

WHEREFORE, Stanley Jalowiec respectfully requests that this Honorable Court grant him a stay of execution of his sentence pending the filing and determination of his Petition for Writ of Certiorari in the United States Supreme Court, as well as the exhaustion of available state remedies (including all appeals), in accordance with the United States Supreme Court's decision and this Court's decision in *State v. Steffen.*

NATHAN A. RAY #0041570
Attorney for Appellant

STATE OHIO)
) SS:
SUMMIT COUNTY)

AFFIDAVIT OF NATHAN A. RAY

I, NATHAN A. RAY, being first duly sworn according to law, depose and state the following:

1) I am an attorney licensed to practice law in the State of Ohio.

2) I have been requested by Stanley Jalowiec to prepare his Petition for Writ of Certiorari to the United States Supreme Court;

3) I will file a timely Petition for Writ of Certiorari for the United States Supreme Court.

FURTHER AFFIANT SAYETH NAUGHT.

NATHAN A. RAY #0041570
Attorney for Appellant

SWORN TO before me and subscribed in my presence this 1st day of May, 2001.

NOTARY PUBLIC
5/30/05

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion for Stay of Execution Pending the United States Supreme Court's Decision on Petition for Writ of Certiorari and Disposition of All Available Remedies was mailed, postage prepaid on the 7 day of May, 2001, to Lorain County Prosecutor's Office, 226 Middle Avenue. Elyria, Ohio 44035.

NATHAN A. RAY
Attorney for Appellant

C.I. COMPUTER-SCAN

The Supreme Court of Ohio

FILED
MAY 31 2001
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

93-407

State of Ohio, Appellee,	:	Case No. 98-1074
v.	:	E N T R Y
Stanley E. Jalowiec, Appellant.	:	(Lorain County)

Upon consideration of the motion filed by counsel for appellant to stay the execution of sentence in the above-styled cause pending the decision by the United State Supreme Court on appellant's petition for a writ of certiorari and pending the exhaustion of state post-conviction remedies,

IT IS ORDERED by the Court that said motion be, and the same is hereby, granted.

IT IS FURTHER ORDERED by the Court that compliance with the mandate and execution of sentence be, and hereby are, stayed pending the timely filing of the petition in The Supreme Court of the United States.

IT IS FURTHER ORDERED that if such petition is timely filed, this stay shall continue for an indefinite period pending final disposition of this cause by The Supreme Court of the United States.

IT IS FURTHER ORDERED by the Court that this stay shall remain in effect until exhaustion of all state post-conviction proceedings, including any appeals.

IT IS FURTHER ORDERED that counsel for the appellant and for the appellee shall notify this Court upon a final disposition by The Supreme Court of the United States or when all proceedings for post-conviction relief before Courts of this State have been exhausted, whichever occurs later.

(Court of Appeals No. 96CA006445)

THOMAS J. MOYER
Chief Justice

0050r052901

ORIGINAL

ON COMPUTER - RAN

IN THE OHIO SUPREME COURT

No.98-1074

STATE OF OHIO	:	
	:	
Plaintiff-Respondent	:	
	:	
vs	:	**DEATH PENALTY CASE**
	:	
STANLEY E. JALOWIEC	:	
	:	
	:	
Appellant-Petitioner	:	
	:	

FILED
JUN 0 6 2001
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

MOTION FOR STAY OF EXECUTION DURING PENDENCY OF STATE POSTCONVICTION REMEDIES PURSUANT TO R.C. §2953.21

COUNSEL FOR RESPONDENT:

GREGORY WHITE ESQ.
Lorain County Prosecutor
226 Middle Avenue - 4th Floor
Elyria, Ohio 44035

COUNSEL FOR PETITIONER:

PATRICIA J. SMITH, ESQ. #0059621
4403 St. Clair Avenue
Cleveland, Ohio 44103
(216) 361-1112

IN THE OHIO SUPREME COURT

No. 98-1074

STATE OF OHIO	:	
	:	
Plaintiff-Respondent	:	
	:	
vs	:	
	:	
STANLEY E. JALOWIEC	:	
	:	MOTION TO STAY
	:	EXECUTION DURING PENDENCY
Appellant-Petitioner	:	OF STATE POSTCONVICTION
	:	REMEDIES: § 2953.21

Now comes the appellant, Stanley E. Jalowiec, by and through undersigned counsel and respectfully moves this court to grant this motion for a stay of execution of the death sentence. An execution date of July 3, 2001, has been set by this Court. On May 11, 2001, the petitioner timely filed a pro-se Notice of Appeal from the denial of his post-conviction petition in the Ninth District Court of Appeals, 01CA007844. Undersigned counsel filed a timely duplicate Notice of Appeal on May 14, 2001, 01CA007847. The time-stamped copy of the Notice of Appeal is attached to this motion. The reasons in support of this motion are more fully set forth in the following memorandum.

Respectfully submitted,

PATRICIA J. SMITH
Counsel for Petitioner

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4097

MEMORANDUM

As noted previously, both the Petitioner, Stanley Jalowiec, and undersigned counsel filed Notice of Appeals from the Lorain County Common Pleas Court's denial of the Petitioner's Petition to Vacate filed pursuant to Ohio Revised Code § 2953.21. This is the petitioner's first petition filed in effort to overturn his conviction and death sentence. The Petitioner also filed amended petitions on a pro-se basis. In the trial court's opinion of April 15, 2001, all issues raised were denied.

The petitioner's issues are not frivolous. The petition raises issues that draw into question not only the sentence, but also the legitimacy of the convictions

Therefore, pursuant to State v. Glenn (1987), 33 Ohio St. 3d 601, the appellant-petitioner respectfully requests a stay of the execution of his death sentence scheduled for July 3, 2001, so that he may pursue the appeal of the denial of his Petition to Vacate or Set Aside Sentence pursuant to Ohio Revised Code 2953.21.

The petitioner requests an indefinite stay of the execution of his death sentence until the state postconviction proceedings have been completed.

Respectfully submitted,

PATRICIA J. SMITH
Counsel for Petitioner

CERTIFICATE OF SERVICE

A copy of the foregoing Motion was served upon Gregory White, Lorain County Prosecutor, 226 Middle Avenue, 4th Floor, Elyria, Ohio 44035, this 5th day of June, 2001.

PATRICIA J. SMITH
Counsel for Petitioner

ORIGINAL

SUPREME COURT OF OHIO

MOTION, ENTRY, AND CERTIFICATION FOR APPOINTED COUNSEL FEES

State of Ohio,
Plaintiff

V.

Stanley Jalowiec
Defendant

FILED
JUN 11 2001
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Supreme Court No. 98-1074
Appeals Court No. 96 CA 00 6445
Trial Court No. 95 CR 046840

ON COMPUTER - EKB

MOTION FOR APPROVAL OF PAYMENT OF APPOINTED COUNSEL FEES AND EXPENSES

The undersigned, having been previously appointed counsel for the defendant for the appeal to this court, as evidenced by the attached entry of appointment, now moves for an order approving payment of fees earned and expenses incurred as reflected by the itemized statement of the reverse hereof, pursuant to R.C. 2941.51.

Hours Worked:	IN COURT	OUT OF COURT
	.8	193.5

Expenses (if any): $ 225.40

O.R.C. charge section number, name and classification

A. Aggravated Murder with Death Specification 2903.01(A)

B.

C.

SUPREME COURT DECISION	TERMINATION DATE
Affirmed	5/23/01

ATTORNEY'S NAME	SOC. SEC. NO.	ATTORNEY'S SIGNATURE
Nathan A. Ray	[redacted]	

ATTORNEY'S ADDRESS NUMBER AND STREET CITY STATE ZIP
137 S. Main Street, Suite 201, Akron, Ohio 44308

FILED
AUG 09 2001
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

INFORMATION BELOW TO BE COMPLETED BY SUPREME COURT AND COUNTY AUDITOR ONLY

JUDGMENT ENTRY

This court finds that counsel performed the legal services set forth in the itemized statement on the reverse hereof, and that the fees and expenses hereinafter approved are reasonable. IT IS THEREFORE ORDERED that appointed counsel fees are approved in the sum of $ 5,000.00 and expense in the sum of $ 16.90 for a total allowance of $ 5,016.90, which amount is ordered certified to the Lorain County Auditor for payment. It is further ordered that extraordinary fees are hereby approved. It is further ordered that travel expenses are approved, and shall be paid by the county auditor in accordance with the applicable county standards.

94-093

CHIEF JUSTICE

CERTIFICATION

The County Auditor, in executing this certification, attests to the accuracy of the figures contained herein. A subsequent audit by the Ohio Public Defender Commission and/or Auditor of the State which reveals unallowable or excessive costs may result in future adjustments against reimbursement or repayment of audit exceptions to the Ohio Public Defender Commission.

COUNTY NUMBER	WARRANT NUMBER	WARRANT DATE

COUNTY AUDITOR

I hereby certify that the following time was expended in representation of the defendant before the Supreme Court of Ohio:

DATE	ACTIVITY	TOTAL TIME
7/24/98	Telephone conf. w/previous counsel	.9
7/26/98	Review notes/file/prep.issue list	3.3
7/27/98	Review Ct. Appeals Opinion/Briefs	3.4
7/27/98	Research/Drafting motion	3.2
7/28/98	Research/Drafting motion	3.5
7/29/98	Research	4.5
7/29/98	Tele. conf. w/co-counsel	.6
7/30/98	Research	3.5
7/31/98	Research/Drafting brief	4.5
8/1/98	Research/Drafting Brief	6.0
8/2/98	Research/Drafting Brief	5.5
8/3/98	Research/Drafting Brief	7.5
8/4/98	Drafting Brief/Rewrites	9.5
8/5/98	Final Brief/Rewrites	8.0
8/6/98	Prep. Appendix/Brief	5.5
8/6/98	Partial travel to/from Columbus	4.0

Time is to be recorded in tenth of an hour (6 minute) increments.

EXPENSE	PAID TO	AMOUNT

To obtain reimbursement, the purpose of each expense must be clearly identified, and a receipt provided for each expenditure over $1.00.

I hereby certify the above is a true and accurate account of the time spent and expenditures incurred in representing the defendant in the Supreme Court of Ohio.

Applicant's Signature

OPD-1031 (4/96)

I hereby certify that the following time was expended in representation of the defendant before the Supreme Court of Ohio:

DATE	ACTIVITY	TOTAL TIME
8/7/98	Tele. conf. w/Public Defenders Office	.8
8/9/98	Prep. Brief/Correcting	3.2
8/11/98	Prep. motion/research	3.5
8/13/98	Research/Prep. motion	4.0
8/17/98	Prep. Motion	1.8
8/20/98	Letter to client	.8
8/27/98	Tele. conf. w/client	.3
9/5/98	Copying materials/letter to client	2.2
9/16/98	Tele. conf. w/client	.3
11/4/98	Review stats Brief/Review cases/research	3.7
11/6/98	Review States Motion	.2
11/11/98	Response to States Motion	1.3
9/23/99	Tele. conf. w/client	.3
2/3/00	Tele. conf. w/client	.3
3/21/00	Review clients letter/response	.6
3/31/00	Tele. conf. w/client	.5

Time is to be recorded in tenth of an hour (6 minute) increments.

EXPENSE	PAID TO	AMOUNT

To obtain reimbursement, the purpose of each expense must be clearly identified, and a receipt provided for each expenditure over $1.00.

I hereby certify the above is a true and accurate account of the time spent and expenditures incurred in representing the defendant in the Supreme Court of Ohio.

Applicant's Signature

OPD-1031 (4/96)

I hereby certify that the following time was expended in representation of the defendant before the Supreme Court of Ohio:

DATE	ACTIVITY	TOTAL TIME
4/27/00	Travel to/from Mansfield	2.6
4/27/00	Meeting w/client	2.0
9/26/00	Letter to co-counsel	.2
9/27/00	Tele. conf. w/client	.4
11/8/00	Review file/notes/brief	4.5
11/9/00	Tele. conf. w/client	1.5
11/9/00	Prep. Oral Argument	2.5
11/10/00	Prep. Oral Argument/Review transcripts	7.0
11/11/00	Review transcripts/Prep Oral Argument	6.8
11/13/00	Review transcript/cases/research/prep.	7.5
11/14/00	Travel to/from Columbus	5.2
11/14/00	Review file	.7
11/14/00	Oral Argument	.8
11/16/00	Tele. conf. w/client	.3
12/8/00	Tele. conf. w/client	.5
3/28/01	Tele. conf. w/client	.5

Time is to be recorded in tenth of an hour (6 minute) increments.

EXPENSE	PAID TO	AMOUNT

To obtain reimbursement, the purpose of each expense must be clearly identified, and a receipt provided for each expenditure over $1.00.

I hereby certify the above is a true and accurate account of the time spent and expenditures incurred in representing the defendant in the Supreme Court of Ohio.

Applicant's Signature

OPD-1031 (4/96)

I hereby certify that the following time was expended in representation of the defendant before the Supreme Court of Ohio:

DATE	ACTIVITY	TOTAL TIME
4/5/01	Letter to client	.3
4/10/01	Review ct. opinion	1.8
4/11/01	Review cases/research/drafting motion	2.5
4/11/01	Tele. conf. w/client	.5
4/12/01	Rewrites/drafting motion	3.5
4/26/01	Tele. conf. w/client	.4
5/1/01	Motion for Stay	1.7
5/2/01	Letter to client	.3
5/14/01	Tele.conf. w/client	.4
5/29/01	Letter to client	.2

Time is to be recorded in tenth of an hour (6 minute) increments.

EXPENSE	PAID TO	AMOUNT

To obtain reimbursement, the purpose of each expense must be clearly identified, and a receipt provided for each expenditure over $1.00.

I hereby certify the above is a true and accurate account of the time spent and expenditures incurred in representing the defendant in the Supreme Court of Ohio.

Applicant's Signature

OPD-1031 (4/96)

Nathan Ray

STATE OF OHI( )
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)
)
Appellee)
)
v.)
)
STANLEY E. JALOWIEC)
)
Appellant) JOURNAL ENTRY

C.A. NO. 96CA006445

The appellant has moved for appointment of counsel for the purpose of appealing his conviction and death sentence to the Ohio Supreme Court. The motion is moot. On April 24, 1998, this court appointed Patricia Millhoff and Nathan Ray as counsel to represent appellant on appeal to the Ohio Supreme Court; all forms required by Rule 21 of the Rules of Superintendence for the Courts of Ohio were timely submitted.

John W. Reece
Judge

cc: Patricia J. Smith, Attorney at Law, 4403 St. Clair Avenue, Cleveland, Ohio 44103.

Kreig Brusnahan, Attorney at Law, 158 Lear Road, Suite A, Avon Lake, Ohio 44012.

Gregory White, Prosecutor, 226 Middle Avenue, Elyria, Ohio 44035.

ks1:p22/5-19

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4105

FedEx

Invoice Number: 5-753-72275
Invoice Date: Apr 18, 2001
Account Number: 2441-1823-2
Page: 3 of 3

FedEx Express Payment Type Detail (Original)

Dropped off: Apr 12, 2001 **Payor: Shipper** **Reference: NO REFERENCE INFORMATION** FedEx Internal Use: 103221320/0000197/_/_

- Fuel Surcharge - FedEx must apply a temporary fuel surcharge to reflect current market conditions as they relate to fuel costs.
- Distance Based Pricing, Region 3

Tracking ID	825447070538
Service Type	FedEx Priority Overnight
Package Type	FedEx Envelope
Zone	3
Pieces	1
Weight	0
Delivered	Apr 13, 2001 09:09
Service Area Code	A1
Signed by	K.LOOMIS
Bundle ID	000

Sender
NATHAN A RAY
BURDON & MERLITTI
137 S MAIN ST STE 201
AKRON OH 44308-1416 US

Recipient
CLERK OF COURT
US COURT OF APPELAS SIXTH CIRC
POTTER STEWART US COURTHOUSE R
CINCINNATI OH 45202 US

Transportation Charge		14.50
Fuel Surcharge		0.58
Total Charge	**USD $**	**15.08**

Dropped off: Apr 12, 2001 **Payor: Shipper** **Reference: NO REFERENCE INFORMATION** FedEx Internal Use: 104149600/0001486/_/_

- Fuel Surcharge - FedEx must apply a temporary fuel surcharge to reflect current market conditions as they relate to fuel costs.
- Distance Based Pricing, Region 2

Tracking ID	825447070549
Service Type	FedEx Priority Overnight
Package Type	Customer Packaging
Zone	2
Pieces	1
Weight	1.0 lbs, 0.5 kgs
Delivered	Apr 13, 2001 09:54
Service Area Code	A1
Signed by	J.JONES
Bundle ID	000

Sender
NATHAN ARAY
BURDON & MERLITTI
137 S MAIN ST STE 201
AKRON OH 44308-1416 US

Recipient
CLERK OF COURT
SUPREME COURT OF OHIO
30 E BROAD ST
COLUMBUS OH 43215 US

Transportation Charge		16.25
Fuel Surcharge		0.65
Total Charge	**USD $**	**16.90**

Payment Type Detail Subtotal ..... **USD $** **31.98**

1234511

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4106

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

ORIGINAL

ON COMPUTER-II

August 21, 2001

Clerk
Supreme Court of Ohio
30 East Broad Street
Columbus, OH 43266-0419

Re: Stanley E. Jalowiec
v. Ohio
No. 01-5898
(Your No. 98-1074)

Dear Clerk:

The petition for a writ of certiorari in the above entitled case was filed August 20, 2001 and placed on the docket August 20, 2001 as No. 01-5898.

Sincerely,

William K. Suter, Clerk

by

Gail B. Johnson
Assistant

FILED
AUG 23 2001
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

RECEIVED
AUG 23 2001
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

ORIGINAL

October 9, 2001

ON COMPUTER

Clerk
Supreme Court of Ohio
30 East Broad Street
Columbus, OH 43266-0419

Re: Stanley E. Jalowiec
v. Ohio
No. 01-5898
(Your No. 98-1074)

Dear Clerk:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

FILED
OCT 15 2001
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

98-1074
99-1753

FedEx Ground

FedEx Ground
P.O. Box 108
Pittsburgh, PA 15230-0108

4/3/2002

Dear Customer:

Here is the proof of delivery letter for the shipment with package tracking number **074083500000614**. Our records reflect the following information.

Shipping Information:

Tracking ID:	074083500000614
Invoice Number:	
Purchase Order Number:	
Cust. Reference Number:	
Delivered To:	DSOTO 308 2ND ELYRIA OH 44035

Delivery Information:

Delivery Status:	Delivered
Delivery Location:	ELYRIA
Signed for or Released By:	DSOTO
Delivery Stop Number:	045
Ship Date:	03/28/2002
E-PDI Date:	
Est. Delivery Date:	Delivered
Delivery Date:	03/29/2002 11:59:20 AM
Service Level:	Ground-Domestic
Total Weight:	28.0 Pounds, Gross Weight



Thank you for choosing FedEx Ground. We look forward to working with you in the future.

FedEx Ground
Delivery Information Department
1-800-Go-FedEx®

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4109

THE SUPREME COURT OF OHIO

State of Ohio
v.
Raymond Smith
&
Stanley Jalowiec

Case Numbers:
98-0912
98-1074
99-1753
Shared Exhibits
Receipt of Record
OPX

The undersigned hereby acknowledges receipt of the record in the above-named case.

List Contents:

1 Box

Signature

9-25-02

Date

96CA006331, 96CA006445

D O C K E T S H E E T

Jul 28, 2003 3:32 pm — Lorain County, Elyria Ohio USA — Page 1

General Division
Ron Nabakowski
Clerk of Court of Common Pleas

D O C K E T S H E E T for 95CR046840
STATE OF OHIO vs. STANLEY E JALOWIEC

Date Filed: 03/08/95 — Style: OHIO VS. JALOWIEC

Judge : G3

Action : CRIMINAL

Judge	Kosma J. Glavas	Judge	
Plaintiff 1 Pty 1	STATE OF OHIO	Attorney	WHITE, GREGORY A
Defendant 1 Pty 2	JALOWIEC, STANLEY E	Attorney	216 331-8844 Gen CLEARY, EDWARD F 20800 CENTER RIDGE RD. SUITE #217 ROCKY RIVER OH 44116
	DOB [redacted] BOND $200,000.00 CASH OTHER 5'11" 170LBS BRN/BLUE		
		Attorney	440 930-2600 Gen BRUSNAHAN, KREIG J 158 LEAR RD. SUITE A AVON LAKE OH 44012

Date	Description	Actions
03/08/95	INDICTMENT FILED. WARRANT TO ARREST W/COPY OF INDICTMENT ISSUED TO LORAIN COUNTY SHERIFF. INDICTMENT FOR AGGRAVATED MURDER, 2903.01(A)(1); SPECIFICATIONS (2)	INDICTMENT
03/10/95	CERTIFICATE OF SERVICE FILED.	SERVICE
03/10/95	SHERIFF'S RETURN - I ARRESTED DEFENDANT ON MARCH 9, 1995 MARTIN J. MAHONY, SHFF	RETURN
03/10/95	BOND SET AT $200,000.00 CASH. (TWJ) VOLUME 709 PAGE 303	BOND
03/14/95	DEFENDANT ARRAIGNED. WAIVED READING OF INDICTMENT, ENTERED PLEA OF NOT GUILTY. BOND CONTINUED. CASE ASSIGNED TO JUDGE GLAVAS. PRE-TRIAL SET FOR 3/20/95 AT 8:30 A.M. (EMZ)	ARRNMENT.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4111

VOLUME 710 PAGE 139

03/14/95 ATTY APPT

IT APPEARING DEFENDANT IS INDIGENT, THE COURT HEREBY APPOINTS AS COUNSEL FOR DEFENDANT ATTORNEY JOSEPH C. GRUNDA AND ATTORNEY EDWARD CLEARY.

03/15/95 FILING

NOTICE OF FILING INDICTMENT SENT TO SUPREME COURT.

03/20/95 PRE-TRIAL

(KJG) FIRST PRE-TRIAL HAD. DEFT. DOES NOT REQUEST DISCOVERY AND BILL OF PARTICULARS. ALL MOTIONS SHALL BE FILED ON OR BEFORE --- . CASE IS SET FOR HEARING(S) ON MOTION(S) AND SECOND PRE-TRIAL ON 4/24/95. DEFT. WAIVES STATUTORY TIME PURSUANT TO R.C. 2945.71 ET SEQ.
VOLUME 711 PAGE 151

04/07/95 MOTION

MOTION FILED
BY STATE TO COMPEL THE PRODUCTION OF BLOOD SAMPLES

04/14/95 FILING

OBJECTION TO MOTION TO COMPEL THE PRODUCTION OF BLOOD SAMPLES FILED BY DEFT

04/24/95 PRE-TRIAL

PRE-TRIAL HAD.
JURY TRIAL SET FOR 9-12-95 AT 8:30 A.M.
(KJG)
VOL 716 PAGE 43

05/01/95 (KJG)

DEFENDANT'S OBJECTION TO MOTION TO COMPEL THE PRODUCTION OF BLOOD SAMPLES IS GRANTED, PER AUTHORITY GRANTED IN SCHMERBER V. CALIFORNIA (1966) 384 U.S. 757; STATE V. BLAIR (1990), 70 OHIO APP. 3D 774.; ST. V. MARUT (1989) 63 OHIO APP. 3D 487.
VOL 717 PAGE 81 (SEE ENTRY DATED 5/4/95)

05/04/95 (KJG)

COURT'S ENTRY OF MAY 1, 1995 IS HEREBY AMENDED TO READ AS FOLLOWS: DEFT.'S OBJECTION TO MOTION TO COMPEL THE PRODUCTION OF BLOOD SAMPLES IS OVERRULED AND MOTION BY THE STATE TO COMPEL THE PRODUCTION OF BLOOD SAMPLES IS HEREBY GRANTED PER AUTHORITY GRANTED IN SCHMERBER V. CALIFORNIA (1966) 384 U.S. 757; STATE V. BLAIR (1-90), 70 OHIO APP. 3D 774.; STATE V. MARUT (1989) 63 OHIO APP. 3D 487. NUNC PRO TUNC.
VOLUME 717 PAGE 609

05/16/95 (KJG)

CASE SET FOR HEARING MAY 22, 1995 AT 8:30 A.M.
VOL 718 PAGE 386

05/18/95 FILING

SUGGESTION OF CONFLICT OF INTEREST FILED BY STATE

05/22/95 (KJG)

DEFENDANT IN COURT WITH BOTH COUNSEL. DEFT. ADVISED OF A POTENTIAL CONFLICT BECAUSE ATTORNEY CLEARY REPRESENTED CO-DEFENDANT DAN SMITH IN CASE NO. 94CR046295.
DEFT. WAIVED ANY CONFLICT IN OPEN COURT. SAID WAVIER IS ACCEPTED BY THE COURT AFTER INQUIRY AND FOUND THE WAIVER KNOWINGLY AND INTELLIGENTLY MADE.
(94CR046386/94CR045350/95CR046840/94CR045018/95CR046875)
VOLUME 718 PAGE 959

05/25/95 FILING

DISCOVERY FILED BY STATE OF OHIO.

05/25/95 FILING

DISCOVERY FILED BY STATE OF OHIO.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4112

06/01/95 MOTION
MOTION FILED
BY STATE TO TAKE A DEPOSITION
06/01/95 (KJG)
IT IS HEREBY ORDERED, PURSUANT TO CRIMINAL RULE 15, THAT THE DEPOSITION OF MICHAEL SMITH WILL TAKE PLACE ON THURSDAY, JUNE 15, 1995 AT 2:00 P.M. IN THE LORAIN COUNTY COURTHOUSE.
VOL 719 PAGE 61
06/06/95 MOTION
MOTION FILED
BY DEFT FOR CONTINUANCE OF DEPOSITION
06/07/95 FILING
STATE'S OBJECTION TO DEFT'S MOTION FOR CONTINUANCE OF DEPOSITION FILED
06/07/95 (KJG)
MOTION FOR CONTINUANCE OF DEPOSITION FILED BY MICHAEL J. DUFF, ATTORNEY FOR DEFENDANT, DANNY SMITH, IS HEREBY SET FOR HEARING ON JUNE 12,1995 AT 8:30 A.M.
VOL 719 PAGE 809
06/13/95 (KJG)
BY ORDER OF THE COURT, THE DEPOSITION OF MICHAEL SMITH WILL TAKE PLACE AT 2:00 P.M. ON 6-16-95 IN THE LORAIN COUNTY COURTHOUSE.
VOL 719 PAGE 1448
06/29/95 MOTION
MOTION FILED
BY DEFENDANT IN REGARDS TO WHEREABOUTS OF INDIVIDUAL.
07/03/95 (TWJ)
DEFENDANT'S REQUEST FOR THE STATE TO INFORM COURT ON A WEEKLY BASIS AS TO MICHAEL A. SMITH'S WHEREABOUTS IS HEREBY DENIED.
VOL 721 PAGE 46
07/10/95 MOTION
MOTION TO DISMISS FILED BY DEFENDNAT, STANLEY JALOWIEC.
07/10/95 MOTION
MOTION FOR RELEASE OF RECORDS FILED BY DEFENDANT, STANLEY JALOWIEC.
07/10/95 MOTION
MOTION TO RECORD ALL TRIAL PROCEEDINGS FILED BY STANLEY JALOWIEC.
07/10/95 MOTION
MOTION TO PROHIBIT LAW ENFORCEMENET OFFICERS FROM WEARING UNIFORMS WHILE IN COURTROOM FILED BY DEFENDANT, STANLEY JALOWIEC.
07/10/95 MOTION
MOTION TO PROVIDE ACCUSED NOTICE OF SELECTION OF THE SPECIAL VENIRE FILED BY DEFENDANT, STANLEY JALOWIEC.
07/10/95 MOTION
MOTION TO PROVIDE COUNSEL WITH A LIST OF PROSPECTIVE JURORS AS EARLY AS POSSIBLE BEFORE TRIAL FILED BY DEFENDANT, STANLEY JALOWIEC.
07/10/95 FILING
PROPOSED VOIR DIRE PROCEDURES AND INSTRUCTIONS TO JURY FILED BY DEFENDANT, STANLEY JALOWIEC.
07/10/95 MOTION
MOTION TO SUBMIT QUESTIONNAIRE TO PROSPECTIVE JURORS FILED BY DEFENDANT, STANLEY JALOWIEC.
07/10/95 MOTION
MOTION FOR COMMPREHENSIVE VOIR DIRE FILED BY DEFENDANT,

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4113

STANLEY JALOWIEC.

07/10/95 MOTION

MOTION FOR INDIVIDUAL SEQUESTERED DIRE WITH ORAL HEARING REQUESTED FILED BY DEFENDANT, STANLEY JALOWIEC.

07/10/95 MOTION

MOTION FOR RULING ON NUMBER OF PEREMPTORY CHALLENGES WITH ORAL HEARING REQUESTED FILED BY DEFENDANT, STANLEY JALOWIEC.

07/10/95 MOTION

MOTION TO PROHIBIT DEATH-QUALIFICATION OF JURY IN THE ALTERNATIVE, IF NECESSARY, TO SEAT A SEPARATE JURY DURINNG PENALTY PHASE OF TRIAL WITH ORAL HEARING REQUETED FILED BY DEFENDANT, STANLEY JALOWIEC.

07/10/95 MOTION

MOTION TO PROHIBIT DEATH-QUALIFICATIONS UNLESS AND UNTIL THE PROSECUTION HAS SHOWN PROBABLE CAUSE THAT THE CASE WILL PROCEED TO MITIGATION WITH ORAL HEARING REQUESTED FILED BY DEFENDANT, STANLEY JALOWIEC.

07/10/95 MOTION

MOTION TO REQUIRE PROSECUTOR TO STATE REASONS FOR EXERCISING PEREMPTORY CHALLENGES FILED BY DEFENDANT, STANLEY JALOWIEC.

07/10/95 MOTION

MOTION TO PROHIBIT THE USE OF PEREMPTORY CHALLENGES TO EXCLUDE JURORS WHO EXPRESS CONCERNS ABOUT CAPITAL PUNISHMENT WITH ORAL HEARING REQUESTED FILED BY DEFENDANT, STANLEY JALOWIEC.

07/10/95 FILING

VOIR DIRE MEMORANDUM: VENIREPERSONS WHO CANNOT FAIRLY CONSIDER MITIGATING EVIDENCE AND WHO WOULD AUTOMATICALLY VOTE FOR DEATH UPON A SHOWING OF GUILT MUST BE EXCUSED FILED BY DEFENDANT, STANLEY JALOWIEC.

07/10/95 MOTION

VOIR DIRE MEMORANDUM: THE DEFENSE MUST BE ALLOWED TO EXAMINE PROSPECTIVE JURORS REGARDING THEIR VIEWS ON CAPITAL PUNISHMENT PRIOR TO THEIR EXCUSAL FILED BY DEFENDANT, STANLEY JALOWIEC.

07/10/95 MOTION

MOTION TO PROHIBIT REFERENCES TO THE JURY, AT ANY POINT IN THESE PROCEEDINGS, THAT A VERDICT AS TO DEATH IS ONLY A RECOMMENDATION, IN THE ALTERNATIVE, MOTION TO PROHIBIT REFERENCES TO THE BINDING OR NON-BINDING NATURE OF THE JURY'S DETERMINATION WITH ORAL HEARING REQUESTED FILED BY DEFENDANT, STANLEY JALOWIEC.

07/10/95 MOTION

MOTION FOR SECOND VOIR DIRE OF JURY WITH ORAL HEARING REQUESTED FILED BY DEFENDANT, STANLEY JALOWIEC.

07/10/95 MOTION

MOTION TO PROHIBIT DISPLAY OF EVIDENTIARY EXHIBITS UNTIL ADMITTED WITH ORAL HEARING FILED BY DEFENDANT, STANLEY JALOWIEC.

07/10/95 MOTION

MOTION TO PROHIBIT ANY EVIDENCE BEARING ON THE CHARACTER OF THE VICTIM OR VICTIM IMPACT WITH ORAL HEARING REQUESTED FILED BY DEFENDANT, STANLEY JALOWIEC.

07/10/95 MOTION

MOTION TO EXCLUDE ANY EVIDENCE RELATING TO OTHER CRIMES, WRONGS OR ACTS WITH ORAL HEARING REQUESTED FILED BY DEFENDANT, STANLEY JALOWIEC.

07/28/95 MOTION

MOTION FOR APPROPRIATIONS OF FUNDS FOR EXPERT ASSISTANCE FILED BY DEFT.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4114

07/28/95 (KJG)
DEFENDANT'S MOTION FOR APPROPRIATIONS OF FUNDS FOR EXPERT ASSISTANCE IS HEREBY GRANTED, NOT TO EXCEED $1500.00 WITHOUT FURTHER ORDER OF COURT.
VOL 722 PAGE 1530

07/31/95 FILING
SUPPLEMENTAL DISCOVERY FILED BY STATE

08/01/95 FILING
NOTICE OF RETURN OF PROPERTY FILED BY STATE

09/08/95 MOTION
MOTION FILED
BY DEFT FOR CONTINUANCE

09/08/95 (KJG)
UPON THE COURT'S MOTION, CASE SET FOR PRE-TRIAL ON 9/25/95 AT 8:30 A.M.
VOLUME 725 PAGE 532

09/25/95 PRE-TRIAL
PRE-TRIAL HAD.
JURY TRIAL SET FOR 11-28-95 AT 8:30 A.M. DEFT. CONTINUES TO WAIVE ALL STATUTORY TIME PERIODS.
(KJG)
VOL 726 PAGE 720

09/26/95 FILING
SUPPLEMENTAL DISCOVERY FILED BY STATE

11/22/95 FILING
SUPPLEMENTAL DISCOVERY FILED BY STATE

11/28/95 (KJG)
DEFENDANT'S MOTION FOR A CONTINUANCE IS GRANTED. JURY TRIAL RESET FOR 3-12-96 AT 8:30 A.M.
VOL 730 PAGE 1228

11/30/95 MOTION
MOTION FILED
BY DEFT FOR ADDITIONAL QUESTIONS TO BE PLACED ON QUESTIONNAIRE TO PROSPECTIVE JURORS

12/07/95 (KJG)
DEFT'S MOTION FOR ADDITIONAL QUESTIONS TO BE PLACED ON QUESTIONNAIRE TO PROSPECTIVE JURORS IS DENIED. VOL.731 PAGE.885

12/13/95 MOTION
MOTION FOR COPY OF TRANSCRIPT FILED BY DEFENDANT, STANLEY JALOWIEC.

12/21/95 FILING
STATE'S RESPONSE TO DEFENDANT'S MOTION FOR TRANSCRIPT

12/26/95 (KJG)
THE COURT HAVING CONSIDERED THE STATE'S MOTION TO CONSOLIDATE AND HAVING READ THE AUTHORTIES CITED, THE COURT IS OF THE OPINION THAT EVEN THOUGH CONSOLIDATION IS POSSIBLE IN THESE MATTERS; NEVER-THE-LESS THIS COURT DENIES SAID MOTION IN THE INTEREST OF JUSTICE AND OVER ABUNDANCE OF CAUTION. (95CR046839-SMITH, 95CR046840-JALOWIEC) VOLUME 732 PAGE 847

12/26/95 (KJG)
DEFT.'S MOTION FOR COPY OF TRANSCRIPT OF TRIAL OF STATE OF OHIO VS. RAYMOND SMITH, CASE NO. 94CR046838 IS HEREBY GRANTED.
VOLUME 732 PAGE 848

12/26/95 (KJG)
DEFT.'S MOTION FOR TRANSCRIPT AS REQUESTED IS HEREBY GRANTED.
VOLUME 732 PAGE 849

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4115

01/31/96 MOTION
MOTION FILED
BY DEFENDANT FOR CHANGE OF VENUE

02/05/96 FILING
STATE'S RESPONSE TO DEFENDANT'S MOTION FOR CHANGE OF VENUE

02/07/96 (KJG)
MOTION FOR CHANGE OF VENUE FILED BY DEFT. IS DENIED.
VOLUME 735 PAGE 810

03/04/96 MOTION
MOTION FILED
BY DEFENDANT TO DISQUALIFY.

03/07/96 (KJG)
DEFT.'S MOTION TO DISQUALIFY IS DENIED FOR NOT PROPER VENUE.
VOLUME 737 PAGE 774-A

03/11/96 ENTRY
(THOMAS J. MOYER, CHIEF JUSTICE)
THE AFFIDAVIT OF DISQUALIFICATION IS FOUND NOT WELL-TAKEN AND IS DENIED. THE CAUSE SHALL PROCEED BEFORE JUDGE GLAVAS. SEE JOURNAL.
VOLUME 737 PAGE 913

03/11/96 (KJG)
MOTIONS (21) FILED BY DEFENDANT, STANLEY JALOWIEC, RULED ON. SEE JOURNAL ENTRY.
VOLUME 737 PAGE 924

03/11/96 FILING
SUPPLEMENTAL DISCOVERY FILED BY STATE

03/11/96 MOTION
MOTION FILED
BY STATE TO QUASH SUBPOENA

03/11/96 MOTION
MOTION FILED
BY DEFENDANT FOR CONTINUANCE

03/11/96 (EMZ)
UPON A HEARING BEFORE THE ADMINISTRATIVE JUDGE ZALESKI ON A MOTION TO QUASH SUBPEONA ISSUED TO JUDGE GLAVAS. TESTIMONY WAS PRESENTED BY BOTH SIDES. THE COURT RULES THAT THE SUBPEONA ISSUED TO JUDGE GLAVAS IS QUASHED AS THE DEFT HAS FAILED TO SHOW THAT SUCH TESTIMONY OF THE JUDGE IS REASONABLY RELEVANT TO THE ISSUES AT HAND.
JOURNAL 737 PAGE 972

03/15/96 (KJG)
THE LORAIN COUNTY SHERIFF OR HIS AUTHORIZED DEPUTY IS ORDERED TO TRANSPORT RAYMOND A SMITH, INMATE #314-607 FROM MANSFIELD CORRECTIONAL INSTITUTION TO THE LCCF ON OR BEFORE 3/18/96. RAYMOND A SMITH TO BE TRANSPORTED FROM THE LCCF TO THE LORAIN COUNTY COURTHOUSE, COURTROOM #3 ON 3/18/96 AT 9:00 AM. FOR TESTIMONY. JOURNAL 737 PAGE 1562

03/15/96 WARRANT
WARRANT TO CONVEY TO
LORAIN COUNTY CORRECTIONAL FACILITY.
(RAYMOND A. SMITH)

03/18/96 RETURN
SHERIFF'S RETURN - I CONVEYED THE DEFENDANT TO PLACE DESIGNATED ON
MARCH 18, 1996,(RAYMOND A. SMITH) MARTIN J MAHONY SHERIFF

03/19/96 FILING
PROPOSED JURY INSTRUCTIONS FILED BY DEFENDANT

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4116

03/20/96 (KJG)
THE COURT HEREBY GRANTS PERMISSION TO CHRONICLE-TELEGRAM TO: BROADCAST/TELEVISE/RECORD OR PHOTOGRAPH IN THE COURTROOM DURING THE TRIAL OF THE WITHIN MATTER, SUBJECT TO ANY LIMITATIONS WHICH THE COURT MAY LATER IMPOSE. (MEDIA REQUEST ATTACHED, 3/13/96)
VOLUME 738 PAGE 447

03/20/96 (KJG)
(3/12/96) FIRST DAY OF JURY TRIAL. VOIR DIRE OF JURY COMMENCED. ADJOURNED UNTIL MARCH 13, 1996 AT 8:30 A.M.
VOLUME 738 PAGE 423

03/20/96 (KJG)
(3/13/96) SECOND DAY OF JURY TRIAL. FURHTER VOIR DIRE CONDUCTED OF THE JURY. JURY OF 14 IMPANELED. ADJOURNED UNTIL MARCH 14, 1996 AT 8:30 A.M.
VOLUME 738 PAGE 424

03/20/96 (KJG)
(3/14/96) THIRD DAY OF JURY TRIAL. OPENING STATEMENTS PRESENTED. STATE'S CASE IN CHIEF PARTIALLY PRESENTED. ADJOURNED UNTIL 9:00 A.M. ON MARCH 15, 1996.
VOLUME 738 PAGE 425

03/20/96 (KJG)
(3/15/96) FOURTH DAY OF JURY TRIAL. STATE'S CASE PARTIALLY PRESENTED. ADJOURNED UNTIL 8:15 A.M. ON MARCH 18, 1996.
VOLUME 738 PAGE 426

03/20/96 (KJG)
(3/18/96) FIFTH DAY OF JURY TRIAL. STATE'S CASE IN CHIEF PRESENTED. RULE 29 MOTION MADE BY DEFENSE AND OVERRULED. NO EVIDENCE PRESENTED BY THE DEFENDANT. DEFENSE RESTS. ADJOURNED UNTIL MARCH 19, 1996 AT 8:45 A.M.
VOLUME 738 PAGE 427

03/20/96 (KJG)
(3/19/96) SIXTH DAY OF JURY TRIAL. CLOSING ARGUMENTS PRESENTED. JURY CHARGED. ALTERNATES EXCUSED. DELIBERATIONS COMMENCED. ADJOURNED UNTIL 3/20/96 AT 9:00 A.M.
VOLUME 738 PAGE 428

03/20/96 (KJG)
(3/20/96) FURTHER DELIBERATIONS COMMENCED. VERDICT: DEFENDANT FOUND GUILTY. MITIGATION HEARING SET FOR APRIL 9, 1996. SEE VERDICT.
VOLUME 738 PAGE 429

03/27/96 (KJG)
DR. DEBORAH KORICKE IS HEREBY GRANTED VISITATION PRIVILEGES WITH DEFENDANT, STANLEY JALOWIEC AT THE LORAIN COUNTY CORRECTIONAL FACILITY.
JOURNAL 738, PAGE 1259
(1 CC SENT TO SHERIFF)

03/27/96 (KJG)
DR. DEBORAH KORICKE IS HEREBY APPOINTED AS AN EXPERT PSYCHOLOGIST ON BEHALF OF THE DEFENDANT AT A COST TO THE STATE NOT TO EXCEED $1,000.00.
JOURNAL 738, PAGE 1260

03/29/96 MOTION
MOTION FILED
BY DEFENDANT TO REQUIRE THE JURY TO ARTICULATE THE METHOD BY WHICH IT WEIGHS THE AGGRAVATING CIRCUMSTANCES AGAINST THE MITIGATING FACTORS WITH ORAL HEARING REQUESTED.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4117

03/29/96 MOTION
MOTION FILED
BE DEFENDANT TO ALLOW THE DEFENSE TO ARGUE LAST AT THE PENALTY PHASE WITH ORAL HEARING REQUESTED

03/29/96 MOTION
MOTION FILED
BY DEFENDANT TO PRECLUDE READMISSION OF TRIAL PHASE EVIDENCE AND EXHIBITS IN PENALTY PHASE, AND RELATED PROSECUTORIAL COMMENT WITH ORAL HEARING REQUESTED.

03/29/96 MOTION
MOTION FILED
BY DEFENDANT TO PERMIT DEFENSE TO ADMIT ALL MITIGATING EVIDENCE AT SENTENCING PHASE WITH ORAL HEARING REQUESTED.

03/29/96 MOTION
MOTION FILED
BY DEFENDANT TO PROHIBIT THE PROSECUTOR FROM ARGUING AND THE COURT FROM GIVING INSTRUCTIONS REGARDING STATUTORY MITIGATING FACTORS NOT RAISED BY THE DEFENSE WITH ORAL HEARING REQUESTED

03/29/96 MOTION
MOTION FILED
BY DEFENDANT TO LIMIT STATE'S EVIDENCE TO REBUTTAL WITH ORAL HEARING REQUESTED

03/29/96 MOTION
MOTION FILED
BY DEFENDANT TO LIMIT REBUTTAL EVIDENCE AND ARGUMENT RESPECTING THE DECEDENT WITH ORAL HEARING REQUESTED

03/29/96 MOTION
MOTION FILED
BY DEFENDANT TO LIMIT PROSECUTOR'S ARGUMENT TO THE AGGRAVATING CIRCUMSTANCES PROVEN AT THE FIRST PHASE OF THE TRIAL, AND TOLIMIT THE PROSECUTOR'S PRESENTATION OF EVIDENCE AND ARGUMENT TO PROPER REBUTTAL OF THE DEFENSE PRESENTATION WITH ORAL HEARING REQUESTED

03/29/96 FILING
MOTION IN LIMINE FILED BY DEFENDANT TO PROHIBIT PREJUDICIAL ARGUMENTS AND THEMES AT THE CLOSING ARGUMENT OF THE PENALTY PHASE WITH ORAL HEARING REQUESTED

03/29/96 MOTION
MOTION FILED
BY DEFENDANT TO PROHIBIT REFERENCE TO NATURE AND CIRCUMSTANCES OF THE OFFENSE AS A FACTOR TO BE CONSIDERED IN MITIGATION OR IN INTRODUCTORY LANGUAGE RESPECTING MITIGATION WITH ORAL HEARING REQUESTED

03/29/96 MOTION
MOTION FILED
BY DEFENDANT FOR INSTRUCTION THAT THE STATE BEARS THE BURDEN OF PROVING THE ABSENCE OF ANY MITIGATING FACTORS OFFERED BY THE DEFFENSE WITH ORAL HEARING REQUESTED

03/29/96 MOTION
MOTION FILED
BY DEFENDANT TO REPHRASE THE INSTRUCTION REFLECTING THE R.C. 2929.04(B)(7) "CATCH ALL" MITIGATING CIRCUMSTANCE TO REFLECT THAT SUCH FACTORS ARE ANY OTHER FACTORS THAT CALL FOR A PENALTY LESS DEATH, OR LESSEN THE APPROPRIATENESS OF A SENTENCE OF DEATH WITH ORAL HEARING REQUESTED

03/29/96 MOTION
MOTION FILED
BY DEFENDANT TO ALTER DEFINITION OF MITIGATING CIRCUMSTANCES TO REMOVE REFERENCE TO "REDUCING THE DEGREE OF BLAME" AND

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4118

REPLACE THIS WITH OTHER LANGUAGE, AND TO SO LIMIT THE PROSECUTOR IN ARGUMENT WITH ORAL HEARING REQUESTED

03/29/96 MOTION

MOTION FILED
BY DEFENDANT TO INSTRUCT THE JURY TO CONSIDER MERCY IN ITS MITIGATION PHASE DELIBERATIONS, AND TO PROHIBIT THE PROSECUTOR FROM ARGUING THAT THE JURY SHOULD NOT CONSIDER MERCY WITH ORAL HEARING REQUESTED

03/29/96 MOTION

MOTION FILED
BY DEFENDANT FOR PENALTY PHASE PHASE JURY INSTRUCTION RESPECTING ORDER OF DELIBERATIONS AND LACK OF NECESSITY TO FIRST AGREE UNANIMOUSLY ON A RECOMMENDATION OF DEATH

03/29/96 MOTION

MOTION FILED
BY DEFENDANT TO INSTRUCT THE JURY THAT IT IS TO RECOMMEND A SENTENCE OF DEATH ONLY AFTER THE PROPER WEIGHING, AND DETERMINING THAT DEATH IS THE APPROPRIATE PUNISHMENT; ORAL HEARING REQUESTED

03/29/96 MOTION

MOTION FILED
BY DEFENDANT TO INSTRUCT ON SPECIFIC MITIGATING FACTORS RAISED BY DEFENSE WITH ORAL HEARING REQUESTED

03/29/96 MOTION

MOTION FILED
BY DEFENDANT TO INCLUDE RESIDUAL DOUBT ABOUT GUILT, OR SIMILAR LANGUAGE. AMONG LIST OF MITIGATING FACTORS IN PENALTY PHASE JURY INSTRUCTIONS WITH ORAL HEARING REQUESTED.

04/05/96 FILING

STATE'S RESPONSE TO DEFENDANT'S MOTION NUMBER: M-16

04/05/96 FILING

STATE'S RESPONSE TO DEFENDANT'S MOTIONS NUMBER: M-12, M-13, M-15, M-17 AND M-18

04/05/96 FILING

STATE'S RESPONSE TO DEFENDANT'S MOTION NUMBER: M-9

04/05/96 FILING

STATE'S RESPONSE TO DEFENDANT'S MOTION M-2

04/05/96 FILING

STATE'S RESPONSE TO DEFENDANT'S MOTION NUMBERS: M-1, M-4, M-5, M-6 AND M-8

04/05/96 FILING

STATE'S RESPONSE TO DEFENDANT'S MOTION NUMBERS: M-3, M-7, M-10,M-11, M-14

04/08/96 (KJG)

RULING UPON (19) MOTIONS OF THE DEFENDANT.
SEE JOURNAL ENTRY.
VOLUME 739 PAGE 898

04/11/96 (KJG)

(4/9/96) MITIGATION HEARING COMMENCED. ALL JURORS, INCLUDING THE TWO ALTERNATES, ARE PRESENT. STATE INCORPORATES BY REFERENCE ALL TESTIMONY FROM GUILT OR INNOCENCE PHASE OF TRIAL. TESTIMONY PARTIALLY PRESENTED BY DEFENSE COUNSEL ON MITIGATION. REBUTTAL BY STATE. ADJOURNED UNTIL 4/10/96 AT 8:15 A.M. JURY NOT SEQUESTERED FOR THE NIGHT.
VOLUME 739 PAGE 1349

04/11/96 (KJG)

(4/10/96) SECOND DAY OF MITIGATION HEARING. STAET COMPLETES REBUTTAL TESTIMONY. REQUEST FOR LIMITING INSTRUCTION BY THE DEFENSE. REQUEST GRANTED. CLOSING

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4119

ARGUMENTS. JURY CHARGED. ALTERNATE EXCUSED. JURY DELIBERATIONS COMMENCED. VERDICT: RECOMMENDATION FOR DEATH PENALTY. SEE VERDICT.
COURT ACCEPTS THE RECOMMENDATION AND ORDERS EXECUTION ON APRIL 10, 1997. DEFENDANT ADVISED OF HIS APPELLATE RIGHTS. COURT TO APPOINT COUNSEL FOR APPEAL.
VOLUME 739 PAGE 1350, 1352

04/11/96 SENTENCING

(KJG) THE COURT HEREBY ACCEPTS THE RECOMMENDATION OF THE JURY AND IMPOSES A SENTENCE OF DEATH AFTER AN INDEPENDENT WEIGHING AS REQUIRED BY STATUTE. SENTENCE TO BE CARRIED OUT ON APRIL 10, 1997.
DEFT.'S THREE YEAR SENTENCE OF ACTUAL INCARCERATION IS IMPOSED CONSECUTIVELY FOR THE GUN SPECIFICATION.
DEFT. APPRISED OF HIS RIGHTS UPON APPEAL. OPINION AS REQUIRED BY STATUTE TO FOLLOW.
VOLUME 739 PAGE 1351

04/12/96 SENT/CONV

C/C OF INDICTMENT, JOURNAL ENTRY, AND SENTENCE ISSUED TO LORAIN COUNTY SHERIFF ALONG WITH WARRANT TO CONVEY TO:
LORAIN CORRECTIONAL INSTITUTION
(ALONG WITH DEATH WARRANT)

04/17/96 RETURN

SHERIFF'S RETURN - I CONVEYED THE DEFENDANT TO PLACE DESIGNATED ON
APRIL 12, 1996. MARTIN J. MAHONY, SHERIFF.

04/29/96 (KJG)

OPINION, R.C. 2920.03(F).
THIS COURT FINDS BY PROOF BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCE OUTWEIGHS ALL MITIGATING FACTORS. ACCORDINGLY, THE DEATH PENALTY WAS IMPOSED BY THIS COURT ON APRIL 10, 1996.
SEE JOURNAL ENTRY.
VOLUME 740 PAGE 1518

05/08/96 AFFIDAVIT

AFFIDAVIT OF INDIGENCY FILED.

05/08/96 MOTION

MOTION FILED
BY DEFENDANT PRO SE FOR PUBLIC RECORDS

05/09/96 MOTION

MOTION FILED
BY DEFENDANT PRO SE FOR PUBLIC RECORDS.

05/09/96 FILING

NOTICE OF APPEAL FILED.
(#96CA006445)

05/13/96 FILING

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR PUBLIC RECORDS

05/21/96 (KJG)

DEFT'S MOTION FOR PUBLIC RECORDS IS DENIED.
VOL. 742 PAGE 469

05/21/96 (KJG)

THE COURT REPORTER IS HEREBY INSTRUCTED TO PREPARE THE TRANSCRIPT IN THE ABOVE MATTER AT STATE'S EXPENSE FOR THE PURPOSE OF APPEAL.
VOL. 742 PAGE 470

05/24/96 (KJG)

ATTORNEY KREIG BRUSNAHAN AND ATTORNEY PATRICIA SMITH ARE HEREBY APPOINTED AS CO-COUNSEL TO REPRESENT THE DEFENDANT, STANLEY E. JALOWIEC FOR THE PURPOSE OF APPEAL TRANSCRIPTS TO BE OBTAINED FOR SAID APPEAL AT STATE'S EXPENSE.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4120

JOURNAL 742, PAGE 824

05/30/96 (KJG)
DEFT JALOWIEC'S MOTION FOR PUBLIC RECORDS FILED ON 5/8/96, IS DENIED. SEE JOURNAL
JOURNAL 742 PAGE 1437

07/16/96 FILING
TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES TOGETHER W/ALL ORIGINAL PAPERS FILED IN C/A CASE #96CA006445.

12/23/96 MOTION
MOTION FILED
BY PETITIONER STANLEY JALOWIEC FOR CO-DEFENDANT DANIEL SMITH'S TRIAL TRANSCRIPTS

01/02/97 (KJG)
MOTION FOR CO-DEFT'S TRIAL TRANSCRIPTS FILED BY DEFT'S ATTNY IS GRANTED. SAID TRANSCRIPT TO BE PROVIDED AT THE COST OF SECOND COPY. VOL 757 PAGE 12

02/25/97 MOTION
MOTION FILED
BY DEFT FOR EXPERT ASSISTANCE AND DISCOVERY

03/17/97 FILING
POST-CONVICTION PETITION TO VACATE OR SET ASIDE SENTENCE FILED BY DEFENDANT-PETITIONER - EVIDENTIARY HEARING REQUESTED

03/25/97 (KJG)
COURT HAS TAKEN MOTION FOR EXPERT ASSISTANCE UNDER ADVISEMENT. COURT REQUESTS FROM COUNSEL AN APPROXIMATE AMOUNT OF MONEY NEEDED FOR SAID EXPERTS BEFORE MAKING ITS RULING. VOL 762 PAGE 1259

04/15/97 MOTION
MOTION FILED
BY DEFT TO AMEND THE RECORD PURSUANT TO APP.R. 9(C)

04/17/97 FILING
FIRST AMENDED POST CONVICTION PETITION, EVIDENTIARY HEARING REQUESTED, PETITION TO VACATE OR SET ASIDE SENTENCE PURSUANT TO OHIO REVISED CODE 2953.21 FILED BY DEFT

06/13/97 (KJG)
THIS CAUSE WAS CONSIDERED UPON DEFT-APPELLANT'S MOTION TO AMEND THE RECORD PURSUANT TO APPELLATE RULE 9(C). THE MOTION IS GRANTED & THE RECORD SHOULD RELECT THAT THE FOLLOWING JURORS, ALTHOUGH NOT NOTED ON THE "JUROR STRIKE OFF LIST" WERE EXCUSED BY THE DEFENSE & BY THE PROSECUTION. THE RECORD IS AMENDED TO REFLECT THAT THE ABOVE JURORS WERE CHALLENGED & EXCUSED BY THE PARTIES AS NOTED AS ABOVE. SEE JOURNAL.
VOL 767 PAGE 1814

06/23/97 MOTION
MOTION FILED
BY STATE TO CORRECT THE RECORD

06/24/97 (KJG)
STATE'S MOTION TO CORRECT THE RECORD IS GRANTED.
VOL 768 PAGE 1311

08/06/97 FILING
SECOND AMENDED POST-CONVICTION PETITION FILED BY DEFENDANT (EVIDENTIARY HEARING REQUESTED)

03/19/98 MOTION
MOTION FILED
BY ATTORNEY PATRICIA J. SMITH, TO WITHDRAW AS COUNSEL AND FOR APPOINTMENT OF SUBSTITUTE COUNSEL.

03/24/98 (KJG)
MOTION TO WITHDRAW AS COUNSEL AND FOR APPOINTMENT OF

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4121

SUBSTITUTE COUNSEL IS DENIED. THIS MATTER IS NOW IN THE COURT OF APPEALS AND THE JURISDICTION REGARDING COUNSEL IS UP TO COURT OF APPEALS. SHOULD IT BE THAT THIS COURT DOES HAVE JURISDICTION, THEN MOTION TO WITHDRAW IS DENIED UNTIL NEW COUNSEL ENTERS APPEARANCE OF RECORD.
OF RECORD. VOLUME # 786 PAGE # 1339

03/30/98 MOTION

MOTION FILED
BY DEFENDANT PRO SE REQUESTING THIS COURT TO STRIKE THE COUNSELOR'S PETITION FOR POST-CONVICTION AND ITS AMENDMENTS AND ALLOW PETITIONER TIME TO REFILE HIS OWN PRO SE PETITION FOR THE RECORD.

03/30/98 MOTION

MOTION FILED
BY DEFENDANT PRO SE FOR DISCOVERY
(HEARING REQUESTED)

04/15/98 FILING

(96CA006445) JUDGMENT AFFIRMED. SEE JOURNAL.
VOL 787, PAGE 1805

02/22/00 FILING

PETITIONER'S THIRD AMENDED PETITION FOR POST-CONVICTION FILED PRO SE, EVIDENTIARY HEARING REQUESTED, FILED BY DEFENDANT PRO SE, PETITION TO VACATE OR SET ASIDE SENTENCE AND JUDGMENT PURSUANT TO O.R.C. 2953.21

03/28/00 MOTION

MOTION FOR DISCOVERY FILED BY DEFENDANT PRO SE
ORAL HEARING REQUESTED

04/09/01 FILING

STATE'S RESPONSE TO PETITIONER'S THIRD AMENDED PETITION FOR POST CONVICTION RELIEF FILED

04/12/01 (KJG)

DEFT'S THIRD AMENDED PETITION FOR POST CONVICTION RELIEF IS DISMISSED. SEE JOURNAL.
VOLUME # 859 PAGE # 1899

04/24/01 FILING

SENT DEFENDANT A COURT OF APPEALS DOCKETING STATEMENT PER HIS REQUEST.

05/11/01 FILING

NOTICE OF APPEAL FILED BY STANLEY E. JALOWIEC.
(01CA007844)

05/14/01 APPEAL

NOTICE OF APPEAL TO THE COURT OF APPEALS FILED.
BY STANLEY E. JALOWIEC (01CA007847)

06/04/01 ENTRY

(SUPREME COURT CASE NO. 98-1074) (96CA006445)
MOTION GRANTED FOR APPELLANT TO STAY THE EXECUTION OF SENTENCE IN THE ABOVE-STYLED CAUSE PENDING THE DECISION BY THE UNITED STATE SUPREME COURT ON APPELLANT'S PETITION FOR A WRIT OF CERTIORARI AND PENDING THE EXHAUSTION OF STATE POST-CONVICTION REMEDIES.
SEE JOURNAL ENTRY. (CHIEF JUSTICE THOMAS J. MOYER)
VOLUME 863 PAGE 359
CC: SOUTHERN OHIO CORRECTIONAL FACILITY

06/27/01 TRANSCRIPT

TRANSCRIPT OF DOCKET & JOURNAL ENTRIES TOGETHER WITH ALL ORIGINAL PAPERS RECEIVED AND FILED
IN C/A 01CA007844.

10/15/01 ENTRY

IT IS ORDERED BY THE COURT THAT THE MOTIONS BE, AND HEREBY ARE, DENIED.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4122

VOL. 81 PG. 342
(S/C 99-1753)

10/15/01 ENTRY

THIS CAUSE, HERE ON APPEAL FROM THE COURT OF APPEALS FOR LORAIN COUNTY, WAS CONSIDERED IN THE MANNER PRESCRIBED BY LAW. ON CONSIDERATION THEREOF, THE JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED CONSISENT WITH THE OPINION RENDERED HEREIN. IT IS FURTHER ORDERED THAT THE APPELLEE RECOVER FROM THE APPELLATN ITS COSTS HEREIN EXPENDED; AND THAT A MANDATE BE SENT TO THE COURT OF APPEALS FOR LORAIN COUNTY TO CARRY THIS JUDGMENT INTO EXECUTION; AND THAT A COPY OF THIS ENTRY BE CERTIFIED TO THE CLERK OF THE COURT OF APPEALS FOR LORAIN COUNTY FOR ENTRY.
VOL. 81 PG. 343
(S/C 99-1753)

10/15/01 ENTRY

THE SUPREME COURT OF OHIO COMMANDS YOU TO PROCEED WITHOUT DELAY TO CARRY THE FOLLOWING JUDGMENT IN THIS CAUSE INTO EXECUTION: JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED CONSISTENT WITH THE OPINION RENDERED HEREIN.
VOL. 81 PG. 344
(S/C 99-1753)

03/07/02 (EMZ)

C/A JOURNAL ENTRY. THE JUDGMENT OF THE LORAIN COUNTY COURT OF COMMON PLEAS DENYING POST-CONVICTION RELIEF UPON A THIRD PETITION RELIEF IS AFFIRMED. JUDGMENT AFFIRMED. (SEE JOURNAL
(CA # 01CA007844,01CA007847)
VOLUME # 881 PAGE # 1255

07/17/02 FILING

PETITIONER'S MOTION FOR FUNDS TO RETAIN EXPERT ASSISTANCE IN THE FIELD OF CLINICAL/FORENSIC PSYCHOLOGY AND INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN THE ABOVE CAPTIONED CASE FILED

07/17/02 MOTION

MOTION FOR DISCOVERY FILED (HEARING REQUESTED) BY DEFT, PRO SE

07/17/02 FILING

SECOND PETITION FOR POST-CONVICTION RELIEF FILED BY DEFT (EVIDENTIARY HEARING REQUESTED)

08/12/02 FILING

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR POST CONVICTION RELIEF AND REQUEST FOR EVIDENTIARY HEARING FILED.

08/15/02 (KJG)

DEFENDANT-PETITIONER'S MOTION FOR DISCOVERY IS HEREBY DENIED. THE COURT HAVING DENIED PETITIONER'S FOURTH POST CONVICTION PETITION. IT IS SO ORDERED.
VOL. 891 PAGE 2709

08/15/02 (KJG)

JUDGMENT ENTRY. THE CONDENSED STATEMENT OF THE CASE AS APPEARS IN THE STATE'S RESPONSE SEEMS TO BE QUITE CLEAR AND ACCURATE AND, THEREFORE, THIS COURT WILL REPEAT HEREIN SAID STATEMENT: SEE JOURNAL. IT IS SO ORDERED.
VOLUME # 891 PAGE # 2710

09/06/02 APPEAL

NOTICE OF APPEAL TO THE COURT OF APPEALS FILED.
BY STANLEY E. JALOWIEC.
(02CA008130)

06/18/03 DECISION

(02CA008130)
DECISION AND JOURNAL ENTRY. JUDGMENT AFFIRMED. SEE JOURNAL.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4123

COSTS TAXED TO APPELLANT.
VOL. 90 PG. 182

Click the Back Button to Return to Previous Screen

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4124

RECEIVED
MAY 9 - 1996
JUDGE

IN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

ENTERED

FILED
LORAIN COUNTY
MAY 8 1 56 PM '96
CLERK OF COMMON PLEAS
DONALD J. ROTHGERY

STATE OF OHIO
plaintiff;

VS.

STANLEY E. JALOWIEC
defendant, Pro Se

CASE NO.95CR046840
JUDGE KOSMA J. GLAVAS
MOTION FOR PUBLIC RECORDS

Now comes the defendant, Stanley E. Jalowiec, Pro Se, pursuant to Revised Code 149.43 and moves this honorable court for an order requiring the State of Ohio to produce the following documents for copying and or inspection. Further more the defendant respectfully request this court to provide such documents without cost in that the defendant is indigent. The defendant submits the attached affidavit of indigence.
Wherefore the defendant prays for the appropriate order in the interest of justice.

1. Any and all records pursuant to 149.43 (A) (2).
2. Any and all records ,logs, or memoranda pursuant to 149.43 (a) (3)
3. Any and all records pursuant to 149.43 (a) (2) (a),(2) (b).
4. All public records pursuant to 149.43 (a)(4)
5. All records pursuant to 149.43(a)(4)(b).

Respectfully submitted,
Stanley E Jalowiec
Defendant, Pro Se
Stanley E. Jalowiec
Inmate no. 321-712
P.O box 788
Mansfield ,Ohio 44901

PROOF OF SERVICE

A copy of the forgoing was sent by regular US. Mail to the Attorney of record, Jonathan E. Rosebaum, Assistant,Lorain County Prosecuting Attorney, Lorain County ADministration Building, 226 Middle Avenue, Elyria, Ohio 44035 on this 6 day of May, 1996

98-1074

FILED
JUN 17 1998
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Supreme Court of Ohio
Case No. 99-1753
Date Rec'd 10/5/99

116

AFFIDAVIT OF INDIGENCE

ENTERED
MAY 0 8 1996

I Stanley E. Jalowiec hereby certifies that I am indigent

and it would cause me great heartship to pay for such paper work. Wherefore I pray that the court grant the motion.

FILED IN LORAIN COUNTY
CLERK OF COURTS
DONALD J. ROTHGERY, CLERK

Respectfully Submitted,

Stanley E. Jalowiec

Stanley E. Jalowiec 321-712
P.O Box 788
Mansfield ,Ohio 44901

Dear, Your Honorable Judge Kosma J. Glavas

Your Honor i'm writing you to find out who my attorney is for my appeal, Case No. 95CR046840. Also enclosed with this letter is a Motion For Public Records it should be filed with the Clerk Of Courts By now, Your Honor what I would like is all public records including the statements made to police, please provide me with such document, and I pray that you grant the Motion in my favor. Thank you for your time.

Your Honor you may send any and all response to the address listed below once again thank you.

Respectfully Submitted,

Stanley E. Jalowiec

Stanley E. Jalowiec #321-712
P.O. Box 788
Mansfield, Ohio 44901

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4127

Stanley E. Jalowiec 321-712
P.O. Box 788
Mansfield, Oh 44901

JUDGE Kosma J. Grad
Court of Common Pleas
Elyria Oh 44035

MANSFIELD OH
MAY 7 1986
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Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4128

RECEIVED
MAY 10 1996
JUDGE KOSMA J. GLAVAS

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

ENTERED

FILED
LORAIN COUNTY
MAY 9 PM 29 AM '96
CLERK OF COMMON PLEAS
DONALD J. ROTHGERY

STATE OF OHIO)
plaintiff;)
)
VS.)
)
STANLEY E. JALOWIEC)
defendant, Pro Se)

CASE NO.95CR046840
JUDGE KOSMA J. GLAVAS

MOTION FOR PUBLIC RECORDS

Now comes the defendant, Stanley E. Jalowiec, Pro Se, pursuant to Revised Code 149.43 and moves this honorable court for an order requiring the State of Ohio to produce the following documents for copying and or inspection. Further more the defendant respectfully request this court to provide such documents without cost in that the defendant is indigent. The defendant submits the attached affidavit of indigence.
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2. Any and all records ,logs, or memoranda pursuant to 149.43 (a) (3)
3. Any and all records pursuant to 149.43 (a) (2) (a),(2) (b).
4. All public records pursuant to 149.43 (a)(4)
5. All records pursuant to 149.43(a)(4)(b).

Respectfully submitted,
Stanley E Jalowiec
Defendant, Pro Se
Stanley E. Jalowiec
Inmate no. 321-712
P.O box 788
Mansfield ,Ohio 44901

PROOF OF SERVICE

A copy of the forgoing was sent by regular US. Mail to the Attorney of record, Jonathan E. Rosebaum, Assistant,Lorain County Prosecuting Attorney, Lorain County ADministration Building, 226 Middle Avenue, Elyria, Ohio 44035 on this 6 day of May, 1996

117

AFFIDAVIT OF INDIGENCE

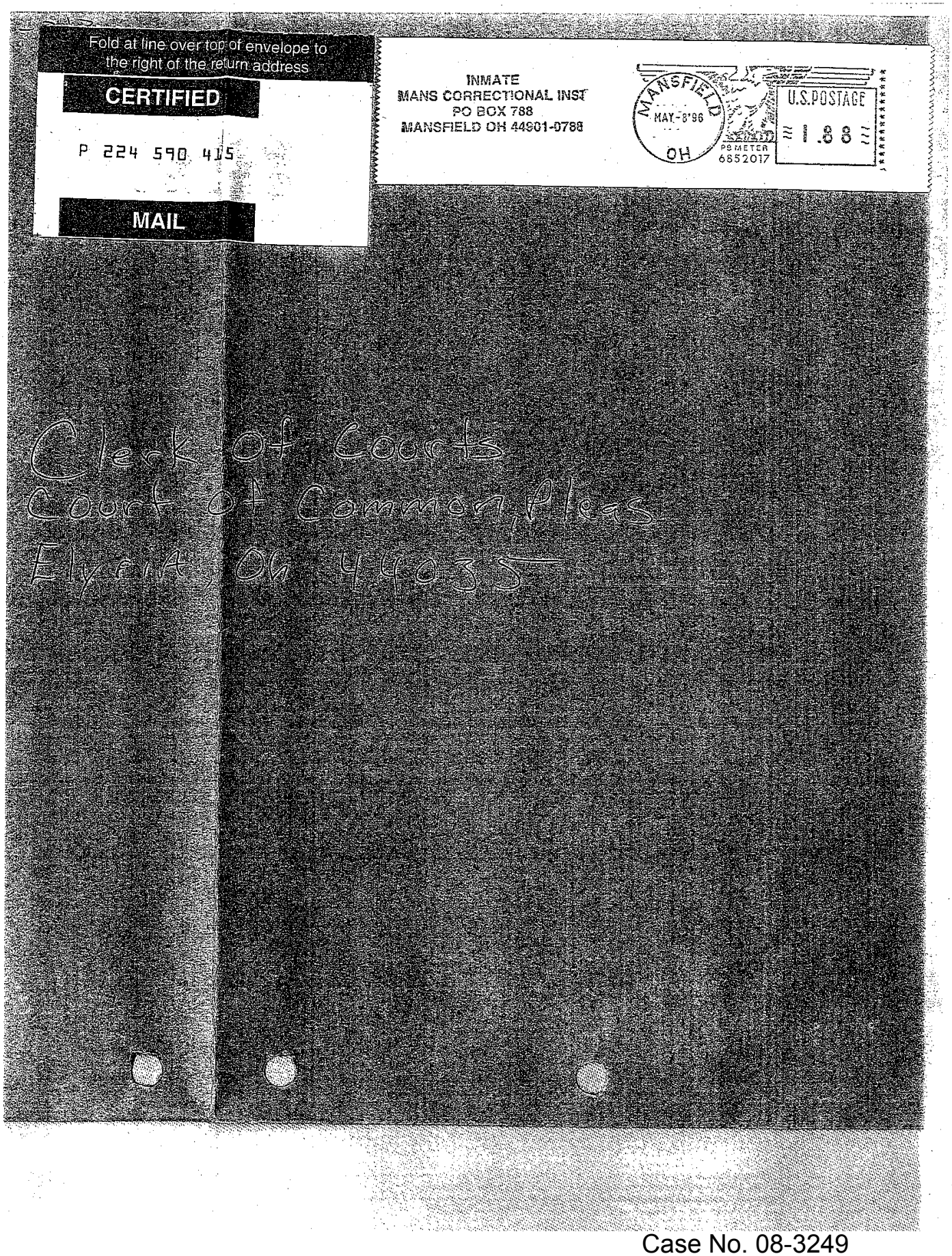
MAY 0 9 1996

I Stanley E. Jalowiec hereby certifies that I am indigent and it would cause me great heartship to pay for such paper work. Wherefore I pray that the court grant the motion.

Respectfully Submitted,

Stanley E. Jalowiec

Stanley E. Jalowiec 321-712
P.O Box 788
Mansfield ,Ohio 44901


Fold at line over top of envelope to the right of the return address
CERTIFIED
P 224 590 415
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INMATE
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PO BOX 788
MANSFIELD OH 44901-0788
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6852017
Clerk of Courts
Court of Common Pleas
Elyria, OH 44035

Stanley E Jalowiec 321-
P.O. Box 788
Mansfield OH 44901

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the right of the r

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P 224 590 4

MAIL

Clerk
Court
Elyria

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4132

FILED
LORAIN COUNTY

ENTERED

MAY 13 10 18 AM '96

IN THE COURT OF COMMON PLEAS
CLERK OF COMMON PLEAS LORAIN COUNTY, OHIO
DONALD J. ROTHGERY

STATE OF OHIO	)	CASE NO. 95CR046840
	)	
Plaintiff	)	JUDGE KOSMA J. GLAVAS
	)	
vs.	)	
	)	
STANLEY JALOWIEC	)	STATE'S RESPONSE TO
	)	DEFENDANT'S MOTION FOR
Defendant	)	PUBLIC RECORDS

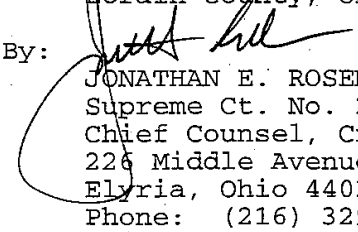
Now comes the State of Ohio and responds to defendant's motion for public records as follows:

1) The defendant is not entitled to make a demand on the prosecutor for public records pursuant to Ohio Revised Code Section 149.43, as long as the criminal proceeding itself is pending. This includes all appeals and post-conviction relief. State ex rel. Steckman v. Jackson (1994), 70 Ohio St. 3d 420.

2) The Lorain County Prosecutor's Office is not the custodian of many of the records sought. Proper demand, after the criminal case is over, shall be made upon the respective police departments, who are custodian of those records. It is the position of the Lorain County Prosecutor's Office that the State's file is work product and trial preparation records.

Respectfully submitted,

GREGORY A. WHITE
Prosecuting Attorney
Lorain County, Ohio

By: 

JONATHAN E. ROSENBAUM
Supreme Ct. No. 21698
Chief Counsel, Criminal Division
226 Middle Avenue, Fourth Floor
Elyria, Ohio 44035
Phone: (216) 329-5393

PROOF OF SERVICE

A copy of the foregoing State's Response to Defendant's Motion for Public Records was mailed by regular U.S. Mail this 3 day of May, 1996 to:

Stanley Jalowiec
Inmate No. 321-712
P.O. Box 788
Mansfield, Ohio 44901

JONATHAN E. ROSENBAUM
Chief Counsel, Criminal Division

FILED
LORAIN COUNTY

MAY 21 9 51 AM '96

CLERK OF COMMON PLEAS
DONALD J. ROTHGERY

ENTERED

JOURNAL ENTRY

COURT OF COMMON PLEAS

Lorain County, Ohio

Donald J. Rothgery, Clerk

Case. No. 95CR046840

STATE OF OHIO — Plaintiff — Attorney for Plaintiff

vs.

STANLEY JALOWIEC — Defendant — Attorney for Defendant

Date 5/20/96 Vol. 742 Page 469

Defendant's Motion for Public Records is DENIED.

120

Judge

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4135

FILED
LORAIN COUNTY

MAY 21 2 52 PM '96

CLERK OF COMMON PLEAS
DONALD J. ROTHGERY

ENTERED

JOURNAL ENTRY

COURT OF COMMON PLEAS

Lorain County, Ohio

Donald J. Rothgery, Clerk

Case. No. 95CR046840

STATE OF OHIO — Plaintiff — Attorney for Plaintiff

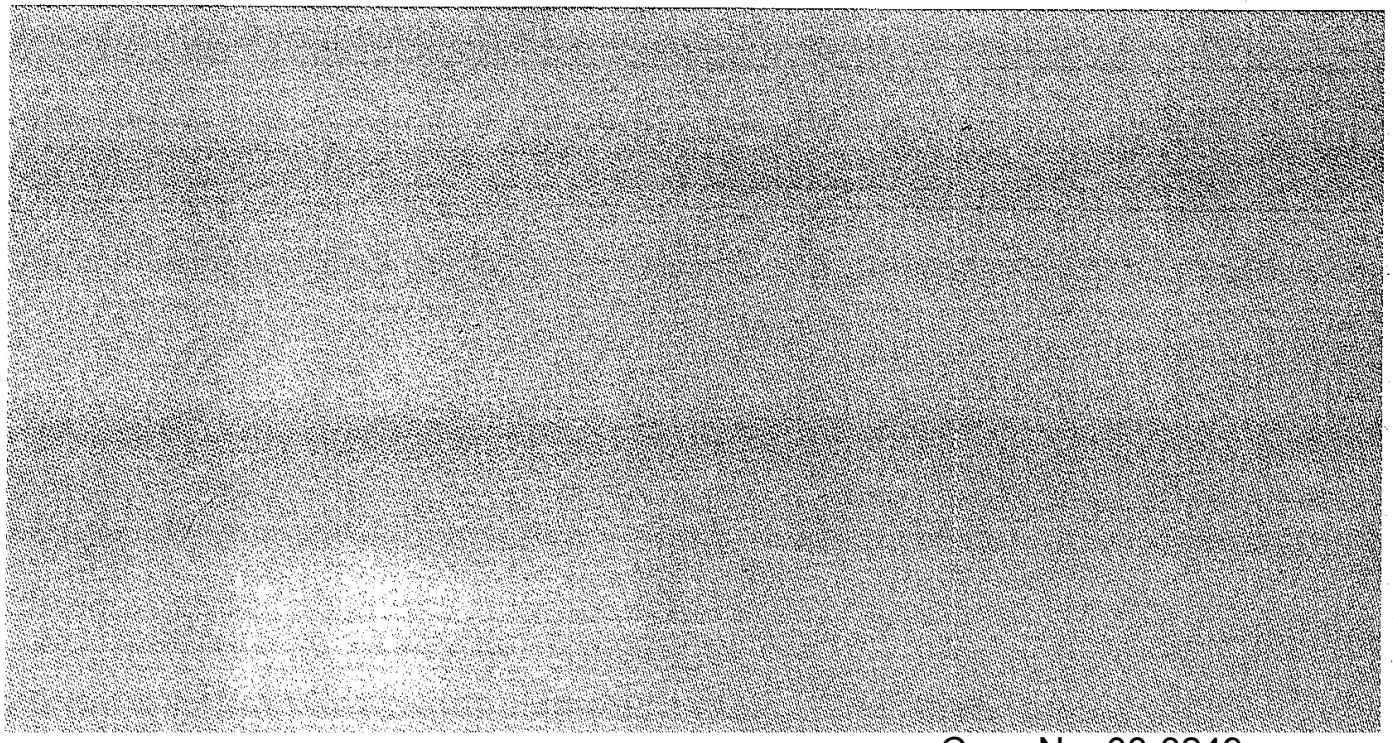
vs.

STANLEY JALOWIEC — Defendant — Attorney for Defendant

Date 5-22-96 J.E. Vol. 742 Page 470

The Court Reporter is hereby instructed to prepare the transcript in the above matter at state's expense for the purpose of appeal.

Judge



FILED
LORAIN COUNTY

MAY 24 10 17 AM '96

CLERK OF COMMON PLEAS
DONALD J. ROTHGERY

ENTERED

JOURNAL ENTRY

COURT OF COMMON PLEAS

Lorain County, Ohio

Donald J. Rothgery, Clerk

Case. No. 95CR046840

State of Ohio — Plaintiff — Attorney for Plaintiff

vs.

Stanley E. Jalowiec — Defendant — Attorney for Defendant

Date 5-24-96 J.E. Vol. 742 Page 824

Attorney Kreig Brusnahan and Attorney Patricia Smith are hereby appointed as co-counsel to represent the Defendant, Stanley E. Jalowiec for the purpose of appeal. Transcripts to be obtained for said appeal at State's expense.

Judge

FILED
LORAIN COUNTY

MAY 30 2 22 PM '96

CLERK OF COMMON PLEAS
DONALD J. ROTHGERY

B

JOURNAL ENTRY

COURT OF COMMON PLEAS

Lorain County, Ohio

ENTERED

Donald J. Rothgery, Clerk

Case. No. 95CR046840

State of Ohio — Plaintiff — Attorney for Plaintiff

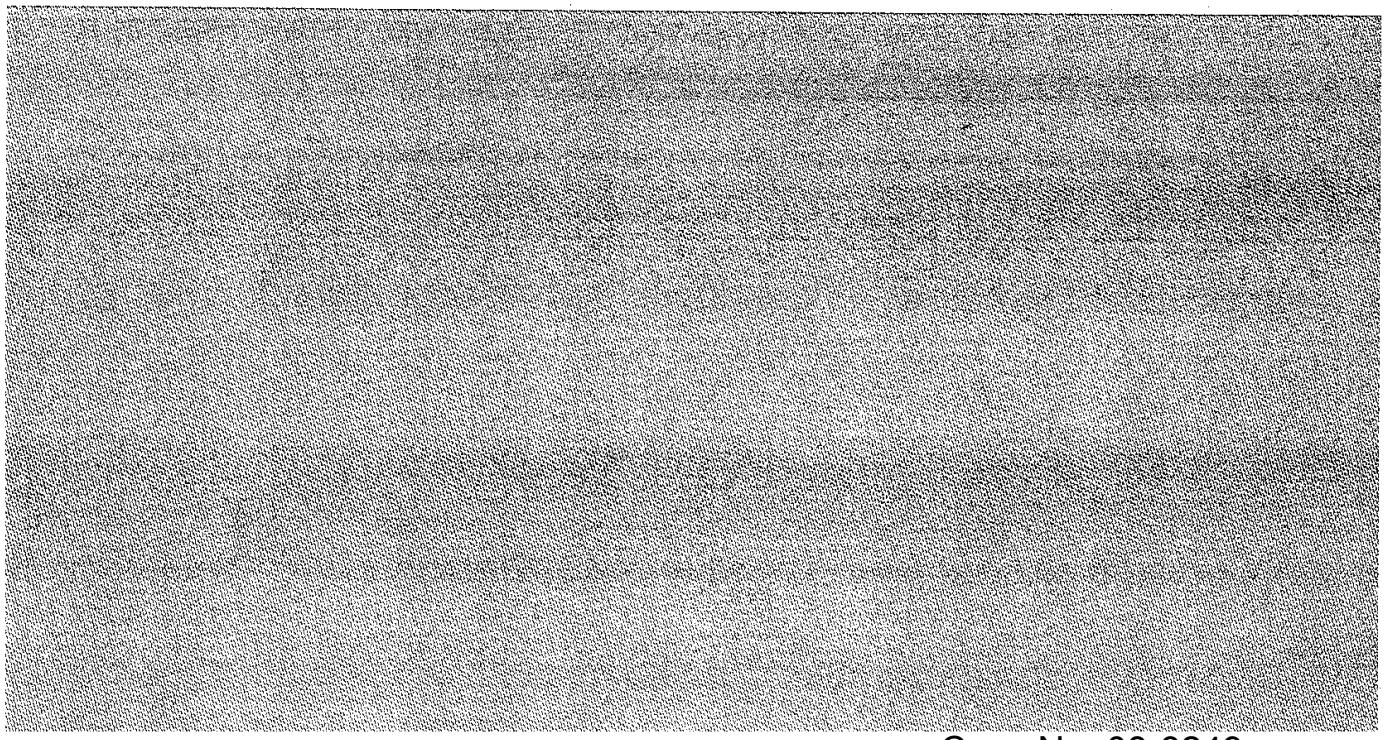
vs.

Stanley E. Jalowiec — Defendant — Attorney for Defendant

Date _____ J.E. Vol. 742 Page 1437

Defendant Jalowiec's motion for public records filed on 5/8/96, is denied. SEE JOURNAL.

Judge



Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4138

FILED
LORAIN COUNTY
MAY 30 2 22 PM '96
CLERK OF COMMON PLEAS
DONALD J. ROTHGERY

IN THE COURT OF COMMON PLEAS

LORAIN COUNTY, OHIO

STATE OF OHIO,	CASE NO. 95CR046840
Plaintiff	
vs.	JUDGE KOSMA J. GLAVAS
STANLEY E. JALOWIEC,	JOURNAL ENTRY & ORDER
Defendant	

I

On May 8, 1996, Stanley E. Jalowiec, the defendant in this case, filed a motion asking the Court to order plaintiff State of Ohio to produce, for inspection and copying, various records which are referred to in Ohio Revised Code Section 149.43(A)(2).

The defendant also submitted an affidavit of indigency and asked that the pertinent records be provided at no cost to him.

II

This defendant was indicted for aggravated murder, with specifications, and this case proceeded to trial beginning March 12, 1996. The jury in this case found the defendant guilty of aggravated murder, and guilty of a death penalty specification and a gun specification.

Pursuant to law a mitigation hearing commenced on

Journal 742 Page 1438

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4139

April 9, 1996. After mitigation proceedings were held and deliberations by the jury, the jury recommended that the defendant be sentenced to death.

This Court accepted the recommendation of the jury and imposed a sentence of death, on April 11, 1996.

The Court made a determination that this defendant was indigent at his arraignment, and the defendant has been represented by court-appointed counsel throughout these proceedings.

On May 9, 1996, a notice of appeal was filed in this case and the defendant's conviction is now on appeal with the Court of Appeals of Ohio, Ninth Judicial District (Case No. 96CA006445).

III

Turning now to the defendant's motion for public records, the Court finds that the defendant has relied entirely upon R.C. 149.43, which grants to the citizenry access to various public records which are not otherwise exempt from disclosure.

Revised Code Section 149.43 provides for an action in mandamus when a person alleges that he or she is aggrieved because a custodian of records has refused to permit or allow the inspection of a public record which is subject to inspection and copying.

In a case where R.C. 149.43 applies, the custodian of the records need only supply the records for inspection within a reasonable time during regular business hours, and

if copies are requested, the copies are to be supplied at a reasonable cost to the person seeking the records, or to the qualified representative of the person.

The Supreme Court of Ohio has held, even in the case where an incarcerated person is indigent, that the custodian is not required to mail copies of public records or the records themselves. See **State ex rel. Nelson v. Fuerst (1993), 66 Ohio St.3d 47; see also State ex rel. Fenley v. Ohio Historical Soc. (1992), 64 Ohio St.3d 509.**

Thus, even if this defendant were entitled to certain public records, this Court would not order that copies be mailed to the defendant by the custodian, but could only find that the custodian would have to make the records available, to the person or that person's designated representative, during regular business hours.

IV

For the reasons which are set forth below, the defendant's motion for public records must be denied.

In **State ex rel. Steckman v. Jackson (1994), 70 Ohio St.3d 420**, the Supreme Court of Ohio considered a variety of issues raised on appeal involving the use and attempted use of R.C. 149.43, from cases originating in Franklin, Cuyahoga, and Lake counties.

In **Steckman**, the Supreme Court declared that trial preparation records or other information, which is not subject to discovery pursuant to Criminal Rule 16(B), and which is contained in the file of a prosecutor who is

prosecuting a criminal matter, is not subject to release as a public record pursuant to R.C. 149.43, and is specifically exempt from release as a trial preparation record, in accordance with R.C. 149.43(A)(4).

The Supreme Court also held in **Steckman** that records or information assembled by law enforcement officials, in connection with a probable or pending criminal proceeding, is, pursuant to R.C. 149.43(A)(2)(c), not subject to release and a work product exception, unless such information must otherwise be disclosed under Criminal Rule 16.

The Supreme Court further held that in a criminal proceeding itself, a defendant may only use Criminal Rule 16 to obtain discovery. **State ex rel. Steckman v. Jackson, supra.**

Finally, in the **Steckman** decision the Ohio Supreme Court held that in a pending criminal case, persons seeking to secure records which are alleged to be public records, and access to which has been requested and denied, must use, in accordance with R.C. 149.43(C), mandamus. No other procedure of any kind may be recognized.

V

Since this case remains pending on appeal, defendant Jalowiec must continue to obtain records which are subject to disclosure in accordance with Criminal Rule 16.

In this case there is no claim or evidence submitted by defendant Jalowiec that he has been denied access to records which are subject to disclosure.

Further, defendant Jalowiec has filed a post-trial motion which is not a mandamus action, and for that reason alone, his motion must be denied.

For all of the reasons which are recited herein, Defendant Jalowiec's motion for public records must be, and is, denied.

No costs to be charged with respect to Jalowiec's motion for public records.

IT IS SO ORDERED.

KOSMA J. GLAVAS, JUDGE

RECEIVED
DEC 24 1996
JUDGE KOSMA J. GLAVAS

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

ENTERED

95 CRD 46840

STATE OF OHIO

Plaintiff-Respondent : JUDGE KOSMA J. GLAVAS

-vs- :

STANLEY JALOWIEC :

Defendant-Petitioner :

FILED
LORAIN COUNTY
DEC 23 2 47 PM '96
CLERK OF COMMON PLEAS
DONALD J. ROTHGERY

MOTION FOR CO-DEFENDANT'S TRIAL TRANSCRIPTS

COUNSEL FOR RESPONDENT:

GREGORY A. WHITE, ESQ.
Lorain County Prosecutor
226 Middle Avenue
Elyria, Ohio 44035
(216) 329-5375

COUNSEL FOR PETITIONER:

PATRICIA J. SMITH, ESQ.
Regis. No. 0059621
4403 St. Clair Avenue
Cleveland, OH 44103-1125
(216) 361-1112

(124)

FILED
LORAIN COUNTY
DEC 23 2 47 PM '96
CLERK OF COMMON PLEAS
DONALD J. ROTHGERY

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

95 CRD 46840

STATE OF OHIO	:	
Plaintiff-Respondent	:	JUDGE KOSMA J. GLAVAS
-vs-	:	
STANLEY JALOWIEC	:	MOTION FOR CO-DEFENDANT'S TRIAL TRANSCRIPTS
Defendant-Petitioner	:	

Defendant-Petitioner, Stanley Jalowiec, moves this Honorable Court to order the preparation of the trial transcripts for the co-defendant, Daniel Smith, at state's expense. The defendant-petitioner is indigent and currently resides on death row in the Mansfield Correctional Institution. The reasons for this request are explained in the attached Memorandum.

Respectfully submitted,

Patricia J. Smith

PATRICIA J. SMITH
Doughten & Smith
Counsel for Petitioner

CERTIFICATE OF SERVICE

A copy of the foregoing Motion was sent by regular U.S. mail to Gregory A. White, Lorain County Prosecutor, 226 Middle Avenue, Elyria, Ohio 44035 on this 11th day of December, 1996.

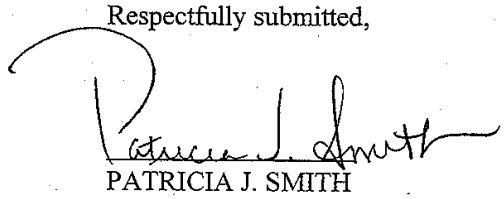
Patricia J. Smith

PATRICIA J. SMITH
Doughten & Smith
Counsel for Petitioner

MEMORANDUM

The co-defendant in the defendant-petitioner's case, Daniel Smith, was tried and found not guilty. Mr. Jalowiec is preparing his post-conviction petition. There is evidence relevant to the preparation of his post-conviction petition contained in the transcript of Daniel Smith's trial. However, Mr. Jalowiec is indigent and cannot afford the cost of having Mr. Smith's trial transcript's prepared. Therefore, the defendant-petitioner respectfully requests that this Honorable Court order the preparation of the trial transcripts for the co-defendant, Daniel Smith, at state's expense.

Respectfully submitted,



PATRICIA J. SMITH
Doughten & Smith
Counsel for Petitioner

FILED
LORAIN COUNTY

JAN 2 2 54 PM '97

CLERK OF COMMON PLEAS
DONALD J. ROTHGERY

JOURNAL ENTRY

ENTERED

COURT OF COMMON PLEAS

Lorain County, Ohio

Donald J. Rothgery, Clerk

Case. No. 95CR046840

STATE OF OHIO — Plaintiff — Attorney for Plaintiff

vs.

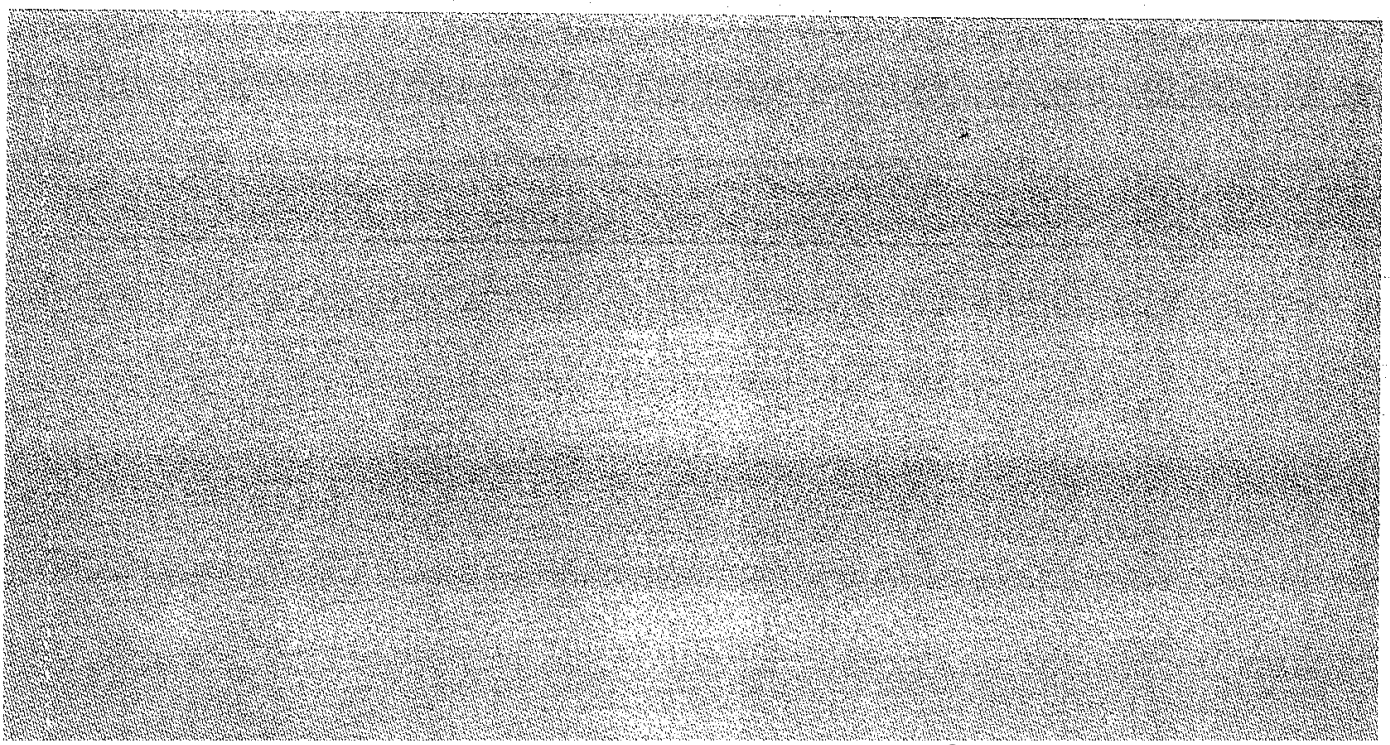
STANLEY JALOWIEC — Defendant — Attorney for Defendant

Date 1/2/97 J.E. Vol. 757 Page 12

Motion for Co-Defendant's Trial transcripts filed by defendant's attorney is hereby granted. Said transcript to be provided at the cost of second copy.

(125)

Judge



Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4148

RECEIVED
FEB 2 1997
JUDGE KOSMA J. GLAVAS

ENTERED

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

STATE OF OHIO	:	CASE NO. 95CR 046840
Plaintiff-Respondent	:	JUDGE KOSMA J. GLAVAS
-vs-	:	
STANLEY JALOWIEC	:	
Defendant-Petitioner	:	

FILED
LORAIN COUNTY
FEB 25 11 42 AM '97
CLERK OF COURTS PLEAS
DONALD J. ROTHGERY

MOTION FOR EXPERT ASSISTANCE AND DISCOVERY

Defendant-Petitioner, Stanley Jalowiec, moves this Court to grant appointment of experts to prepare for an evidentiary hearing as well as discovery and a one hundred twenty (120) day time period in which to complete discovery in preparation for hearing. The reasons for this request are explained in the attached Memorandum.

Respectfully Submitted,

Patricia J. Smith

Patricia J. Smith #0059621
Counsel for Petitioner
Doughten & Smith
4403 St. Clair Ave.
Cleveland, Ohio 44103
(216) 361-1112

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Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4149

MEMORANDUM

CHRONOLOGY

Petitioner, Jalowiec, intends to file his petition for post-conviction relief pursuant to RC §2953.21 on or before March 18, 1997. The Petitioner's direct appeal was filed in the Ninth District on February 14, 1997.

EVIDENTIARY HEARING

Petitioner Jalowiec respectfully requests an evidentiary hearing on his claims. Under Ohio law, "When determining whether there are substantive grounds for post-conviction relief that would warrant a hearing, the affidavits offered in support of the petition should be accepted as true. ***The affidavit or affidavits in support need only present sufficient prima facie evidence *** to warrant a hearing. ***The credibility of witnesses and any conflict in evidence are properly resolved at the post-conviction hearing, not before." State v. Swortcheck, 656 N.E.2d 732 (1995) (citations omitted). Petitioner Jalowiec will submit affidavits and evidentiary documents to support his claims that he received ineffective assistance of counsel and that he was thereby prejudiced.

APPOINTMENT OF EXPERTS/DISCOVERY

Ohio Revised Code Ann. §2953.21(E) (Banks-Baldwin 1995) provides that a trial court must proceed to a hearing on the merits of a post-conviction claim unless the claim is merit less on its face. The Ohio courts applying the prior language of §2953.21 generally concluded that until the threshold showing of a substantive ground for relief is met -- that is, until a petitioner is found entitled to a hearing -- it is not an abuse of discretion for a trial court to deny a petitioner's request for discovery in support of his petition. See, e.g., State v. Smith, 30 Ohio App.3d 138, 506 N.E.2d 1205, 1208 (1986).

There can be no dispute, however, and the Ohio courts plainly find, that the decision to permit discovery (which includes the appointment of experts) -- whether before or after the court grants a hearing -- is a matter fully within the discretion of the trial court. See, e.g., State v. Sherrills, Case No. 61882, 1992 Ohio App. LEXIS 173, *3 (Cuyahoga County App. January 16, 1992). (recognizing that in post-conviction proceedings, the "regulation of discovery is within the discretion of the trial court"); State v. Smith, 30 Ohio App.3d 138, 506 N.E.2d at 1208 (1986) (recognizing court's discretion regarding discovery in post-conviction matters and holding no abuse of discretion in failing to permit discovery); State v. Otstot, Case No. 2500, 1989 Ohio App. LEXIS 753, *3 (March 7, 1989) (holding that court abused its discretion in failing to permit discovery on his claim prior to determining whether he was entitled to a hearing). This Court should approve of expenditures for experts in the exercise of its discretion because there are significant, meritorious claims which require the evidentiary support of expert testimony to be proved.

Capital petitioners face a serious dilemma under Ohio's post-conviction scheme. The text of the statute provides that a petitioner must include affidavits or evidence in support of the claim in a petition. It is from the face of the petition that a trial court must determine if a hearing is required. Once that determination is made, however, indigent petitioners like Jalowiec face the burden of collecting evidence in support of valid claims prior to the holding of an evidentiary hearing without any means to pay for the services of expert witnesses. Without such support, Ohio's Post-conviction process is rendered meaningless. Indeed, the Sixth Circuit has commented several times on the inadequacy of the process. See, e.g., Coley v. Alvis, 381 F.2d 870, 872 (6th Cir. 1967) (Noting that Ohio's post-conviction process is "ineffective to protect the rights" of defendants); Allen v. Perini, 424 F.2d 134, 139 (6th Cir. 1970) ("We are convinced

that an appeal would be futile under the decision of the Supreme Court of Ohio in State v. Perry, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967)"); Keener v. Ridenour, 594 F.2d 581, 590 (6th Cir. 1979) ("This court consistently has recognized that because of the narrow interpretation placed on §2953.21 by the Ohio Supreme Court, collateral relief is often unavailable or ineffective as a State remedy").

Petitioner acknowledges that §2953.21 does not expressly authorize the appointment of experts, therefore, petitioner relies upon the court's inherent authority to regulate discovery in post-conviction proceedings. The importance of pre-hearing discovery, however, cannot be ignored. In the federal habeas corpus arena, expert assistance is an essential component of the process. State collateral review and habeas corpus are similar creatures in terms of procedure, and Petitioner proposes that this Court consider the habeas corpus jurisprudence as compelling support for Petitioner's request for the appointment of experts.

In McCleskey v. Zant, 499 U.S. 467 (1991), the United States Supreme Court held that every habeas corpus petitioner must conduct a reasonable investigation into the facts of his case and, following such investigation, must present all claims to the district court in his initial petition for writ of habeas corpus. In order for a petitioner to include all claims in a single petition, the Court found that there must be reasonable access to counsel, experts and discovery in order to effectively prepare a petition. 21 U.S.C. §848(q)(4)(B) and 18 U.S.C. §3006A (a)(2)(B) and (e)(1) specifically provide for the permit application for funds for expert assistance which is reasonably necessary for the investigation, preparation, and presentation of claims for relief in a habeas corpus petition. Such assistance is likewise necessary to enable Petitioner to comply with the mandate of McCleskey.

As noted above, there are significant questions whether Petitioner Jalowiec was denied the right to the effective assistance of counsel during the trial and penalty phases of his capital case. Petitioner, however, can neither properly investigate or present his case at hearing on this matter without the experts he requests. Such expert assistance is reasonably necessary for Petitioner to properly investigate, prepare, and present relevant claims in his post-conviction hearing. Furthermore, expert assistance is necessary to permit counsel to comply with their duty to reasonably investigate this case and present all viable claims for relief in Petitioner's post-conviction hearing.

At present, Petitioner Jalowiec requests the appointment of the following experts:

1. A forensic psychological expert: Dr. James Eisenberg
2. A mitigation expert: Terri Oldham, L.I.S.W.
3. An attorney expert: Mr. David L. Doughten, Esq.
4. Private licensed investigator: Mr. Doug Charney

CONCLUSION

Petitioner has maintained that he was denied the effective assistance of counsel during the trial and penalty phases of his capital trial. He is indigent, however, and cannot afford to employ expert witnesses who can assist him with evaluating, preparing, and presenting evidence to enable him to prove his claim at hearing. Wherefore, Petitioner respectfully requests that this Court grant his request for expert assistance and authorize Petitioner to employ the above-listed professionals for pre-hearing preparation and to testify at hearing in this matter. Petitioner

further requests that he be granted an order from this Honorable Court to conduct discovery until June 1, 1997.

Respectfully submitted,

Patricia J. Smith/jc

Patricia J. Smith #0059621
Counsel for Petitioner
Doughten & Smith
4403 St. Clair Ave.
Cleveland, Ohio 44103
(216) 361-1112

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MOTION FOR DISCOVERY AND APPOINTMENT OF EXPERTS was forwarded by regular U.S. mail to Gregory White, Lorain County Prosecutor, 226 Middle Avenue, Elyria, OH 44035 this 24th day of February, 1997.

Patricia J Smith/jc

Patricia J. Smith
Counsel for Petitioner

FILED
LORAIN COUNTY
MAR 17 12 30 PM '97
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

RECEIVED
MAR 18 1997
JUDGE KOSMA J. GLAVAS

ENTERED

STATE OF OHIO	:	95CR046840
Plaintiff-Respondent	:	JUDGE KOSMA J. GLAVAS
-vs-	:	POST CONVICTION PETITION
STANLEY E. JALOWIEC	:	EVIDENTIARY HEARING REQUESTED
Defendant-Petitioner	:	

Petition to Vacate or Set Aside
Sentence Pursuant to
Ohio Revised Code §2953.21

Now comes the Petitioner, Stanley Jalowiec, and petitions this court with a petition for post conviction relief pursuant to Ohio Revised Code §2953.21 as follows:

There was a denial or infringement of Petitioner Jalowiec's rights so as to render the judgment against him void or voidable under the Ohio Constitution and the Constitution of the United States.

The state and federal constitutional errors which entitle Petitioner Jalowiec to relief were not included in the record, and therefore could not have been fully and completely asserted on direct appeal.

The judgment and sentence against Petitioner Jalowiec are void or voidable because he did not receive the effective assistance of counsel during the penalty phase of his trial. Counsel fell far below a minimum standard of reasonable legal representation by numerous actions and failures to act in violation of the Petitioner's constitutional rights as guaranteed by the Fifth,

(127)

Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1 sections 2, 9, 10 and 16 of the Ohio Constitution.

Introduction

Trial counsel did not adequately represent the Petitioner. Defense counsel failed to adequately investigate at the guilt phase. The Petitioner was not present at the scene of the crime nor was he involved in the murder.

Little preparation was made for the penalty phase. Had a proper investigation been instituted, the attorneys would have found that there were numerous, credible witnesses that would have testified on the Petitioner's behalf. Counsel did not interview or prepare the witnesses before presenting them at the penalty phase. In addition, there was no mitigation expert or forensic psychologist employed to help in the preparation of mitigation.

There was a significant amount of mitigation available for the jury and the trial court to consider. The amount of mitigation evidence available far outweighed the aggravating factors. The failure to investigate and present available mitigation was violative of the Petitioner's rights pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The Petitioner's direct appeal is pending before the Ninth District Court of Appeals.

Jurisdictional Facts

1) On March 8, 1995, a Lorain County Grand Jury indicted the Petitioner Jalowiec on one count of Aggravated Murder in violation of O.R.C. §2903.01(A)(1). Two specifications were included in the indictment. The first specification alleged that the Petitioner had a firearm on or about his person or under his control while committing the murder. The second alleged that the decedent of the aggravated murder was a witness to an offense and that the decedent was

purposely killed to prevent his testifying in any criminal proceeding.

2) The Petitioner pleaded not guilty at his arraignment on March 14, 1995.

3) On January 31, 1996, a Motion for Change of Venue was filed. The Petitioner argued that as the murder occurred in Cuyahoga County, Lorain County did not have jurisdiction to hear the case. The case should have been transferred to Cuyahoga County. The motion was denied on February 7, 1996.

4) An Affidavit of disqualification against Judge Glavas was filed in the Supreme Court on March 7, 1996. It was denied on March 8, 1996.

5) A jury trial began on March 12, 1996. The jury found the Petitioner guilty of aggravated murder and the specifications on March 20, 1996.

6) The penalty phase began on April 9, 1996. The jury recommended the death penalty. On that same date, the court accepted the recommendation and imposed a sentence of death.

7) The Petitioner filed a timely Notice of Appeal on May 9, 1996. The Ninth District Court of Appeals has not issued an opinion in this case to date.

8) The Petitioner was represented at trial by Joseph Grunda and Edward Cleary.

9) The Petitioner was represented to the Ninth District Court of Appeals by Patricia J. Smith and Kreig Brusnahan.

10) The issues raised on direct appeal to the Ninth District Court of Appeals are as follows:

First Assignment of Error

> The trial court abused its discretion by dismissing for cause prospective jurors who could fairly consider the possibility of death and failing to dismiss for cause a juror for death whose views in favor of the death penalty precluded fair consideration of life options.

Second Assignment of Error

The trial court erred by failing to grant appellant's motion for judgment of acquittal under Ohio Rule of Criminal Procedure 29, in that the evidence presented by the State of Ohio was insufficient to sustain a conviction for the offense of aggravated murder, in violation of appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 10 & 16 of the Ohio Constitution.

Third Assignment of Error

The allowance of testimony as to out-of-court statements attributed to Danny Smith over defense counsels' objection was prejudicial error and deprived appellant of his rights under the Fifth, Sixth, Eighth and Fourteenth amendments to the U.S. Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

Fourth Assignment of Error

The trial court deprived appellant of his right to a fair trial by improperly admonishing, criticizing and/or correcting defense counsel in front of the jury, depriving appellant of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

Fifth Assignment of Error

The prosecutor improperly commented on the appellant's Fifth Amendment protections.

Sixth Assignment of Error

The trial court erred by allowing the state to adduce evidence of non-statutory aggravating factors during the sentencing phase of trial.

Seventh Assignment of Error

Where the court provides the jury with inaccurate trial phase instructions, a defendant is deprived his protections under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Eighth Assignment of Error

The gruesome coroner's photographs are unfairly prejudicial where they are solely used to inflame the passion of the jury.

Ninth Assignment of Error

Prosecutorial misconduct deprived the appellant a fair penalty determination phase of his capital trial.

Tenth Assignment of Error

The trial court's erroneous penalty phase instructions deprived the appellant of a fair and reliable determination of his sentence in violation of the Fifth, Sixth,

Eighth and Fourteenth Amendments of the United States Constitution and Article I, sections 9, 10 and 16 of the Ohio Constitution.

Eleventh Assignment of Error

The failure of trial counsel to make proper objections, constitutes ineffective assistance of counsel.

Twelfth Assignment of Error

The argument to the jury that their decision is a mere recommendation is unacceptable as it diminishes the responsibility of the jury.

Thirteenth Assignment of Error

Imposition of the death sentence violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I, of the Ohio Constitution.

11) The Petitioner alleges a denial or infringement of his rights as to render his judgment or convictions void or voidable under the Ohio Constitution and the United States Constitution.

12) Some of the constitutional errors which entitle the Petitioner to relief were not included in the record and therefore could not have been fully and completely asserted on direct appeal.

FIRST CLAIM FOR RELIEF

13) Petitioner Jalowiec incorporates paragraphs 1 through 12 as if fully rewritten herein.

14) The failure of defense counsel to adequately represent the Petitioner at the penalty phase resulted in a sentence of death that does not comply with the minimum constitutional standards of reliability required for the imposition of a death sentence under the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Ohio Constitution.

15) The Petitioner was denied the effective assistance of counsel in the penalty phase as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I sections 10 and 16 of the Ohio Constitution. Strickland v. Washington (1984), 466 U.S. 668.

16) Trial counsel failed to adequately investigate the Petitioner's mitigation case.

17) Trial counsel failed to properly interview the witnesses that did testify.

18) Prior to the penalty phase of trial, defense counsel had a duty to investigate possible mitigating factors including a thorough review of Petitioner's background. Defense counsel violated this duty of mitigation investigation by the following acts and omissions.

A) He failed to present a coherent mitigation theory.

B) He failed before the actual mitigation hearing to interview and/or present available witnesses who could have testified to relevant mitigation, including but not limited to:

1. Thomas Evans
2. Julie Valentine
3. Helen Jalowiec
4. Neil Jalowiec
5. Greg Bennett
6. Wanda Queen
7. Michelle Brown
8. Maria Newson

C) The failure to present available witnesses, prepare and/or adequately present a coherent theory of mitigation resulted in the omission and/or failure to establish the following

factors in mitigation and relevant considerations of the Petitioner's character and background:

a. The Petitioner was a very active baby. He went through three cribs as a child. He shook them until they fell apart. (Exhibit A). At nine months old, he climbed up the cupboard and wedged himself between the highest cupboard and the ceiling. (Exhibit A). As a toddler, he pulled a sewing machine onto his head. (Exhibit A). When he was two or three, he drank kerosene from a lamp. When he was four or five, he ingested pain pills. He cut his head open from banging it on the crib. At one point he was even checked for child abuse due to all his cuts and bruises. (Exhibit A).

b. The Petitioner became involved in gymnastics because of his hyperactivity. (Exhibit A). He enjoyed it very much but had to quit due to his diagnosis of juvenile rhuematoid arthritis.

c. In the first grade, the Petitioner was diagnosed with "hyperactivity" by a doctor at the Cleveland Clinic. They also stated that he had minimal brain damage. (Exhibit A).

d. The Petitioner was taking Ritilan from first grade until sixth grade. (Exhibit A).

e. The Petitioner attended Learning Disability-classes until high school. He was then transferred to Severe Behavior Handicap classes at Edison School in Elyria. (Exhibit A & B). The Petitioner also had dyslexia.

f. The Petitioner's grandfather took him for counseling sessions while he was growing up. (Exhibit C). The Petitioner found and cared for a puppy that is still the family pet today. He is not a violent person. (Exhibit C, D & H).

g. The Petitioner had a difficult time accepting his parents divorce. (Exhibit A & D). The Petitioner did not get along with his step-father. (Exhibit A & D).

h. The Petitioner always had a fondness for monkeys. He always wanted stuffed ones as a child. The Petitioner had an imaginary monkey that he would speak to as a child and growing up. (Exhibit A & D).

I. The Petitioner went to live with his grandparents when he was 16 years of age as he was having troubles at home and in school. (Exhibit D). He improved while living at his grandparents.

j. The Petitioner worked for a man that he met while taking his girlfriend's child to the hospital for speech therapy. The Petitioner would ride his bicycle from Elyria to Rocky river to work for Mr. Pasterczyk. (Exhibit E). The Petitioner had arthritis and could not work long hours.

k. The Petitioner was very good with children. He is very caring. (Exhibit F). The Petitioner was excited to hang with a bad crowd. He really began to use drugs quite a bit just before the charges. (Exhibit F). The Petitioner was depressed and used drugs to hide his feelings. (Exhibit F).

l. The Petitioner worked for Tom Evans at Rudy's Tavern in Cleveland. He was a dancer and was very good at it. (Exhibit G). He did it to support his girlfriend and her children. (Exhibit G). He was very dedicated to the children and the girlfriend. (Exhibit G). Very dependable and honest. (Exhibit G).

19. This additional background information would have allowed the jury to see the whole picture of the Petitioner. Trial counsel was ineffective for not presenting these available and willing witnesses to help the jury to understand who the Petitioner was and how his life influenced his actions. Trial counsel failed to establish relevant considerations of the Petitioner's character and background. The witnesses as outlined above would have provided the necessary

sequence to allow the jury to fully understand the Petitioner and the events which led up to the incident. Had this evidence been presented, there is a reasonable probability that the jury would have had a penalty phase verdict of a life sentence.

20) Petitioner Jalowiec requires discovery as provided by the Ohio Rules of Civil Procedure in order to fully develop and pursue this claim. Specifically, Petitioner requests that the court appoint a mitigation specialist or provide funding for undersigned counsel to hire a mitigation specialist. This is necessary to more fully develop the above claims. The mitigation specialist is needed to locate and interview additional potential witnesses. Denial of the request for discovery as it relates to this claim would amount to a denial of substantive and procedural due process as guaranteed by the aforementioned state and federal constitutional provisions.

SECOND CLAIM FOR RELIEF

21) Petitioner Jalowiec incorporates paragraphs 1 through 20 as if fully rewritten herein.

22) The failure of defense counsel to adequately represent the Petitioner at the penalty phase resulted in a sentence of death that does not comply with the minimum constitutional standards of reliability required for the imposition of a death sentence under the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Ohio Constitution.

23) The Petitioner was denied the effective assistance of counsel in the penalty phase as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I sections 10 and 16 of the Ohio Constitution. Strickland v. Washington (1984), 466 U.S. 668.

24) Counsel failed to have a forensic psychologist examine the Petitioner.

25) There is substantial evidence that the Petitioner had a history of behavioral problems. Some relating to learning disabilities and others as serious as brain injury, psychotic behavior and suicide attempts. (Exhibits A, I & B).

26) The preparation for the mitigation phase of a capital trial is a long and very involved task. It includes extensive research into the background and character of the defendant. (Exhibit J). It includes the collection of all available records from schools, mental health clinics, hospitals, psychologists, school psychologists, employers etc. This collection of records is vitally important in the area of intellectual and emotional development. (Exhibit J). These records do exist, however were not collected. The school records were never obtained by defense counsel. (Exhibit B). Hospital records were never obtained by defense counsel. (Exhibit K).

27) The information gathered through a thorough mitigation investigation is necessary for defense counsel to formulate a defense in both the trial and mitigation phase of the trial. (Exhibit J).

28) There is a separate obligation to investigate mitigation as is different in scope and purpose from investigating issues concerning guilt or innocence. (Exhibit J). This obligation is the responsibility of the defense attorneys.

29) Defense counsel hired Dr. Deborah Koricke to evaluate the Petitioner. Dr. Koricke lacked the necessary qualifications and experience to evaluate a defendant for mitigation in a capital case. (Exhibit J). Dr. Koricke saw the defendant for a period of three hours (including testing) prior to making her diagnosis. (Exhibit I). In addition, this session took place only three days prior to the beginning of the penalty phase. Therefore, there was not

enough time for defense counsel to formulate and present a coherent theory of mitigation.

30) There are numerous hospital, school, psychological and family records available that were not requested by either defense counsel or Dr. Koricke for use in the mitigation of the Petitioner's case. (Exhibit B & K).

31) The Petitioner requires discovery provided by the Ohio Rules of Civil Procedure in order to fully develop and pursue this claim. Specifically, Petitioner requests that the court appoint a forensic psychologist and a social worker with a background in mitigation to examine the Petitioner and gather the records necessary to present a coherent theory of mitigation. In addition, counsel requests funding to obtain the records. The cost for obtaining the medical records from EMH Regional Medical Center is Four hundred and four dollars and four cents. ($400.04) (Exhibit K). Denial of the request for discovery as it relates to this claim would amount to a denial of substantive and procedural due process as guaranteed by the aforementioned state and federal constitutional provisions.

THIRD CLAIM OF RELIEF

32) The Petitioner Jalowiec incorporates paragraph 1 through 31 as of fully rewritten herein.

33) The failure of defense counsel to adequately represent the Petitioner at the penalty phase resulted in a sentence of death that does not comply with the minimum constitutional standards of reliability required for the imposition of a death sentence under the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Ohio Constitution.

34) The Petitioner was denied the effective assistance of counsel in the penalty phase

as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I sections 10 and 16 of the Ohio Constitution. Strickland v. Washington (1984), 466 U.S. 668.

35) Counsel failed to have a neuropsychologist examine the Petitioner.

36) The Petitioner had a history of head-banging and head injury. In addition, a doctor from the Cleveland Clinic diagnosed the Petitioner to have minimal brain damage. (Exhibit A).

37) There was no CAT Scan or MRI performed on the Petitioner. These tests would have shown an injury to the Petitioner's brain. This evidence could have been used as mitigation to explain the Petitioner's behavior. Defense counsel's failure to request this examination or investigate into this possibility was a violation of his duty of mitigation investigation. Had this evidence been investigated and obtained, there is a reasonable probability that the jury would have had a penalty phase verdict of a life sentence.

38) The Petitioner requires discovery provided by the Ohio Rules of Civil Procedure in order to fully develop and pursue this claim. Specifically, Petitioner requests that the court appoint a neuropsychologist to examine the Petitioner. Denial of the request for discovery as it relates to this claim would amount to a denial of substantive and procedural due process as guaranteed by the aforementioned state and federal constitutional provisions.

FOURTH CLAIM FOR RELIEF

39) The Petitioner Jalowiec incorporates paragraph 1 through 38 as of fully rewritten herein.

40) The failure of defense counsel to adequately represent the Petitioner at the penalty

phase resulted in a sentence of death that does not comply with the minimum constitutional standards of reliability required for the imposition of a death sentence under the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Ohio Constitution.

41) The Petitioner was denied the effective assistance of counsel in the penalty phase as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I sections 10 and 16 of the Ohio Constitution. Strickland v. Washington (1984), 466 U.S. 668.

42) Trial counsel failed to interview witnesses and/or present these witnesses on the Petitioners behalf, who were present at the incidents that the state presented in mitigation. The state presented witnesses in rebuttal during the mitigation hearing that alleged that the Petitioner had severely assaulted them. There were several witnesses who would have testified that the Petitioner was not the aggressor in these assaults. Furthermore, that the Petitioner did not assault these witnesses. The witnesses to be interviewed include but are not limited to the following:

1. Lois Breeden
2. Cindy Cruz
3. George Lee
4. Alva Easterly
5. Tim Shull
6. Donnie Easterwood
7. Ricky Burgess

43) The Petitioner's family members obtained audio cassette tapes of various witnesses statements regarding the assault incidents. This information was exculpatory in nature.

44) This evidence could have been used as mitigation to rebut the state's allegations. Defense counsel's failure to investigate these witnesses was a violation of his duty of mitigation investigation. Had this evidence been investigated and obtained, there is a reasonable probability that the jury would have had a penalty phase verdict of a life sentence.

45) The Petitioner requires discovery provided by the Ohio Rules of Civil Procedure in order to fully develop and pursue this claim. Specifically, Petitioner requests that the court appoint an investigator or funding for an investigator to interview these witnesses. Denial of the request for discovery as it relates to this claim would amount to a denial of substantive and procedural due process as guaranteed by the aforementioned state and federal constitutional provisions.

FIFTH CLAIM FOR RELIEF

46) The Petitioner Jalowiec incorporates paragraph 1 through 45 as of fully rewritten herein.

47) The failure of defense counsel to adequately represent the Petitioner at the trial or guilt-innocence determination stage resulted in a sentence of death that does not comply with the minimum constitutional standards of reliability required for the imposition of a death sentence under the Eighth and Fourteenth Amendments of the United States Constitution and Article I, section 9 of the Ohio Constitution.

48) The Petitioner was denied the effective assistance of counsel in the trial or guilt-innocence determination phase as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United State Constitution and Article I sections 10 and 16 of the Ohio Constitution.

Strickland v. Washington (1984), 466 U.S. 668.

49) Trial counsel failed to investigate the alibi of the Petitioner. The Petitioner informed defense counsel that certain family members expressed that they recalled the date of the murder and that the Petitioner was at their home for various time frames pertinent to this case. (Exhibit A).

50) Trial counsel failed to pursue an issue that may have led to the conclusion that Petitioner was not the offender in this case. Further, family members supplied defense attorneys with video tapes which would have contradicted trial testimony of witnesses. Trial counsel failed to investigate these video tapes.

51) The Petitioner requires discovery as provided by the Ohio Rules of Civil Procedure in order to fully develop and pursue this claim. Petitioner requests discovery of any and all exculpatory material, including but not limited to all witnesses statements whether verbal or written, as it relates to this case. Specifically, the Petitioner requests funding for an investigator to interview specific witnesses regarding the alibi and to investigate the availability of the videotapes. Denial of the request for discovery as it relates to this claim would amount to a denial of substantive and procedural due process as guaranteed by the aforementioned state and federal constitutional provisions.

52) Counsel's performance was not reasonable under prevailing professional norms. Strickland v. Washington (1984), 466 U.S. 668.

SIXTH CLAIM FOR RELIEF

53) The Petitioner incorporates paragraphs 1 through 52 as if fully rewritten herein.

54) The prosecutor violated due process pursuant to constitutional standards of

reliability required for the imposition of a death sentence under the Eighth and Fourteenth Amendments of the United States Constitution and Article I, section 9 of the Ohio Constitution by failing to disclose a deal made with state's witness Michael Smith in return for his testimony. Michael Smith has since disappeared and has not been located.

55) The Petitioner was denied his rights under the Fifth, Sixth and Fourteenth Amendments to the United State Constitution and Article I sections 10 and 16 of the Ohio Constitution.

56) There is a letter written by Michael Smith from April 22, 1996. This letter is listed on the docket of Michael Smith's case number 94CR045231. (Exhibit L). However, the physical letter is missing from the court file. The Petitioner believes that this letter contains exculpatory evidence. Michael Smith was the state's main and only witness who testified that the Petitioner was involved in the murder of Ron Lally.

57) Michael Smith was given probation on a five to fifteen year sentence, then within a month after testifying for the state in the Petitioner's trial, Michael Smith's case is closed. (Exhibit L).

58) The Petitioner requires discovery as provided by the Ohio Rules of Civil Procedure in order to fully develop and pursue this claim. Specifically, the Petitioner requests that the Court order the production of this letter from Michael Smith's court file. Denial of the request for discovery as it relates to this claim would amount to a denial of substantive and procedural due process as guaranteed by the aforementioned state and federal constitutional provisions.

SEVENTH CLAIM FOR RELIEF

59) The Petitioner incorporates paragraphs 1 through 58 as if fully rewritten herein.

60) The failure of defense counsel to adequately represent the Petitioner at the trial or guilt-innocence determination stage resulted in a sentence of death that does not comply with the minimum constitutional standards of reliability required for the imposition of a death sentence under the Eighth and Fourteenth Amendments of the United States Constitution and Article I, section 9 of the Ohio Constitution.

61) The Petitioner was denied the effective assistance of counsel in the trial or guilt-innocence determination phase as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United State Constitution and Article I sections 10 and 16 of the Ohio Constitution. Strickland v. Washington (1984), 466 U.S. 668.

62) Trial counsel failed to move the court for a change of venue based on extraordinary pre-trial publicity. There was a significant amount of pre-trial publicity relating to the trial and conviction of the Petitioner's co-defendant, Raymond Smith. Mr. Smith was tried and convicted prior to the Petitioner. (Exhibit M).

63) Defense counsel's failure to request a change of venue based on the pre-trial publicity not only from the co-defendants case but from the Petitioner's case does not comply with the constitutional standards of reliability required for imposition of the death sentence under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 9 of the Ohio Constitution.

64) Counsel's performance was not reasonable under prevailing professional norms. Strickland v. Washington (1984), 466 U.S. 668.

65) The Petitioner requires discovery as provided by the Ohio Rules of Civil

Procedure in order to fully develop and pursue this claim. Denial of the request for discovery as it relates to this claim would amount to a denial of substantive and procedural due process as guaranteed by the aforementioned state and federal constitutional provisions.

EIGHTH CLAIM FOR RELIEF

66) The Petitioner incorporates paragraphs 1 through 65 as if fully rewritten herein.

67) The failure of defense counsel to adequately represent the Petitioner at the trial or guilt-innocence determination stage resulted in a sentence of death that does not comply with the minimum constitutional standards of reliability required for the imposition of a death sentence under the Eighth and Fourteenth Amendments of the United States Constitution and Article I, section 9 of the Ohio Constitution.

68) The Petitioner was denied the effective assistance of counsel in the trial or guilt-innocence determination phase as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United State Constitution and Article I sections 10 and 16 of the Ohio Constitution. Strickland v. Washington (1984), 466 U.S. 668.

69) Defense counsel failed to voir dire the prospective jurors on the pre-trial publicity issue.

70) The failure of defense counsel to voir dire on the issue of pre-trial publicity does not comply with the constitutional standards of reliability required for imposition of the death sentence under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 9 of the Ohio Constitution.

71) Counsel's performance was not reasonable under prevailing professional norms. Strickland v. Washington (1984), 466 U.S. 668.

72) The Petitioner requires discovery as provided by the Ohio Rules of Civil Procedure in order to fully develop and pursue this claim. Denial of the request for discovery as it relates to this claim would amount to a denial of substantive and procedural due process as guaranteed by the aforementioned state and federal constitutional provisions.

NINTH CLAIM FOR RELIEF

73) The Petitioner incorporates paragraphs 1 through 72 as if fully rewritten herein.

74) The failure of defense counsel to adequately represent the Petitioner at the trial or guilt-innocence determination stage resulted in a sentence of death that does not comply with the minimum constitutional standards of reliability required for the imposition of a death sentence under the Eighth and Fourteenth Amendments of the United States Constitution and Article I, section 9 of the Ohio Constitution.

75) The Petitioner was denied the effective assistance of counsel in the trial or guilt-innocence determination phase as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United State Constitution and Article I sections 10 and 16 of the Ohio Constitution. Strickland v. Washington (1984), 466 U.S. 668.

76) Defense counsel failed to request that a jury instruction be provided to the jury regarding the pre-trial publicity from both Ray Smith's trial and conviction and for the publicity surrounding the Petitioner's's case.

77) The failure of defense counsel to request the instruction on the issue of pre-trial publicity does not comply with the constitutional standards of reliability required for imposition of the death sentence under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 9 of the Ohio Constitution.

78) Counsel's performance was not reasonable under prevailing professional norms. Strickland v. Washington (1984), 466 U.S. 668.

79) The Petitioner requires discovery as provided by the Ohio Rules of Civil Procedure in order to fully develop and pursue this claim. Denial of the request for discovery as it relates to this claim would amount to a denial of substantive and procedural due process as guaranteed by the aforementioned state and federal constitutional provisions.

TENTH CLAIM FOR RELIEF

80) The Petitioner incorporates paragraphs 1 through 79 as if fully rewritten herein.

81) The failure of defense counsel to adequately represent the Petitioner at the trial or guilt-innocence determination stage resulted in a sentence of death that does not comply with the minimum constitutional standards of reliability required for the imposition of a death sentence under the Eighth and Fourteenth Amendments of the United States Constitution and Article I, section 9 of the Ohio Constitution.

82) The Petitioner was denied the effective assistance of counsel in the trial or guilt-innocence determination phase as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United State Constitution and Article I sections 10 and 16 of the Ohio Constitution. Strickland v. Washington (1984), 466 U.S. 668.

83) Defense counsel failed to interview a key state witness who would have testified that the Petitioner was not present or involved with the murder of Ron Lally. Raymond Smith who was convicted of the murder of Ron Lally has stated that the Petitioner was not involved in this murder. (Exhibit N).

84) The failure of defense counsel to interview this witness prior to trial does not

comply with the constitutional standards of reliability required for imposition of the death sentence under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 9 of the Ohio Constitution.

85) Counsel's performance was not reasonable under prevailing professional norms. Strickland v. Washington (1984), 466 U.S. 668.

86) The Petitioner requires discovery as provided by the Ohio Rules of Civil Procedure in order to fully develop and pursue this claim. Denial of the request for discovery as it relates to this claim would amount to a denial of substantive and procedural due process as guaranteed by the aforementioned state and federal constitutional provisions.

87) There was a constructive denial of counsel altogether in the Petitioner's case. Therefore, prejudice is presumable.

PRAYER FOR RELIEF

WHEREFORE, the Petitioner, Stanley E. Jalowiec, requests the following relief:

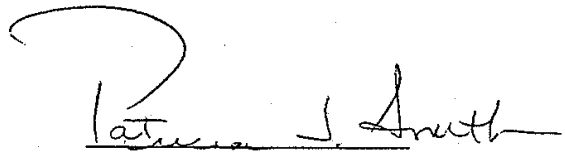
1) That his conviction and sentence of death be vacated and that he be retried.

2) That his conviction and sentence be determined void or voidable and that he be granted a new trial.

3) Or in the alternative, and only if the court determines that his conviction is not void or voidable, that his sentence be determined void or voidable and that Petitioner be granted a new sentencing hearing.

For such other and further relief as the court may deem just and proper.

Respectfully submitted,



Patricia J. Smith #0059621
DOUGHTEN AND SMITH
4403 St. Clair Avenue
Cleveland, OH 44103
(216) 361-1112

APPENDIX

EXHIBIT A

STATE OF OHIO :
: SS.
COUNTY OF LORAIN :

AFFIDAVIT

Now comes Sarah Jalowiec being first duly sworn according to law, and states the following:

1. I am the mother of the defendant Stanley Jalowiec. I testified during the penalty phase of Stanley's trial. The day before I testified, Stanley's attorney told me to "get up and tell what you can." That was the extent of my preparation. I was very nervous when I testified.

2. During my mitigation testimony, I talked about Stanley's perfect elementary school attendance, dropping out of high school, his love of animals, his arthritis and its effect on school and work, his relationship with Jackie and her children, drugs and alcohol, and other charges and offenses. However, there was a great deal about Stanley that I did not say because I was not asked about it.

3. Stanley was born at Elyria Memorial Hospital. Stanley was always very active. As a baby, he went through three cribs. He shook them 'until they came apart. He was hard as hell to get to sleep. I was up all the time with him. Eventually, he would wear himself out.

4. He was always getting into things. When he was nine months old he climbed up cupboards, onto the refrigerator, and climbed to wedge himself between the highest cupboard and the ceiling. As a toddler, Stanley reached up and pulled a sewing machine on to himself. When he was two or three, he drank kerosene from a lamp that he had pulled apart. When he was four or five, he chewed a child-proof cap off his father's pain pills and ingested the pills. He was taken to Elyria Memorial Hospital for the kerosene and pills incidents; he was taken to the hospital on other occasions, including cutting his head open by banging it on his crib. On one trip to the hospital, he was checked for child abuse, because of a cut head and bruises. He just moved and didn't think.

5. As a child, Stanley even ran into cars, ~~on his bike.~~ Because he wasn't paying attention He would run around and flip over the couch. He became involved in gymnastics at the suggestion of his second grade teacher. He really liked gymnastics, but his arthritis, diagnosed in the 6th grade, ended his gymnastics involvement. SJ

6. When he was in the first grade, Stanley was taken to the Cleveland Clinic for evaluation and was diagnosed with "hyperactivity." The doctor at the Cleveland Clinic said Stanley had minimal brain damage. Stanley was also seen by a Dr. Shaffer [sp.] on Broad Street in Elyria. Stanley took Ritalin from the 1st grade until the 6th grade. I then

SJ

took Stanley off the Ritalin because I was worried about Ritalin reports I saw on the television and was afraid of side effects. When Stanley was on the Ritalin, he sometimes just sat there . . . not like a kid, like a zombie.

7. Stanley was a Cub Scout. I became a den mother because the other Cub Scout groups didn't want to deal with the children with behavior difficulties. They gave me all the rowdy boys, but I didn't have problems with them. Stanley stayed in Cub Scouts until it was over.

8. Stan's imagination got him in trouble. His relationship with an imaginary monkey, Bear, started when he was real little. Stanley had a stuffed monkey, and he always wanted monkeys for presents. If Stanley misbehaved, he said, "Bear did it" or "Bear told me to do it." The school raised concerns about Bear when Stanley was in the 6th grade. Stanley went to counseling. The counselor said Stanley knew what he was saying. I was never concerned that Stanley might have some serious psychological problem. Stanley still talks about Bear.

9. As a child, when Stanley got really angry, he would cry. As he got older, he would often still cry and/or run his mouth. He's very sensitive.

10. Stanley attended Learning Disability (LD) classes at East Carlisle Elementary School and Midview Middle School in Grafton. After middle school, Stanley attended SBH (Severe Behavior Handicap) classes at Edison School in Elyria. He briefly attended Elyria High School before dropping out of school at age 17.

11. Stanley never did very well in school. When he was younger, he couldn't sit still, was often out of his seat, and talking when he wasn't supposed to talk. As he got older, the disruptive behavior continued and he had a problem with running his mouth. Stanley would say things before thinking. When Stanley was learning to write, he had problems; his teacher referred to the problem as "dyslexia." He did, and has always, enjoyed drawing. I think that maybe Stanley was kept at Edison too long. For a while, he was doing better and wanted to go to regular school, but he had to stay at Edison longer. I think he gave up and that by the time he got to Elyria High School, he didn't care.

12. Stanley got along with all family members. He is especially close to Tammy; she is only 13 months younger than Stanley. The only difficult relationship has been with Jim Morrison, my boyfriend. All the children had a hard time with our divorce and my relationship with Jim and Jim had a hard time with the children. The children, including Stanley, fought with Jim. None of the kids got along with Jim at first. Jim is the only person I ever saw Stan violent with. The only time I witnessed Stanley being violent towards Jim was when Stanley was age 16 and arguing with Jim. Stanley picked up some numchucks and hit Jim on the side of the head. Stanley cried after he hit Jim.

13. I put Stanley out of her house when he was 18 because people he knew were around the house day and night. Stanley didn't live by the home rules. Stanley lived a

SJ

number of places after that: with Jackie, with Tammy, in motels, in tents, and other places.

14. On January 19 at 4:30 a.m. Stanley was sleeping on my living room floor. I had gotten up at 4:30 to get ready to go to work (at York International). I am sure of the date because that was the birthday of my step-father, Clyde Les Davis. I believe that the information was not used because the attorneys told me they did not need any of this because there was not much evidence to convict him [Stanley].

15. I would have testified to the above had I been prepared for my testimony or at least told ahead of time that I would be testifying.

FURTHER AFFIANT SAYETH NAUGHT.

Sarah Jalowiec
SARAH JALOWIEC

SWORN TO AND SUBSCRIBED in my presence this 17th day of March, 1997.

Gaile George
NOTARY PUBLIC
Commission Expires: 8/4/97

SJ

EXHIBIT B

EXHIBIT B

Pupil Personnel Services

PLACEMENT AND COMMITTEE REPORT

INDIVIDUALIZED EDUCATIONAL PLAN/ANNUAL REVIEW

STUDENT STANLEY JALOWIEC BIRTHDATE [redacted] AGE 10.8

ADDRESS 3038 Grafton Rd., Grafton, Ohio 44044 SCHOOL DISTRICT Midview

PARENT/GUARDIAN Ed & Sarah Jalowiec PRESENT SCHOOL East Carlisle

PHONE 458-6011 PRESENT DATE 8-25-81 FOR SCHOOL YEAR 1981-82

Current Special Program Participation NONE

This Program Placement has been appropriate ____ YES ____ NO WHY NOT ____

Current levels of Education Performance (Ability, Academic, Social, Vocational)

DATE	TEST	RESULTS		
4-81	WISC-R	Average		
	WRAT	STANDARD SCORES		
	Reading	98		
	Spelling	85		
	Math	88		
	PIAT	STANDARD SCORES		
	Math	91	Spelling	89
	READ REC	92	GEN Information	92
	READ COMP	99	Total Test	91

Evaluation Team Members: Referring Teacher K. Matheson Psychologist J. Jenkins

Specialist P. B. Margolis Other ____

GOALS	OBJECTIVES	CRITERIA
1. Stan will receive help in reading recognition and reading comprehension as needed.	1. Raise Sight Word Vocab. to 3rd grade level. Increase Oral Reading Fluency to 3rd grade level. Improve Reading Comprehension to 3rd grade level.	
2. Stan will receive help in written expression	2. Improve Written Expression. Improve Sentence Structure. Improve Capitalization & Punctuation. Improve Written Assignments in Classroom.	
3. Stan will receive help in math calculation and math reasoning as needed.	3. Improve Basic Facts & Simple Operations. Improve Subtraction with Regrouping & Division.	
4.	4.	

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I.E.P.

edures for evaluating Annual Goals, at least annually, will include:

☐ Post-testing ☐ Criterion Referenced Assessment ☐ Check Lists

☐ Classroom Observation ☐ Behavior Rating Scales ☒ Grades Other: _____

After analysis of the completed assessment information and further diagnostic testing, related to the annual goals and short term instructional objectives the special education teacher responsible for implementing the IEP is:

Name Lois Copeland

Based on the assessment information, program entry criteria, and needs of the student, the following program placement recommendation is considered to be the least restrictive.

Special Program Recommendation LEARNING DISABILITIES LEARNING CENTER

School in which student will receive program service EAST CARLISLE Grade: FIVE

List Special Education Services

Program	Date Initiated	Anticipated Duration
L.D.L.C.	8/81	2 years

Special Program Participation

[illegible] INTERVENTION

READING RECOGNITION AND COMPREHENSION AS NEEDED.

MATH CALCULATION AND MATH REASONING AS NEEDED

Related Service	Date Initiated	Anticipated Duration

Regular Class Participation

READING, MATH, SOCIAL STUDIES, SCIENCE, SPECIAL ACTIVITIES.

The special teacher, in consultation with the regular teachers and supervisory staff may adjust the participation in program and the regular class based on current need and functioning. The parent will be notified of these changes.

Placement/IEP Conference Date 8/[illegible]

Evaluation Completed and Information dashed and program recommendations made

Dallas H. Caldwell Chairperson

Provider of Special Education

Participants in Conference

Signature	Title
Dallas H. Caldwell	PRINCIPAL
[illegible]	PARENT
[illegible]	PSYCHOLOGIST
[illegible]	GEN. ED. TEACHER
[illegible]	L.D. TEACHER
[illegible]	SP. ED. SUPERVISOR

☑ I have personally met with the placement committee

☑ The student will be re-evaluated by an assessment team which will include the psychologist, at least every three years. The date for the next evaluation will be during the school year 19[illegible]

☑ I have seen my child's Individualized Educational Plan and have had it verbally explained to me.

☑ I am satisfied with the recommendation for the assignment of my child to a special class program. I have been informed of the advantages and disadvantages of the assignment.

8-25-81 [illegible]
(DATE) (PARENT/GUARDIAN)

I.E.P.

Information contained herein subject to all provisions of Public Law 94-142 and Amended House Bill 455.

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LORAIN COUNTY PUBLIC SCHOOLS

PARENT AUTHORIZATION FOR PROGRAM PLACEMENT

1. Pupil's Name STANLEY JALOWIEC
   Date of Birth [redacted]
   Grade FOUR
   Sex MALE
   Parent/Guardian ED & SARAH JALOWIEC
   School EAST CARLISLE
   District MIDVIEW
   Date 8-25-81

2. I have personally met with:

   Principal/Designee DALLAS CHADWELL
   Teacher KATHY MATHESON
   Special Education Supervisor P. B. MARGOLIS
   Psychologist JEAN JENKINS
   Other _____

3. I understand that after careful consideration of the information obtained from the assessment of my child, the following program recommendation has been made:
   LEARNING DISABILITIES LEARNING CENTER.

4. I accept the recommendation for the assignment of my child to a Special Education Program for LEARNING DISABILITIES, and have been informed of the advantages and disadvantages of the assignment. I understand that if I have future concerns about the placement of my child, I may ask for a special conference with any or all of the above named individuals.

   Signature: [signature]
   Relationship to Child: PARENT
   Address: 3038 Grafton Rd., Grafton, Ohio 44044
   Phone: 458-6011 Date: 8-25-81

I do not accept the recommendation for the assignment of my child to a special class, and do not give my consent to this placement.

   Signature: _____
   Relationship to Child: _____
   Address: _____
   Phone: _____ Date: _____

I waive the right to notification of placement by certified letter from the Superintendent. First Class mail is acceptable.

   Signature of Parent: [signature]

...ld any questions arise regarding the program recommendation, please feel free to contact ...ol.

...t to all provisions of Public Law 94-142 and Amended House Bill 455.

...manent Record; Pink=Parent; Gold=Supervisor; Photostatic Copy=Superintendent

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LORAIN COUNTY PUBLIC SCHOOLS

Pupil Personnel Services

INDIVIDUALIZED EDUCATIONAL PROGRAM

Annual Review

STUDENT Stanley Jalowiec BIRTH DATE [redacted] AGE 13,9

ADDRESS 3038 Grafton Rd, Grafton, O. SCHOOL DISTRICT Midview

PARENT Mr. and Mrs. Ed Jalowiec PRESENT SCHOOL Midview Middle GRADE 6

PHONE 450-6011 PRESENT DATE 5/19/83 FOR SCHOOL YEAR 1983-84

Present Levels of Educational Performance (Ability, Academic, Social, Vocational)

P.I.A.T.	Grade Equivalent	Standard Score
Mathematics	5.5	95
Reading Recognition	4.7	87
Reading Comprehension	4.5	87
Spelling	3.9	81
General Information	8.2	107
Total Test	5.1	88

Evaluation Team: Referring Teacher Mary L. Brown Psychologist

Specialist Phyllis Berger Other

GOALS	OBJECTIVES	CRITERIA
1. Stanley will receive help in reading.	1. To improve word attack skills, sight, phonic, structural) analysis. To review comprehension skills and five areas mastered last semester. Reference, main idea, sequence, inference, and critical thinking.	
2. Stanley will receive help to improve mathematics skills.	2. To be exposed to basic math skills. To be exposed to word problems dealing with time, money, measurement.	
3. Stanley will receive help in Spelling	3. To practice recall, usage and meaning of words	
4. Stanley will receive help in English	4. To review parts of speech, sentence structure, capitalization, punctuation, paragraph writing	

STUDENT [redacted] PAGE 2

I.E.P.

Procedures for evaluating Annual Goals, at least annually, will include:

- ✓ Achievement Tests
- ✓ Criterion Referenced Assessment
- ___ Check Lists
- ✓ Classroom Observation
- ___ Behavior Rating Scales
- ✓ Grades
- ___ Adaptive Behavior
- ___ Other: ___

Based on the assessment information, program entry criteria, and needs of the student, the following program placement recommendation is considered to be the least restrictive:

Special Program Recommendation: Learning Disability

School in which student will receive program service: Midview Middle GRADE: 7

District in which student will receive program service: Midview

List Special Education Services:

Service	Date Initiated	Anticipated Duration
Learning Disability	1983	1984

Special Program Participation:

Reading
Mathematics
Spelling
English

Related Services	Date Initiated	Anticipated Duration

Regular Class Participation:

Science, Social Studies, Art, Band
Shop, Home Economics

The special teacher, in consultation with the regular teachers and supervisory staff, may adjust the participation in program and the regular class based on current need and functioning. The parent will be notified of these changes. The parent may request a conference at any time to discuss the progress or program.

I.E.P. Conference Date: 5/19/83

Evaluation completed and information gathered and program recommendations are made.

Participants in the conference:

Signature	Title
Mary L. Dunlap	L.D. Teacher
Phyllis A. Karg, M.A.	Learning Consultant
[illegible]	Sch. Psychologist

Chairperson: [illegible]

Title: Principal

In the judgement of the Evaluation Team, the student's handicapping condition does not preclude conforming to the standard code of pupil conduct.

	YES	NO
I have seen my child's educational program and understand the goals and objectives.	☐	☐
I understand that my child will be evaluated by a child study team which may include a school psychologist. The date for the next evaluation will be during the 1985 school year.	☐	☐
I waive the notification of placement by certified mail.	☐	☐
I give my consent for the assignment of my child to the special program described on this I.E.P. I am aware of the advantages and disadvantages of this assignment.	☐	☐

5-19-83 [illegible]
Date Parent

I.E.P.
Information contained herein subject to all provisions of Public Law 94-142 and Amended House Bill 455.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4186

LORAIN COUNTY PUBLIC SCHOOLS
PUPIL PERSONNEL SERVICES
INDIVIDUALIZED EDUCATIONAL PROGRAM

IDENT Stanley Jalowiec BIRTH DATE [redacted] AGE 12
IRESS 5120 Graftan Rd. Grafton SCHOOL DISTRICT Midview
ENT/s Ed and Sarah Jalowiec PRESENT SCHOOL Midview Middle GRADE 7
INE PRESENT DATE 2/13/84 FOR SCHOOL YEAR 1984-85

SENT LEVELS OF EDUCATIONAL PERFORMANCE (ABILITY, ACADEMIC, SOCIAL, VOCATIONAL)

	Piat Equivalents	Standard Score
WRK	6.0	94
C.R.	6.0	93
M.C.	4.5	84
Spelling	3.5	74
Gen Info.	8.4	104
Total Test	5.3	87

LUATION TEAM: REFERRING TEACHER _____ PSYCHOLOGIST _____
SPECIALIST _____ OTHER _____

GOALS	OBJECTIVES	CRITERIA
To increase vocabulary and reading skills	1. To read the current assignment and increase his ability to communicate orally and in written form.	100%
To increase math skills	2. [illegible]	100%
To improve in Safety	3. Given direction, student will be able to [illegible]	100%
To improve in Science	4. Given science and health in the student will explore the basic principles and concepts of physical/biological science, [illegible] and community health.	100%
To become more social and mature	5. To improve interaction and cooperation with peers in order to help fulfill [illegible]	

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4187

STUDENT Stacy Jolmiec

I.E.P.

EDURES FOR EVALUATING ANNUAL GOALS, AT LEAST ANNUALLY, WILL INCLUDE:

- ☑ ACHIEVEMENT TESTS
- ☐ CRITERION REFERENCED ASSESSMENT
- ☑ CHECK LISTS
- ☐ CLASSROOM OBSERVATION
- ☐ BEHAVIOR RATING SCALES
- ☑ GRADES
- ☐ ADAPTIVE BEHAVIOR
- ☐ OTHER _____

D ON THE ASSESSMENT INFORMATION, PROGRAM ENTRY CRITERIA, AND NEEDS OF THE STUDENT, THE FOLLOWING PROGRAM PLACEMENT RECOMMEND IS CONSIDERED TO BE THE LEAST RESTRICTIVE:

SPECIAL PROGRAM PLACEMENT: L.D. Unit

OL IN WHICH STUDENT WILL RECEIVE PROGRAM SERVICE Middle GRADE 8

RICT IN WHICH STUDENT WILL RECEIVE PROGRAM SERVICE Midview

SPECIAL EDUCATION SERVICES:

SERVICE	DATE INITIATED	ANTICIPATED DURATION
L.D. Unit	9/1984	6/85

IAL PROGRAM PARTICIPATION:

Math, Reading, Spelling
Social Studies, Science, Gram
Life Vocational, Career Ed-
ucation

RELATED SERVICES	DATE INITIATED	ANTICIPATED DURATION

REGULAR CLASS PARTICIPATION

English, Gym, Art, Home Ec
Wood Shop, 3rd, Homeroom

E SPECIAL TEACHER, IN CONSULTATION WITH THE REGULAR TEACHERS AND SUPERVISORY STAFF, MAY ADJUST THE PARTICIPATION IN PROGRAM A GULAR CLASS BASED ON CURRENT NEED AND FUNCTIONING. THE PARENT WILL BE NOTIFIED OF THESE CHANGES. THE PARENT MAY REQUEST A NFERENCE AT ANY TIME TO DISCUSS THE CHILD'S PROGRESS OR PROGRAM.

E.P. CONFERENCE DATE 3/30/84

/ALUATION COMPLETED AND INFORMATION GATHERED AND PROGRAM ECOMMENDATIONS ARE MADE.

YES	NO	
☐	☐	I HAVE SEEN MY CHILD'S INDIVIDUALIZED EDUCATIONAL PROGRAM, HAVE HAD IT VERBALLY EXPLAINED TO ME AND HAVE CONTRIBUTED TO ITS DEVELOPMENT.
		I UNDERSTAND THAT THE I.E.P. WILL BE REVIEWED AT LEAST ANNUALLY, AND AT LEAST EVERY THREE YEARS MY CHILD WILL BE EVALUATED BY A CHILD-STUDY TEAM, WHICH MAY INCLUDE A SCHOOL PSYCHOLOGIST. THE NEXT EVALUATION WILL BE DURING THE 1984 SCHOOL YEAR.
☐	☐	I WAIVE THE NOTIFICATION OF PLACEMENT BY CERTIFIED MAIL.
☐	☐	I GIVE MY CONSENT FOR THE ASSIGNMENT OF MY CHILD TO THE SPECIAL PROGRAM DESCRIBED ON THIS I.E.P. I AM AWARE OF THE ADVANTAGES AND DISADVANTAGES OF THIS ASSIGNMENT.
☐	☐	IN THE JUDGMENT OF THE EVALUATION TEAM, THE STUDENT'S HANDICAPPING CONDITION DOES NOT PRECLUDE CONFORMING TO THE STANDARD CODE OF PUPIL CONDUCT.

IGNATURE TITLE

Title I Reading Teacher

AIRPERSON

TLE

Date Parent's Signature

I.E.P. Information contained herein subject to all provisions of Public Law 94-142 and Amended House Bill 455.

ORIGINAL=PPS OFFICE: YELLOW=PRINCIPAL/PERMANENT RECORD: PINK=PARENT: GOLD=SUPERVISOR: PHOTOCOPY=SUPERINTENDENT

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4188

KLYRIA CITY SCHOOLS

LRE QUESTIONNAIRE

Student Name: STAN JALOWIEC BD 8-17-70 Date 6-3-85

"CAN THIS CHILD BE EDUCATED IN . . . "	Circle Appropriate Answer	If No is circled, give reason why placement is inappropriate
1. Regular Classroom With no modification other than that provided to non-handicapped students	Yes (No)	THE SEVERITY OF THE BEHAVIORAL NEEDS ARE TO THE EXTENT THEY CANNOT BE SUCCESSFULLY ADDRESSED IN THE REGULAR CLASSROOM
2. Regular Classroom with supplemental services	Yes (No)	"
3. Regular Classroom with individual/small group instruction	Yes (No)	"
4. Special Class/Learning Center in a public school building in this district	Yes (No)	"
5. Special Class/Learning Center in a public school building in another school district	Yes (No)	"
6. Special Class/Learning Center in a separate facility	(*Yes) No	*needs which necessitate placement in a separate facility WEAK SELF PERCEPTIONS, LOW BEHAVIOR INTERACTIONS
EDISON SCHOOL Name of facility, if yes		
7. Home Instruction	Yes No	

Having informed the parents of the child named above of the continuum of alternative placements (eligibility criterion ___), and in an effort to meet the needs, goals and objectives specified in the child's IEP, this IEP committee has considered, in sequence, each of the placement options listed above, and has determined the placement option so designated as the least restrictive for this child.

Paul M Read 6-3-85
IEP Committee Chairperson Date

Parent

This becomes part of the IEP and is attached to the IEP for students placed in a separate facility.

ELYRIA CITY SCHOOLS

INDIVIDUAL EDUCATIONAL PLAN/PERIODIC REVIEW

0028170 — Student Number

1985-86 — School Year

udent STAN JALOWIEC Address 329 W BROAD ELYRIA 44035 B/D [redacted] Grade 9 District of Residence ELYRIA

rent MR/MS. E. JALOWIEC Address SAME Phone 322-2174 District of Attendance ELYRIA

te(s) and Mode of Notification to Parents: Letters 5-20-85 Phone Calls _____ Personal Visits _____ Other _____

Present Level of Educational Performance

tellectual Functioning: WISC-R '77 - '82

ademic Achievement: WRAT READING 6.6 3.2 SPELLING 6.11 5.5 MATH 6.3.9 5.5.10 PIAT READING COMP 6.6 5.5.75

mmunication:

aptive/Social Behavior:

her: BEHAVIOR RATING PROFILES, WEAKNESS PERCEPTIONS, LA BEHAVIOR OBSERVATIONS

Recommendations

Special Education Program SBH

Type of Service (L.R.E.) DAY TREATMENT PROGRAM

Person(s) Implementing the IEP: PARENT/STAFF

Date Entered Elyria Program _____

Anticipated Duration 1 YR SUBJECT TO REVIEW

SPECIAL INSTRUCTIONS

Related Services	Date Initiated	Duration of Services
eech & Language		
cupational Therapy		
ysical Therapy		
tendant Services		
ansportation	9-85	1 YR
aptive Phys. Ed.		
rk Study		
her (COUNSELING)	9-85	1 YR

Approximate number of hours in special class each week (exclude lunch): 30

(Check those that apply)

Participation in Regular Class	Service
Reading	
Language Arts	
Math	
Social Studies/Science	
Health/P.E.	
Music	
Art	NONE
Library	
Lunch	
Homeroom	
Unified Arts/Home Economics	
Discipline rules for non-hand.	

Extent of participation in competency based educational program:
None: _____
Reading: _____
Composition: _____
Mathematics: _____
Other: _____

Modifications of Testing Procedures: _____

* PE WILL BE TAUGHT BY ELYRIA STAFF FOLLOWING THE RECOMMENDED PE. MODIFICATION STUDY.

Copies to:

White - Pupil Personnel File
Canary - Teacher

Case No. 08-3249
Jalowiec v. Bradshaw
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ELYRIA CITY SCHOOLS

Name STAN JALOWIEC School ASTON effective date 9 month 85 year to 6 month 86 year

Annual goal LANG ARTS	Annual goal in MATH	Annual goal in SOC STUDIES	Annual goal in SCIENCE	Annual goal in BEHAVIOR
TO DEVELOP USEFUL SKILLS IN READING, WRITING, THINKING	TO IMPROVE ACADEMIC FUNCTIONING	TO DEVELOP A BETTER UNDERSTANDING OF US EVENTS PRESENT AND PAST	TO INTRODUCE BASIC PRINCIPALS OF PHYSICAL SCIENCE	TX
Specific Objectives: OBJ: INTRODUCE STAN TO LIBRARY WORKS DEVELOP BETTER UNDERSTANDING GRAMMATICAL CONCEPTS DEVELOP BETTER UNDERSTANDING WRITING TECHNIQUES IMPROVE COMPREHENSION SKILLS IMPROVE SPELLING SKILLS	**Specific Objectives:** OBJ: -INCREASE ABILITY TO PERFORM BASIC OPERATIONS (+, −, ×, ÷) WITH WHOLE NUMBERS AND FRACTIONS -INCREASE UNDERSTANDING OF BASIC GEOMETRIC CONCEPTS -IMPROVE MEASUREMENT SKILLS -INCREASE ABILITY TO COUNT MONEY AND MAKE CHANGE	**Specific Objectives:** OBJ: INCREASE HISTORICAL KNOWLEDGE OF US -DEVELOP AWARENESS OF PRESENT EVENTS -INCREASE ABILITY TO EVALUATE AND JUDGE CRITICAL HISTORICAL EVENTS / ISSUES	**Specific Objectives:** OBJ: -DEVELOP A BETTER UNDERSTANDING OF THE FOLLOWING: ELECTRICITY, MAGNETISM, ENERGY, WORK, FORCE, LIGHT, SOUND, DENSITY, ATOMS, ELEMENTS, CHEMICAL FORMULAS	**Specific Objectives:** STAN WILL -DECREASE SURREPTITIOUS BEHAVIOR -INCREASE ABILITY TO IGNORE -INCREASE ABILITY TO MYOB, -INCREASE WILLINGNESS TO VERBALLY REMEDIATE PROBLEMS,
Evaluative Comments	**Evaluative Comments**	**Evaluative Comments**	**Evaluative Comments**	**Evaluative Comments**

Placement IEP Conference Date 6-3-85

Date of next scheduled Annual Review SPRING 86

Participants in Conference

Signature	Title
Paul M Rigdon	Chairperson
Chuck Bartlett	10th TEACHER

As a participant in the placement/review team conference, I have had the educational plan explained to me and have had the opportunity to contribute to its development. ___

I have been informed of the advantages and disadvantages of program placement and I am in agreement with the placement of my child into this special education program. N/A

I waive my right to receive notification of placement by certified mail. N/A

Procedures for evaluating achievement of annual goals and short term objectives and determining whether placement is appropriate:

Teacher observation and achievement ratings ✓ Check Lists ✓

Criterion and norm referenced tests ✓ Other ✓

Multifactored assessment will be conducted for this child at least once every three years. The date for the next evaluation will be during school year 86-87

Case No. 08-3249
Jalowiec v. Bradshaw
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ELYRIA CITY SCHOOLS

INDIVIDUAL EDUCATIONAL PLAN/PERIODIC REVIEW

00028170 — Student Number

1986 - 1987 — School Year

dent: Stan Jalowiec — Address: 328 W. River, Elyria, Ohio 44035 — B/D: [redacted] — Grade: 10 — District of Residence: Elyria

ent: Mr. & Mrs. E. Jalowiec — Address: same as above — Phone: 322-2174 — District of Attendance: Elyria

e(s) and Mode of Notification to Parents: Letters 5/23/86 — Phone Calls ____ — Personal Visits ____ — Other ____

Present Level of Educational Performance

ellectual Functioning: WISC-R 93-102-(10/82)

demic Achievement: IPAT mfg comp 4.4/7 (5/86)

IBAT - R mfg acc 6b/01 11 w-5 [illegible] 5th 7th

(5/86) spelling 3b/66-34 math 5th 7th

math 5b/65-35 written [illegible] 5th 7th

munication: within normal limits

ptive/Social Behavior: [illegible] Teacher Report

): overactivity, not completing assignments, disruption, not

er: following class rules, resistant to authority figures, impulsive, affective withdrawal, defensive

Recommendations

Special Education Program: SMI

Type of Service (L.R.E.): Day Treatment Program

Person(s) Implementing the IEP: Rybinski/Reclaim/Staff

Date Entered Elyria Program: 8/84

Anticipated Duration: 1 year subject to review

SPECIAL INSTRUCTIONS

Related Services	Date Initiated	Duration of Services
ech & Language		
upational Therapy		
sical Therapy		
endant Services		
nsportation	9/86	1 yr. *
ptive Phys. Ed.		
k Study		
er		
Counseling	9/86	1 yr.

Approximate number of hours in special class each week (exclude lunch): 30

* subject to review

(Check those that apply)

Participation in Regular Class	Service
Reading	
Language Arts	
Math	
Social Studies/Science	
Health/P.E.	
Music	
Art	
Library	
Lunch	
Homeroom	
Unified Arts/Home Economics	
Discipline rules for non-hand.	

NONE

Extent of participation in competency based educational program:
None: X
Reading: ____
Composition: ____
Mathematics: ____
Other: ____

Modifications of Testing Procedures: ____

P.E. will be taught by Edison Staff following the regular education course of study.

opies to:

hite - Pupil Personnel File
nary - Teacher

Case No. 08-3249
Jalowiec v. Bradshaw
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ELYRIA CITY SCHOOLS

ne STAN JALOWIEC School EDISON Effective Date SEPT. 86 to June 87

nual Goal in ENGLISH	Annual Goal in OCCUPATIONAL ORIENTATION	Annual Goal in HEALTH	Annual Goal in DIRECTED STUDY OF SOCIAL SCIENCE
levelop useful skills in reading, ting, and thinking.	To develop skills related to occupational success.	To introduce basic health issues.	To assist student in personal growth in the areas of identity, interpersonal relationships, & values.
ecific Objectives & Criteria: ntify & demonstrate knowledge of on parts of speech with 70% acc. ns, pronouns, verbs, prepositions, junctions, interjections, adverbs, ctives) nstrate knowledge of different s of writing: explanations, riptions, directions, essays, ntives, poetry, letters; through rate explanations and/or written ples. ntify and locate details & main idea reading selection with 70% acc. ntify subject & predicate of a ence, differentiate between a plete sentence, write a grammati- y correct sentence with 70% acc. conclusions, infer cause & effect, dict outcomes of a reading ction with 70% accuracy.	**Specific Objectives & Criteria:** Present information about himself through application forms, letters of application, personal data sheets, and interviews with 90% accuracy. Identify appropriate skills and behaviors necessary for interacting w/ employers and co-workers with 80% acc. (e.g., attitude, honesty, attendance, initiative, accepting orders, following directions, treating customers well, getting along with others) Identify occupational values, interests, apptitudes, & goals using results from CAPS, COPES, COPS tests. Use functional reading, writing, and math skills in the context of job situations with 75% accuracy. List responsibilities of both employers & workers with 70% accuracy. Identify types of payroll taxes collected,(100%); interpret paycheck records of earnings & deductions (90%); complete tax forms (70%) Complete a job application file including: personal history, education, key words & abbreviations, health record papers needed, paid & unpaid work experience, references, letters of recommendation, & resume. (100%)	**Specific Objectives & Criteria:** To increase knowledge of diseases and list their symptoms with 70% acc. To recognize the various forms of first aid and demonstrate their applications with 70% accuracy. To identify and discuss appropriate and inappropriate usage of drugs with 80% accuracy. To interpret issues of human sexuality and knowledge of the human reproduction with 80% accuracy.	**Specific Objectives & Criteria** Demonstrate a positive self-concept by: admitting his role in problem situations, expressing feelings openly, accepting constructive criticism from others, & accepting varying ideas held by other people 70% of the time. Write "I learned . . statements," that are realistically related to himself 90% of the time. Exhibit self-disclosure 70% of time. Use group planning as an effort to solve a problem 70% of the time. Recognize society endorsed values 90% of the time. Demonstrate ability to identify, consider consequences, & choose alternatives 70% of the time. Identify, affirm, clarify, defend, & openly express his values 70% of time. Understand & explain/discuss why & how peer pressure influences value formation through teacher directed group discussion.

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Jalowiec v. Bradshaw
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ame Stan Jalowiec School Ellison Effective Date 9/86 to 6/87

nnual Goal in BEHAVIOR

o increase awareness & understanding f own behavior.

pecific Objectives & Criteria:

low teacher directions without ent. 85% of the time.

es appropriate decisions after ining alternatives 85% of the time

ne inappropriate behavior of others of the time.

epts consequences for his behavior of the time.

alizes feelings as an alternative acting them out 75% of the time.

pts constructive criticism and back from staff and peers 75% of time.

s hands and feet to himself 90% of time.

causes disturbing-teasing-antagonistic vior by 50%.

Annual Goal in IWIP

To improve academic functioning and application skills.

Specific Objectives & Criteria:

Master basic addition, subtraction, multiplication, division facts. (100%)

Compute addition equations with & without regrouping with 90% accuracy.

Compute subtraction equations with & without borrowing with 90% accuracy.

Compute multiplication equations with & without regrouping with 80% accuracy.

Compute division equations with & without remainders with 80% accuracy.

Compute monetary problems using [illegible] with 80% accuracy.

Compute perimeter & area of a particular geometric shape with 80% accuracy.

Convert fractions to mixed numbers & mixed numbers to fractions with 70% acc.

Convert fractions to lowest, higher term with 70% accuracy.

Add and subtract fractions with like & unlike denominators.

Apply basic [illegible] skills to problems encountered in everyday living, 70% acc.

✓ As a participant in the placement/review team conference, I have had the educational plan explained to me and have had the opportunity to contribute to its development.

✓ I have been informed of the advantages and disadvantages of program placement and I am in agreement with the placement of my child into this special education program.

Procedures for evaluating achievement of annual goals and short term objectives and determining whether placement is appropriate:

Teacher observation and achievement ratings ✓ Check Lists ✓

Criterion and norm referenced tests ✓ Other ✓

Multifactored assessment will be conducted for this child at least once every three years. The date for the next evaluation will be during school year 1986 - 1987

x Stan P. Jalowiec 6-2-86
Parent/eligible/student (Date)

Placement/IEP Conference Date June 2, 1986

Date of next scheduled Annual Review June 1987

Participants in Conference:

Signature	Title
Daniel L. Tyler	Chairperson
Karen Reilly	Spec. Ed.
Cynthia Kaczynski	Sch. Teacher

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Ohio Pupils Reading Circle

Columbus, Ohio,

This is to Certify, *That* STANLEY JALOWIEC

has read under the auspices of the Ohio Teachers and Pupils Reading Circle, *the required number of books from the list of the* Ohio Pupils Reading Circle, *which constitute the* THIRD *year of the Course as chosen by the* Reading Circle

Jack H. Davis
Secretary

Dallas H. Caldwell
Superintendent or Principal

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4195



Certificate of Award

for

PERFECT ATTENDANCE

Presented to

Stanley Jalowiec

By

East Carlisle School

MIDVIEW SCHOOL DISTRICT

June 4, 1980

Date

Mrs. Linda Cegan

Teacher

Douglas J. Chadwell

Principal

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4196

EXHIBIT C

STATE OF OHIO :
: SS.
COUNTY OF LORAIN :

AFFIDAVIT

Now comes Edward Jalowiec, Sr. being first duly sworn according to law, and states the following:

1. I am Stanley Jalowiec's grandfather. I am retired. I am 80 years old.

2. During my mitigation testimony, I talked about: Stanley's work at the golf course, care for ducks and chipmunks, the arthritis and its effects. I was asked about financial support of Stanley, other charges, and his work history. Stanley's attorney told me to say all the good things about Stanley. I did not receive additional preparation for testifying.

3. When Stanley was younger, I took him to counseling all the time, across from the hospital on E. Bridge Street.

4. Stanley was a good dancer. He would show off at Christmas, then be done for a week because his arthritis would act up.

5. We still have the dog, "Snoop," that Stanley found and cared for as a puppy. Stanley loves the dog and always asks about him.

FURTHER AFFIANT SAYETH NAUGHT.

Edward Jalowiec Sr
EDWARD JALOWIEC, SR

SWORN TO AND SUBSCRIBED in my presence this 11th day of March, 1997.

NOTARY PUBLIC
Commission Expires: 8/11/97

EXHIBIT D

STATE OF OHIO :
: SS.
COUNTY OF LORAIN :

AFFIDAVIT

Now comes Helen Jalowiec, being first duly sworn according to law, and states the following:

1. I am Stanley's grandmother. I was not asked to speak at Stanley's trial. I have physical problems. It would be difficult to go to the courthouse but I would have testified at a deposition. Five years ago, I had a stroke, from which I recovered. But I may have some residual left side weakness. A year ago, I broke my hip and now I use a walker. I have arthritis in my left hip and leg.

2. Stanley is my favorite grandchild. Stanley was really not that good in school, but he had lived many places. We tried to do the best for him, but Stanley wanted to do things his way.

3. Stanley lived with us for about a year. When Stanley was 16, a sophomore, he was having trouble in high school. He had been skipping school, and they would have put him in detention home. Instead, Stanley came to live with us. His grades improved and he attended school regularly. The principal said he was a good kid, but he needed supervision and a home. Stanley never caused me trouble, but he didn't want to live by the rules. He had a curfew he didn't like.

4. On his 17th birthday, Stanley went home to Sarah's (his mother's). Stanley didn't go to school much after that. I wish that Stanley could have stayed with us. When they don't have schooling and discipline, go to school, they're lost. Stanley helped us. He did his homework. He got mad at us sometimes . . . but we never had trouble the year he was here.

5. Stanley did not get along with Jimmy, Sarah Jalowiec's boyfriend. Sarah put Stanley out. I hold that against them. Stanley is a good kid.

6. We did not know Stanley's friends, except Joe and Jackie. Stanley was so close to Cody, Jackie's son.

7. Snoop, the dog that Stanley found and that we still have, was his friend. Stan took him everywhere.

8. When Stanley was a child, he always liked monkeys. Every birthday and Christmas, he wanted a monkey, and I often bought him stuffed monkeys.

H.J.

Case No. 08-3249
Jalowiec v. Bradshaw
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FURTHER AFFIANT SAYETH NAUGHT.

Helen Jalowiec
HELEN JALOWIEC

SWORN TO AND SUBSCRIBED in my presence this 11 day of March, 1997.

Judi George
NOTARY PUBLIC
Commission Expires: 8/11/97

EXHIBIT E

STATE OF OHIO :
: SS.
COUNTY OF CUYAHOGA :

AFFIDAVIT

Now comes Ray Pasterczyk, being first duly sworn according to law, and states the following:

1. I am a friend of Stanley Jalowiec. I testified as a character witness for Stanley during the mitigation phase of Stanley's trial. I was not able to testify fully due to the lack of preparation.

2. I retired from the grocery business over nine years ago. I had worked for A&P for 32 years and Stop-n-Shop for 8 years. I was also in the service for two years in the early 1950's.

3. I have known Stanley Jalowiec for four or five years. We met at St. John's Westshore Hospital when I was receiving treatment after knee replacement surgery and Stanley was bringing his girlfriend's child to speech therapy. Our meeting resulted in Stanley helping me by doing cleaning and yard work at my home in Rocky River. Once when I gave a large family birthday party, Stanley acted as a waiter. I presented pictures of us at this event during my mitigation testimony.

4. I would describe Stanley as not rowdy. He seemed like a kind person. He was not violent. He never gave me a problem. He seemed easy-going. Stanley never drank alcohol or even smoked cigarettes at my house.

5. I would transport Stanley to and from the jobs at my house. During the time Stanley worked for me, Stanley lived at various places. He bounced around. Stanley lived with different family members, including his mother, a brother (Neil), and a sister (Tammy). Stanley lived in a trailer with his girlfriend and her children. He also lived at the YMCA, where the older Smith, Ray, also lived.

6. I gave Stanley a bicycle I could no longer ride. He would ride the bicycle from Elyria to my home in Rocky River to work or to Cleveland to work at the bar.

7. It seemed like the law enforcement people in Elyria would nitpick him. Stanley was once issued a ticket for not having a light on his bicycle. Stanley had had altercations at bars. I think he had sometimes been rowdy. I never witnessed any of this. Stanley used to go to bars with his father, Edward Jalowiec.

8. Stanley had arthritis in his hands. The arthritis interfered with his working long periods. I took Stanley to an appointment for some tests.

9. Stanley's family has a golf course in the Elyria area. Stanley had sometimes worked with his grandfather, called "Pinky" because of his red hair, at the golf course. Stanley had also worked at a bar in Cleveland. I sometimes gave Stanley a ride. The bar, formerly called J. J.'s and now called Rudy's, is located at W. 25th and Lorain.

10. Stanley worked on his G.E.D. when Stanley was at the Lorain County Jail. Stanley is also a good artist - cartoon things - he has a talent.

11. I had the feeling that Stanley had a rough time coming up, since he was 16 years. Stanley's parents have been divorced for some time.

FURTHER AFFIANT SAYETH NAUGHT.

RAY PASTERCZYK

SWORN TO AND SUBSCRIBED in my presence this 15 day of March, 1997.

NOTARY PUBLIC
Commission Expires: 5/11/97

EXHIBIT F

STATE OF OHIO :
: SS.
COUNTY OF LORAIN :

AFFIDAVIT

Now comes Julie Valentine being first duly sworn according to law, and states the following:

1. I have known Stanley Jalowiec for about five years. We dated briefly and have remained friends. I was not interviewed at the time of Stanley's trial.

2. Stanley was easy-going. He liked to have fun - he never wanted to sit around the house. Stanley has a good sense of humor and he is real funny. He tries to, or likes to, hide his feelings when he's hurt. He likes to play the tough guy when he's bothered or upset. Stanley is generally real nice and good-mannered. I have never really seen him angry.

3. Stanley is great with children. I know this because I often saw him with Jessica, Tammy's daughter, and Jackie's, his former girlfriend's, children. He also would call and send them cards and pictures. Stanley is really interested in them. He's always asking how they are doing.

4. I was not surprised Stanley was in trouble because of the people he was around. I know the people he was hanging out with. They're not a good crowd. I think he was excited by it all. Stanley was hanging out with that crowd because he would be getting or selling drugs. He was using drugs quite a bit at the end. He used everything he could get his hands on, including marijuana, crack, cocaine. He would try to hide it from me. The drugs made him suppress how he felt and he took them to not feel. I think Stanley was upset about his life. I think he was heartbroken over his break-up with Jackie.

FURTHER AFFIANT SAYETH NAUGHT.

JULIE VALENTINE

SWORN TO AND SUBSCRIBED in my presence this 11th day of March, 1997.

NOTARY PUBLIC
Commission Expires: 5/11/97

EXHIBIT G

STATE OF OHIO :
: SS.
COUNTY OF CUYAHOGA :

AFFIDAVIT

Now comes Thomas Evans being first duly sworn according to law, and states the following:

1. I have known Stanley Jalowiec for seven or eight years. I am the manager at Rudy's Tavern, 2032 W. 25th Street, Cleveland; Stanley worked at that tavern when it was called J.J.'s.

2. At the time of Stanley's trial, I offered my assistance but no one ever spoke to me.

3. Stanley was an entertainer. He never lowered himself to become a prostitute. Stanley created an illusion that he enjoyed his work, but he treated it as a job. The job enabled Stanley to make money to help support his girlfriend and her children. Stanley was not an educated man.

4. He cared for that girl [Jackie], he tried to be a father to her children. These children are not Stanley's children, but he tried to be a father to them. Stanley was a dedicated young man. Stanley would care for the baby, sometimes bringing the baby with him to visit. He tried to create a homelife [for Jackie and the children]. Stanley was looking for some sense of acceptance and fatherhood was a means to that end. Stanley was not raised in the best environment.

5. During the three or four years Stanley worked at the tavern, he never exhibited any vile or mean traits. I never saw him violent. In fact, I have seen him walk away from fights. I have never seen traits of anger, anxiety or hatred in Stanley. His agenda was peace and harmony.

6. Stanley was not a great user of illicit drugs. I did not see any signs of cocaine or crack use. While Stanley may have smoked a little marijuana, or may have even sold a packet or two of drugs if he needed money, I do not believe Stanley was as involved in drugs as was portrayed at his trial.

7. Stanley also did minor house repairs for me. Stanley was at my home on numerous occasions. Stanley was a pretty stable kid, dependable and honest. I have a lot of collectibles at the house. Stanley is not a thief.

FURTHER AFFIANT SAYETH NAUGHT.

12E

Thomas E Evans
THOMAS EVANS

SWORN TO AND SUBSCRIBED in my presence this 13th day of March, 1997.

Jane George
NOTARY PUBLIC
Commission Expires: 8/11/97

EXHIBIT H

STATE OF OHIO :
: SS.
COUNTY OF LORAIN :

AFFIDAVIT

Now comes Edward Jalowiec, Jr. being first duly sworn according to law, and states the following:

1. I am Stanley Jalowiec's father. I have been employed at Continental Concrete Walls (CCW) for approximately 3 years. During the time of the offense, I was in Pennsylvania doing construction work for Industrial Pollution Control (IPC).

2. After my divorce, I went to Georgia for two years, then spent time in West Virginia, and worked in New York and Pennsylvania.

3. I testified during the penalty phase of Stanley's trial. Stanley's attorney said to me on the day I testified, "if you want to go up in front, go up in front, if not, it's okay, don't." I wanted to speak on my son's behalf. I was not further prepared by the attorney.

4. My mitigation testimony included talking about my relationship with Stanley, the Sam's incident that resulted in the arson charge, the arthritis and its affects.

5. Stanley was not a violent person. He wouldn't shoot a rabbit.

6. Stanley had worked at the Chronicle as a stuffer, when he was 20 or 21 and at the corner Convenient store.

7. Me and my children are well-known and respected at Elyria bars. Me and Stanley always ran together. When we went to the bars, there was never any trouble. Everybody loved him [Stanley].

FURTHER AFFIANT SAYETH NAUGHT.

Edward J Jalowiec
EDWARD JALOWIEC, JR

SWORN TO AND SUBSCRIBED in my presence this 11 day of March, 1997.

NOTARY PUBLIC
Commission Expires: 5/11/97

EXHIBIT I

CENTER FOR
Effective Living, Inc.

April 3, 1996

TO: Attorney Joseph C. Grunda

FROM: Deborah A. Koricke, Ph.D.

RE: Stanley Jaloweic

At your request, I conducted a psychological examination and testing of Stanley Jaloweic at the Lorain County Correctional Facility on April 3, 1996. During the approximately 3 hours I spent with Mr. Jaloweic, I conducted a clinical interview, as well as psychological testing consisting of the Shipley Scales and Minnesota Multiphasic Personality Inventory. The purpose of my evaluation was to assess any mitigating circumstances that may be present regarding the client's aggravated murder conviction for purposes of upcoming sentencing.

Mr. Jaloweic was cooperative during my meeting and the results of testing performed are believed valid. The client's IQ on the Shipley was measured at 98, within the average range. His MMPI was within admissible validity limits, despite his attempts to respond in an overly positive picture of himself. He shows limited insight into his effect on others and is attempting to project an overly virtuous image to others. He is a naively defensive person. He is often uncompromising and can overuse the defense of repression. The profile usually indicates an excessively conventional and narrow lifestyle. Also, his ability to operate under stress is mediocre. Paranoid features are also evidenced.

The client gives a history of being born in Elyria on 8/17/70 and living in the area throughout his life. He was raised by both parents, and reports no mistreatment during childhood. Both parents are alive and well. Mr. Jaloweic was the second of four children, having two brothers and one sister. He was diagnosed as hyperactive at an early age and took medication (Ritalin) for this condition until approximately the 5th grade. He repeated the first grade because of dyslexia and had problems reading most of his school years.

East/Administrative Offices • Signature Square II • 25101 Chagrin Blvd. #310 • Beachwood, Ohio 44122-5619

West • INA Building • 14701 Detroit Avenue #344 • Lakewood, Ohio 44107

Telephone: (216) 464-7555 • **FAX:** (216) 464-8733

The client had other problems in childhood, engaging in acts which resulted in involvement with the legal system in his teens. He was hospitalized psychiatrically at age 16 for suicidal ideation and placed in a special education setting because of his psychiatric symptoms.

The client was diagnosed with rheumatoid arthritis following a hospital stay in the fifth grade. His job history was erratic due to problems with this condition adversely affecting his ability to work.

While he was not married nor had any children of his own, he had a relationship of approximately six years with a woman, whose two children he helped care for during the time they were involved.

SUMMARY

After assessing the results of my evaluation and the other data available to me, I believe there are mitigating circumstances which should be seriously considered by the jury in their consideration of the appropriate sentence in this case.

These are:

- his psychiatric condition - the client has had a persistent delusional belief, which he continues to hold, that there is a monkey which is his "best friend" and continues to communicate with him. Thus, he meets the criteria for a psychotic disorder, a serious mental impairment.

- his history which does not indicate seriously violent acts in his past, and indicates positive, long term relationships with others.

- his relatively young age.

EXHIBIT J

JAMES R. EISENBERG, Ph.D.
161 NORTH STATE STREET
PAINESVILLE, OH 44077

PHONE (216) 354-6030

FORENSIC AND CLINICAL PSYCHOLOGY

DIPLOMATE, AMERICAN BOARD
OF FORENSIC PSYCHOLOGY

AFFIDAVIT OF JAMES R. EISENBERG, Ph.D.

Re: State of Ohio v. Stanley Jalowiec

IN THE STATE OF OHIO

COUNTY OF LAKE, SS:

I, James R. Eisenberg, being first duly sworn according to law, state the following:

1) I am a psychologist, licensed to practice in Ohio since 1978.

2) I hold Board Certification from the American Board of Professional Psychology and am a Diplomate of the American Board of Forensic Psychology.

3) I am a tenured Professor of Psychology at Lake Erie College and have been employed there since 1977.

4) For the past seventeen years I have been the Court Psychologist for the Lake County Forensic Psychiatric Clinic and I continue to serve in that capacity for the Lake County Court of Common Pleas.

5) In the course of my employment with the Psychiatric Clinic and my practice as a Forensic Psychologist, I have evaluated more than five thousand criminal defendants including approximately one hundred and fifty capitally charged defendants and twenty-five death penalty inmates for post-conviction.

6) I am recognized nationally on my expertise in the role of the psychologist in death penalty litigation and have presented workshops to the American Academy of Forensic Psychology on this topic every year for the past four years. I have presented numerous talks on the same subject to attorneys

"Death Penalty Litigation: Evaluating Mitigating and Aggravating Factors." Contemporary Issues in Forensic Psychology - Workshop Series. April 30, 1994, Baltimore, Maryland.

"Forensic Psychology: Shrinking the Case." Forensic Science CLE Workshop: Sex, Lies & Microscopes. Presented by the Ohio Association of Criminal Defense Lawyers, June 5, 1992, Akron, Ohio.

"Penalty Phase Investigation and Advanced Mitigation." presented at the Ohio Death Penalty Seminar Death Penalty Litigation in the '90's. Cleveland, Ohio, May 7-8, 1992.

"Mitigation: The Basic Building Blocks." Death Penalty Seminar by the Ohio Association of Criminal Defense Lawyers. Cincinnati, Ohio July 13-14, 1989.

7) I have testified for the prosecution, defense and for the court. I am very familiar with the type of preparation required for capital cases, especially mitigation of the death penalty.

8) The preparation for the mitigation phase of a capital case is a long and tedious task. The preparation involves extensive research into the background of the defendant especially if he or she comes from a different culture. Mitigation investigation includes a collection of all available records from schools, mental health clinics, juvenile authorities, hospitals, psychologists, school psychologists, social workers, psychiatrists, employers, probation officers, etc. The collection of records is vitally important in the area of intellectual and emotional development, sexual and marital development, medical history, and other collaborative material. In my experience, these records often do exist, but its takes months to collect them.

9) A forensic psychologist and a social worker with mitigation experience are the individuals most qualified for this task.

10) The information gathered through mitigation investigation is essential for defense counsel in order to gain detailed, accurate knowledge of the defendant.

11) Such knowledge enables the defense counsel to formulate defense strategies both for the trial and mitigation phases, and to provide the trier of facts with an accurate and detailed understanding of the defendant, his culture and environment, and potentially mitigating factors.

12) As stated previously, the process of gathering this information often takes many months and requires the coordination of criminal and social investigators, mental health professionals and attorneys.

a. This process should begin from the moment of the indictment. The mitigation specialist, the psychologist, the investigator, and all other persons involved in this team approach should meet regularly to determine strategy for both the guilt and mitigation phases. In order to prepare properly for both trial and mitigation, it is necessary to pursue and investigate every conceivable avenue related to mitigation. This serves to explain the defendant's behavior in light of his complete life history, including psycho-social and physical development.

b. There exists a separate obligation to investigate mitigation since it is often different in scope and purpose from investigating issues concerning guilt or innocence. Only through this type of detailed exploration into the life of the defendant could it be hoped to develop a cohesive theory of mitigation to present to the jury.

13) The responsibility ultimately lies with the defense attorney to initiate and coordinate this process and provide direction and integration to the defense. Any decisions to include or exclude witnesses during mitigation must be based on an informed understanding of each participant's role.

14) To summarize, any preparation for the mitigation phase should include the following:

I. Obtaining the following background information:

a. The defendant's developmental experiences;
b. The defendant's family dynamics and functioning;
c. The parenting capacities in the family of the defendant;
d. The defendant's academic capacities and achievements as well as failures;
e. The defendant's work experiences including relationships with co-workers as well as job skills;
f. The defendant's interpersonal relationships and social adjustments;
g. The defendant's sexual and marital history;
h. The defendant's medical history;
i. The psychological functioning across the defendant's lifetime.
j. Issues relating to cultural and social differences.

[illegible] can be obtained by [illegible] interviews with:

f. medical and psychiatric professionals.
g. cultural experts who might be able to provide valuable information given a defendant's particular circumstances.

In preparation for this affidavit I have reviewed the two-page psychological report dated April 3, 1996, prepared by Deborah A. Koricke, Ph.D., of the Center for Effective Living, for purposes of assessing mitigation circumstances.

UPON MY REVIEW OF THE ABOVE MENTIONED INFORMATION, I HAVE THE FOLLOWING OPINION:

15) The psychological evaluation and report prepared by Dr. Koricke lacks any forensic relevance. Dr. Koricke did not interview Mr. Jalowiec until April 3, 1996 following his conviction on March 20, 1996. She had interviewed no one to verify or to develop an in-depth psycho-social history for Mr. Jalowiec prior to the mitigation hearing which began on April 6, 1996. She relied totally on information provided by the defendant and cites no other sources of information. This type of evaluation may be adequate in a clinical setting, but does not meet any of the specific standards established for forensic evaluations as described in the Specialty Guidelines for Forensic Psychologists. Since Dr. Koricke is not Board Certified by the American Board of Professional Psychology in Forensic Psychology (or any other field of psychology) she should have declined to do the evaluation. According the Guidelines, **"Forensic psychologists provide services only in areas of psychology in which they have specialized knowledge, skill, experience and education."** Based on the information available, Dr. Koricke lacked the specialized knowledge, skill, experience, and education to perform the above-stated evaluation. Even her diagnosis of a "psychotic disorder" does not conform to the specific criteria listed in the Diagnostic and Statistical Manual of Mental Disorder, fourth edition.

16. Thus the defense attorneys were given inaccurate and misleading information about their client preventing them from developing any type of relevant mitigation theory. No attempt was made to explain the offense in psychological terms and no attempt was made to explain the diagnosis offered. No apparent attempt was made to provide an in-depth psychological evaluation prior to the trial.

17. Because of this lack of investigation and data, the defense counsel had no clear understanding of the defendant or of his offense. Therefore defense counsel had no well formulated, coherent theory of mitigation.

18. A competent forensic psychologist would have spent far more that three hours (which included psychological testing) with the defendant and would have spent many hours interviewing all relevant sources of information about the client. The evaluation should have started months before trial.

19. No attempt was made to provide information to the jury from professionals concerning Mr. Jalowiec's childhood, his juvenile rheumatoid arthritis and the effects that would have on his psycho-social development, his learning disabilities, prior suicide incidents, and a cultural understanding of his home environment.

20. It is reasonable to assume that further investigation would have been helpful (and would still be helpful) in increasing understanding of the defendant and the offense, that such information could be testified to in a mitigation hearing, and that such information could of consequence to a trier of fact in weighing the aggravating and mitigating factors in this case.

FURTHER AFFIANT SAYETH NAUGHT.

James R. Eisenberg, Ph.D.

Sworn to and subscribed before me this 14th day of March, 1997.

Notary Public

BARBARA EMCH
Notary Public, State of Ohio
My Commission Expires [illegible]-2000
(Recorded in Geauga County)

Date: 3-13-97

SMART

EXHIBIT K [redacted]

Medical Record Correspondence Copying

Tracking #:

Pre-payment Request

Payment options : Check, Visa & Master Card. Checks must be payable to Smart Corporation. Credit card payments please call (310) 224-4159.

If paying by check, PLEASE mail check payment to the Remit Address below.

Sold To :	Patricia G. Smart	**Check Payment Remit To :**	EMH Regional Medical Center
Requester:		**Attention :**	Smart Medical Records
Address:	4403 St. Clair Ave.	**Address :**	630 E. River St.
City, ST, Zip:	Cleveland, OH 44103 425	**City, ST, Zip :**	Elyria, OH 44035
Telephone :		**Telephone :**	216-329-7500 EXT-7055

Dear Medical Record Requester,
We received your request for medical record copies for

Patient: Stanley Jalowiec **Date of Birth:** [redacted]

Soc. Sec. #: [redacted] **Date of admission:** ALL

SMART Corporation has contracted with EMH Regional Medical Center (Medical facility/ State) to copy it's authorized requests for medical records. We are an independent service organization that specializes in processing third party requests for medical records. Our own qualified personnel inspects, copies and mails the medical record requests. All copies are made from original medical records at the designated health care facility.

The charges for performing this service are detailed below. We require PREPAYMENT in order to process your request.

SMART'S FEE SCHEDULE:

Page Count	133 @ 1st 1 page 1.00 rest copy	Retrieval Fee	6.00	Transaction Total	$ 460.04
Basic Fee	15.00	Shipping/Handling	5.29	(Check Number)	
Per Page Fee	1.50 @ 1st 1.00 rest copy	Sales Tax	21.75	(Credit Card Tracking #)	
				Do NOT write Credit card number on this form!	

If you prefer, we can provide an abstract for $_____ which consists of:

Face Sheet	☐	History & Physical	☐	x-rays	☐
Consultations	☐	Discharge Summary	☐	Other	☐
Progress Notes	☐	Pertinent Lab Tests	☐		

Smart Representative Rhonda Bonner Rep# 6753

Health Care Facility Phone# 216-329-7500 EXT-7055 Area / Site # 352 / 36100

PreBill/Rev1/97

EXHIBIT L

LAIN COUNTY - GENERAL DIVISION
COURTHOUSE - ELYRIA, OHIO
DONALD J. ROTHGERY, CLERK
D O C K E T S H E E T

STYLE: OHIO VS. SMITH
ACTION: CRIMINAL
JUDGE : KOSMA J. GLAVAS

CASE NO. 94CR045231
FILED: 4/19/94

****

8:30 AM. BOND SET AT $20,000. CASE. MR BOYLAN APPOINTED TO REPRESENT DEFT. DEFT TO BE HELD IN CUSTODY OF ELYRIA POLICE DEPARTMENT, AT THAT DEPT EXPENSE.
JOURNAL 738 PAGE 861

4/22/96 FILING — LETTER FROM DEFENDANT TO JUDGE GLAVAS FILED

4/29/96 (KJG) — MERITS HEARING SET FOR 5-6-96 AT 8:30 A.M. IS RE-SET FOR 4-29-96 AT 8:30 A.M.
JOURNAL 740, PAGE 1490

4/29/96 (KJG) — AT THE REQUEST OF THE DEFENDANT, AND WITH THE CONSENT OF THE PROSECUTING ATTORNEY, THE MERITS HEARING IS ADVANCED TO 8:30 A.M., APRIL 29, 1996.
JOURNAL 740, PAGE 1491

4/29/96 (KJG) — MERITS HEARING CONTINUED TO 5/6/96 AT 8:30 AM.
JOURNAL 740 PAGE 1492

5/02/96 (KJG) — AT COUNSEL'S REQUEST AND CAUSE BEING ESTABLISHED, DEFT. GRANTED EMERGENCY RELEASE TO THE CUSTODY OF REV. WILLIAMS WHO SHALL TRANSPORT DEFT. TO CLEVELAND METRO HOSPITAL TO ATTEND WIFE'S SURGERY AND RETURN TO E.P.D. UPON COMPLETION THEREOF.
VOLUME 741 PAGE 207

5/07/96 (KJG) — CASE CALLED FOR MERITS HEARING. COURT ORDERS DEFT TO CONTINUE ON PROBATION. ORIGINAL SENTENCE IS NOT REIMPOSED. DEFT ORDERED TO PLACEMENT IN 3/4 HOUSE, GRANTWOOD IN CLEVELAND. DEFT MUST COMPLY WITH ALL TERMS AND CONDITIONS OF PROBATION. DEFT TO REMAIN AT GRANTWOOD A MINIMUM OF 3 WEEKS AND SHALL NOT LEAVE WITHOUT APPROVAL OF PROBATION DEPT.
JOURNAL 741 PAGE 674

6/06/96 (KJG) — CAPIAS WITHDRAWN IN THAT THIS CASE HAS COME TO A FINAL DISPOSITION AND IS CLOSED.
JOURNAL 743 PAGE 496
1 CC TO SHERIFF

6/10/96 FILING — SHERIFF'S RETURN, CAPIAS WITHDRAWN
MARTIN J. MAHONY, SHFF

FILED
MAR 17 12 30 PM '97
CLERK OF COURTS
DONALD C. NUGENT

APPENDIX

PART II

STATE OF OHIO VS. STANLEY JALOWIEC

95 CR 046840

EXHIBIT M

OHIO
NEWS BUREAU INC.
CLEVELAND, OHIO 44115
216/241-0675

CHRONICLE TELEGRAM
ELYRIA, OH.
PM CIRC. 37,065

MAR-20-96

Jalowiec guilty

Ginger Parker
The Chronicle-Telegram 249

ELYRIA — Jurors today convicted Stanley Jalowiec on charges he murdered a one-time drug informant two years ago.

Jalowiec, 25, of Elyria was led out of the courtroom in shackles and handcuffs after a jury found him guilty of aggravated murder.

He is the second of three men charged with murdering Ronald Lally to be convicted.

Jurors will reconvene April 9 to hear testimony on whether Jalowiec should receive the death penalty. They have the option of recommending that he die in Ohio's electric chair or serve a life sentence in prison.



Stanley Jalowiec

LED OUT OF COURT. Stanley Jalowiec, bent over because of the handcuffs and leg irons he is wearing, is taken to Lorain County jail by sheriff's deputies. He was found guilty of murder.



BRUCE BISHOP / CHRONICLE

Jalowiec finds 'joy,' but no 'justice' here

Ginger Parker
The Chronicle-Telegram

ELYRIA — Stanley Jalowiec smirked Wednesday after jurors convicted him in the murder of a police informant two years ago.

The 25-year-old Elyrian later explained his reaction by saying, "The Lord says any time you go through trials, look for joy."

Jalowiec's mother apparently could find no joy in the verdict. She left the courtroom crying and would not talk with reporters.

See **JALOWIEC**, A8

JALOWIEC

From A1

Jurors found Jalowiec guilty of aggravated murder in the death of Ronald Lally on Jan. 19, 1994. The jury will reconvene April 9 to hear additional testimony on whether Jalowiec should receive the death penalty or life in prison.

Jalowiec called a reporter Wednesday afternoon and said he was prepared for the guilty verdict.

"It was only obvious," he said. "I'm not gonna get justice in Lorain County."

Jalowiec has accused Elyria police Detective Al Leiby of strong-arming witnesses into testifying against him because he would not cooperate with police.

Leiby strongly denied the accusations. "People should keep in mind that desperate people say and do desperate things," he said.

Jalowiec said he plans to better himself whether he gets life in prison or is sent to Ohio's Death Row, where six other Lorain Countians are already awaiting execution.

"I currently passed the GED (General Educational Development) pre-test and am preparing to take that and go from there," he said. "I figure if I go to prison I can get in some school program and better myself."

Jalowiec, who dropped out of high school in the 11th grade, said he'd like to study law or work in a prison drug rehabilitation program.

Jalowiec is the second person convicted in Lally's murder. Raymond Smith, 55, of Elyria was found guilty in December, and Common Pleas Judge Kosma J. Glavas sentenced him to death.

Raymond Smith's son, Daniel, will go on trial on aggravated murder charges next month. Jalowiec said he may testify on Daniel Smith's behalf.

Lally, 30, of Elyria was a crack addict who told police about his drug dealings with Raymond Smith and Smith's son, Daniel, 24. Lally was murdered when he was scheduled to testify against the younger Smith.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4217

Jurors hear Jekyll-Hyde sides of killer

Ginger Parker
The Chronicle-Telegram

ELYRIA — Depending on who was testifying Tuesday, convicted killer Stanley Jalowiec was either a kindhearted son who would do anything for his family or a violent drug dealer.



Jalowiec

Jurors listened to about eight hours of conflicting testimony on whether Jalowiec deserves life in prison or the death penalty.

Last month, the jurors convicted Jalowiec of killing Ronald Lally, an informant for the Elyria Police Department.

Testimony and closing arguments concluded this morning. Jurors were expected to begin deliberations this afternoon. They will then make a recommendation to Common Pleas Judge Kosma Glavas, who will make the decision.

On Tuesday, several friends and members of Jalowiec's family told jurors that he is a good-natured, caring person.

"He would take (my son) to physical therapy and baby-sit the older boy," said Jackie Chaffin, Jalowiec's girlfriend.

His mother, Sarah, described her son as a "fun-loving kid," who used to bring home stray animals.

His father, Edward, told jurors that his son isn't capable of killing.

"I can't see how he could've done this," Edward Jalowiec said. "I do a lot of hunting, and he wouldn't even shoot a rabbit. That's the truth."

His sister, Tammy, said her brother wasn't the violent type and had seen him walk away from bar fights.

"I've seen my brother walk away from a lot of fights," she said, holding back tears. "And I've seen him with my daughter. He couldn't do this. I just ask you to please not sentence him to death."

But police and witnesses gave a different account.

Jeff Hicks said Jalowiec jumped him outside of an Elyria bar Jan. 27, 1994 — eight days after Lally was found dead in a Cleveland cemetery.

See **JURORS,** D2

JURORS

From D1

"I got hit by Stan," Hicks nervously told jurors. "He hit me with a bat or some kind of club."

The beating was so severe that Hicks was knocked unconscious. He said his friends told him Jalowiec kicked him in the head several times after he passed out on the pavement.

Deanna Butler, a prosecution witness, testified that she saw Jalowiec inside the bar bragging about how he kicked Hicks in the head.

"Stanley happened to be standing next to me," she said. "I heard him laughing to his friends and showing them how he kicked Jeff in the face."

Hicks was hospitalized after the beating. He had several broken bones in his face, and his jaw was shattered. Doctors wired his jaw shut, but an infection set in, Hicks said. He was hospitalized for three months and near death at one point, he testified. The injuries left him with a $20,000 medical bill.

Jalowiec's parents both testified that they never knew their son to take drugs — in particular crack cocaine.

But Sheriff's Capt. Dennis Cavanaugh, who is the leader of the county's drug task force, testified that police had bought crack cocaine from Jalowiec on Sept. 28 and Oct. 6, 1994.

Elyria police Detective Scott Sargent also testified he once frisked Jalowiec after a traffic stop, and a crack pipe fell out of Jalowiec's pants.

But defense attorney Joseph C. Grunda attacked Sargent's credibility by asking, "Isn't it true you've been convicted of lying under oath?"

Grunda was referring to Sargent's conviction of uttering in 1991. In that case, Sargent testified that he and another officer had a search warrant before they found 2 kilos of cocaine in a car. Witnesses, however, said the officers found the cocaine first and then went for a search warrant. His conviction has been expunged.

Rosenbaum immediately objected to Grunda's question. Glavas ruled that Sargent didn't have to answer.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4218

Man agrees to testify against brother, pal in informant's slaying

Ginger Parker
The Chronicle-Telegram

ELYRIA — Michael Smith, whose statement helped convict his father of killing a drug informant, will testify against his brother and a friend in the same case.

Jonathan Rosenbaum, an assistant county prosecutor, said today that Michael Smith will testify in the next few days in the murder trial of Stanley Jalowiec, 24, of Elyria.

Smith dropped out of sight after giving prosecutors a deposition that accused Raymond Smith, his father, and Jalowiec of killing Ronald Lally, 80, of Elyria in January 1994. Prosecutors said Raymond's other son, Daniel, planned the killing but didn't take part in it.

Authorities expect Michael Smith to take the stand Friday. Today, Rosenbaum called two witnesses who said Daniel Smith approached them for help in killing Lally, who was expected to testify against him in drug cases.

Lynne Altpater, a friend of Daniel Smith, testified that he asked her for poison and chloroform because "he needed to get rid of somebody who was going to testify" against him.

A second witness, Carl E. Hartman, said Daniel Smith approached him twice to kill Lally. On the third time they spoke, Smith told Hartman to forget it, Hartman said. He quoted Smith as saying "Stanley and my dad will take care of it."

In his deposition, Michael Smith said Jalowiec and Raymond Smith beat Lally in the Woodlawn Cemetery in Cleveland on Jan. 19, 1994. After the beating, Raymond Smith shot Lally, the deposition said. Jalow-

See **SMITH,** D2

The life was contained in that [illegible], Draves said.

SMITH

From D1

iec then drove over Lally's body two or three times with a car, according to the statement.

Jalowiec and Daniel Smith each could face the death penalty if convicted. Michael Smith is being held in police custody until the end of the trial, authorities said.

Common Pleas Judge Kosma Glavas is hearing the case because prosecutors said the slaying was planned in Elyria. Prosecutors expect to finish their case Friday, and defense attorneys Joseph C. Grunda and Edward Cleary will call witnesses and decide if Jalowiec will testify.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4219

Killer's fate is resting with jury

Ginger Parker
The Chronicle-Telegram

ELYRIA — Convicted murderer Stanley Jalowiec pleaded with jurors today to spare his life.

Jalowiec, 25, of Elyria took the stand to provide an unsworn statement to jurors debating whether he spend his life in prison or be sentenced to death for his role in the January 1994 death of a onetime police informant, Ronald Lally.

"I ask that you spare my life so I can reform myself from these people," Jalowiec said.

The 11th-grade dropout choked up when he described his childhood dream of becoming a veterinarian and how he faithfully attended school as a child despite suffering from dyslexia.

He said health problems interrupted his perfect attendance from kindergarten to fifth grade. "I begged the doctors to let me go to school," he said.

He also told jurors he once took a job in a gay bar to help cover medical expenses for his girlfriend's second child, who was born deaf and required speech therapy. He described himself as a father figure to her children.

See FATE, A10

From A1

An unsworn statement — allowed by law in the sentencing phase of death penalty cases — means prosecutors do not have the opportunity question defendants about their remarks.

Jalowiec was convicted of aggravated murder last month. Prosecutors say Jalowiec helped Raymond Smith, 55, and his son, Daniel Smith, 24, kill the crack-addicted Lally for telling police about the Smiths' drug dealing.

Raymond Smith was convicted in December and sentenced to death in connection with Lally's death. Daniel Smith is awaiting trial.

Jalowiec and the Smiths drove Lally to Cleveland on the pretense of putting him on a bus to Smith, prosecutors say. Instead, they stopped at a Cleveland cemetery and beat, stabbed and ran over the 30-year-old Lally.

During the 40-minute statement, Jalowiec blamed the Smiths for Lally's murder.

"Why would I do anything?" he asked. "I had no reason to kill this man. He didn't bust me. That's not my family ...It doesn't make sense."

He said the witnesses who implicated him in the case each were facing long prison sentences if they did not cooperate with authorities. He said Michael Smith, another of Raymond Smith's sons who testified against Jalowiec, covered his own involvement by blaming Jalowiec.

"He should be here saying this speech, not me," Jalowiec said.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4220

Defense bypasses witnesses

Lawyers confident of Jalowiec acquittal

Benjamin Gleiser
The Chronicle-Telegram

ELYRIA — Attorneys for a man who faces the death penalty say they can get an acquittal even though they didn't present a defense.

The case of Stanley Jalowiec, 25, of Elyria is expected to go to a jury today after attorneys complete their closing arguments. Jalowiec is one of three men charged in the slaying of Ronald Lally, 30, of Elyria in 1994. If convicted, Jalowiec faces the death penalty.

Attorneys Edward Cleary and Joseph C. Grunda, who are defending Jalowiec, dismissed two defense witnesses Monday because the men cited their Fifth Amendment rights to avoid self-incrimination. Jalowiec also declined to take the witness stand.

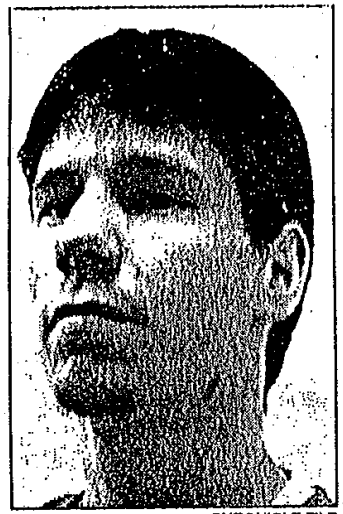
Grunda said he wasn't worried about presenting no defense for Jalowiec.

"The prosecution didn't prove their case," Grunda said. "Everyone who has testified has been totally inconsistent. Every prosecution witness has either been a crackhead or has made a deal to get out of their own problems."

Asked to comment on Grunda's accusation, Jonathan Rosenbaum, an assistant county prosecutor, only smiled.

Jalowiec is the second man to go on trial for the murder of Lally, a one-time informant for the Elyria Police Department.

Raymond Smith, 55, and his son, Daniel, 24, also were charged with aggravated murder. Raymond Smith was convicted and sentenced to death in January for his part in Lally's death. Daniel Smith is scheduled to stand trial next month.



CHRONICLE FILE

STANLEY JALOWIEC: His lawyers say prosecutors didn't prove their case against the Elyria man charged with murder.

Prosecutors said Daniel Smith planned the killing, while Jalowiec and Raymond Smith carried it out in a cemetery in Cleveland.

Grunda and Cleary were forced to jettison their plans for defending Jalowiec after they called Raymond Smith to the stand, and he refused to testify.

Common Pleas Judge Kosma Glavas told the court Raymond Smith's attorney, Harvey Bruner of Cleveland, had advised his client not to talk. If he was questioned, he should decline.

As the shackled Smith was led away, friends and family members shouted their support, saying, "We miss you, baby," and "We have your suit waiting for you."

The defense rested without calling a single witness after

See **JALOWIEC,** C2

JALOWIEC

From C1

Grunda announced that Daniel Smith, Raymond's son, also had been told to avoid testifying because he could incriminate himself.

Bruner said he told Raymond Smith not to testify because the case was being appealed. He hinted there were other reasons for giving his client that advice but declined to elaborate.

Earlier in the trial, Elyria police Detective Al Leiby testified that Lally volunteered to work as a police informant on June 7, 1993, and he specifically wanted to get Raymond Smith because he thought Smith had stolen a microwave oven from Lally's girlfriend.

A few hours after Lally volunteered his services, police wired him and sent him to a home on West River Road, where he bought six rocks of crack cocaine from Smith for $100, Leiby said. That evening, police arrested Raymond and Daniel Smith.

The cases were dismissed when Lally, the prosecution's chief witness, was killed. The cases had been set for trial the morning that Lally died.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4221

Lawyers dispute Jalowiec witness quality

Ginger Parker
The Chronicle-Telegram

ELYRIA — Defense attorneys say prosecutors relied on lying drug addicts to pin a murder charge on Stanley Jalowiec.

"I just hope the jury doesn't electrocute someone based on the testimony of these people," Edward Cleary, a defense attorney said Tuesday.

But Jonathan Rosenbaum, an assistant county prosecutor, picked apart the criticism: "A conspiracy conceived in hell is seldom witnessed by angels. Remember, the state doesn't get to choose its witnesses. They were chosen by the defendant."

Rosenbaum made the statements in his closing arguments Tuesday. The case was turned over to a jury, and the attorneys expect a verdict today.

Jalowiec faces the death penalty if he is convicted. If that happens, the jury would recommend whether Jalowiec deserves to die. Common Pleas Judge Kosma Glavas would make the decision on whether Jalowiec goes to death row.

Jalowiec is charged with aggravated murder in the death of Ronald Lally, 30, of Elyria. He and two other men, Raymond and Daniel Smith, also are charged in the slaying, which happened two years ago.

Prosecutors said Lally was a key witness in a drug trial against the Smiths. On the morning of the trial, Raymond Smith and Jalowiec, a friend of the family, drove Lally to a cemetery in Cleveland. There, prosecutors said, Smith shot Lally and Jalowiec beat him and drove a car over him.

Jurors, who were sequestered overnight, began deliberating Jalowiec's fate Tuesday afternoon. They resumed deliberations this morning.

At Jalowiec's request, jurors will not consider a lesser charge. That means the verdict will be "all or nothing" Glavas said.

In closing statements, Grunda described some of the prosecution's witnesses as drug-addicted liars who testified in exchange for lesser sentences.

Rosenbaum acknowledged that some of the witnesses were not model citizens, but he told jurors they were a reflection of Jalowiec.

Jalowiec is charged with brutally murdering Ronald Lally, a one-time drug informant for the Elyria Police Department. Lally's body was found Jan. 19, 1994, in a Cleveland graveyard. His injuries indicated had been shot, stomped, beaten, run over with a car and had his throat cut, according to testimony.

Jalowiec is accused of beating and stomping Lally and then ramming into him with a borrowed car, according to testimony.

"If this is the case, how co he didn't have any blood him?" asked Grunda. "How c he didn't have any injuries? V weren't his clothes torn?"

But Rosenbaum told ju that Jalowiec had the car was before returning it, "so why c they clean themselves up?"

Rosenbaum has character Lally's death as a "heinous, blood assassination of a gov ment witness."

Raymond Smith's second Michael, testified that he high on crack cocaine and there the night of the murder told jurors his father and Ja iec killed Lally together, whil sat in shock inside the car.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4222

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Jalowiec guilty

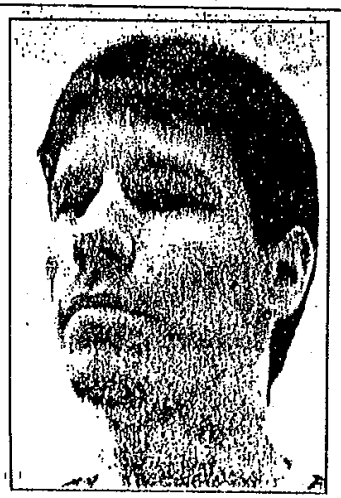
Ginger Parker
The Chronicle-Telegram

ELYRIA — Jurors today convicted Stanley Jalowiec on charges he murdered a one-time drug informant two years ago.

Jalowiec, 25, of Elyria was led out of the courtroom in shackles and handcuffs after a jury found him guilty of aggravated murder.

He is the second of three men charged with murdering Ronald Lally to be convicted.

Jurors will reconvene April 9 to hear testimony on whether Jalowiec should receive the death penalty. They have the option of recommending that he die in Ohio's electric chair or serve a life sentence in prison.



Stanley Jalowiec

Jalowiec guilty

ELYRIA — It took jurors more than seven hours to convict Stanley Jalowiec of murder. Now they'll have to come back April 9 to decide whether the Elyria man should get the death penalty.

Jalowiec, 25, was convicted yesterday of aggravated murder in the death of Ronald Lally, a 30-year-old crack addict and police informant who was slain in January 1994 on the day he was due to testify against Raymond and Daniel Smith in a drug case. Witnesses said Jalowiec drove Lally to a Cleveland cemetery, where he was beaten, shot in the head and run over by a car.

Raymond Augustus Smith, 55, has already been convicted for his role in the killing.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4223

Informant returns to testify

Ginger Parker
The Chronicle-Telegram

ELYRIA — When Michael Smith became a police informant, he broke away from the drug dealers of his past, including those in his family.

Today, Smith was to tell a jury how his father, Raymond, and brother, Daniel, joined a friend in killing another informant two years ago.

Smith is scheduled to testify today in the case of the friend, Stanley Jalowiec, 25, of Elyria, who is charged with aggravated murder. If convicted, he could face the death penalty.

Smith dropped out of sight after giving a deposition to prosecutors that described how Ronald Lally, 30, of Elyria was killed Jan. 19, 1994. Lally was a confidential informant for Elyria police.

Based on the deposition, Smith's father was convicted and sentenced to death in January for his role in the murder. Daniel Smith, 24, also is charged with aggravated murder, and he is scheduled to stand trial next month.

The deposition said Jalowiec and Raymond Smith beat Lally because he was to testify against Daniel Smith. Raymond Smith then shot Lally, according to the statement, and Jalowiec drove over his body.

On Thursday, prosecutors gave the jury pictures of Lally's body.

Terry Hopkins, a convicted felon, told the jury that Jalowiec and Raymond Smith bragged about killing Lally.

Jonathan Rosenbaum, an assistant county prosecutor, asked Hopkins what Jalowiec bragged about.

"He said he had stomped him and ran him over with the car," Hopkins said.

But defense attorney Edward Cleary was critical of Hopkins' testimony. Cleary suggested Hopkins was giving the testimony in exchange for his suspended five- to 15-year prison sentence.

Hopkins was serving a prison term after he was convicted of attempted aggravated burglary, attempted felonious assault and domestic violence. He was released from prison and p on super shock probation.

Cleary said Hopkins cha his testimony from what he fled at Raymond Smith's tria

"In your previous testin you could not remember wh cifically said what, but now remember," Cleary said.

Hopkins said: "Now tha had time to think about remember."

Hopkins and two other nesses also testified that D Smith approached them for in killing Lally.

See TESTIF

TESTIFY

From C1

Lynne Altpater, a friend of Daniel Smith, testified that he asked her for poison and chloroform because "he needed to get rid of somebody who was going to testify" against him.

Hopkins said Daniel Smith also approached him for help, but he referred him to his friend, Carl E. Hartman.

Hartman testified that Daniel Smith approached him twice to kill Lally. On the third time they spoke, Smith didn't ask, Hartman said.

He quoted Smith as saying, "Stanley and my dad will take care of it."

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4224

Witness' brother is banned from Jaloweic trial

By STEPHEN HUDAK
PLAIN DEALER REPORTER

ELYRIA — A witness' brother was banned from a courtroom yesterday after a judge ruled he disrupted a death-penalty case.

Raymond A. Smith III went into a loud coughing spasm that deputies interpreted as an attempt to cover up an outburst aimed at the witness.

Lorain County Common Pleas Judge Kosma J. Glavas told Smith he could not return when the trial resumes on Monday.

Smith III, whose father is sitting on death row because of his brother Michael's testimony, denied his coughing spasm was deliberate or was used to cover up threats aimed at the witness.

"I won't be no scapegoat," Smith said. "The prosecutor's mad because even he can see Mike wasn't where he said he was and didn't see nothing."

Michael Smith, 29, is the state's key witness in the trial of Stanley Jaloweic, 25, who is accused of helping Smith's father murder a police informant.

Jaloweic could face the death penalty if convicted.

Raymond Smith, 56, is appealing his conviction from death row at Mansfield Correctional Institution. He was found guilty in an earlier trial.

Ron Lally, 30, of Elyria was shot, stabbed and beaten in Woodland Cemetery in Cleveland on Jan. 19, 1994, the day he was to testify in a drug trial.



RAMON MENA OWENS / PLAIN DEALER

Stanley Jalowiec was in Lorain County Common Pleas Court yesterday, where he is on trial. He is accused of helping to kill a police informant in a Cleveland cemetery.

The defendants in the drug case were Raymond and his son, Daniel Smith.

Michael Smith testified his father and Jaloweic were responsible for the cemetery killing of Lally.

Though he testified he was at the cemetery, he said he did not realize Lally was going to be killed. Michael Smith has not been charged.

He said his father held a gun on Lally and told him he would "never snitch on nobody again." Michael Smith said his father shot Lally in the teeth.

Smith said he dropped his head into his hands.

"But I could hear things," he said.

SEE WITNESS/4-B

Brother is banned in tria

WITNESS FROM 1-B

"I could hear Ron promising 'I won't tell nobody, I won't tell nobody,' and begging 'Please don't kill me.' "

Smith said he froze when his father called for help, but Jaloweic got out of the borrowed convertible and tried to stuff Lally into the trunk.

Lally's 6-foot-6 body wouldn't fit.

Michael Smith said Jaloweic then climbed back into the driver's seat and, three times, threw the convertible into reverse and backed over Lally.

"I was hoping this was all a bad dream," he said.

Michael Smith said that as Jaloweic drove them back to Lorain County, his father took the gun apart and piece by piece flipped it onto the highway.

Defense lawyers Edward Cleary and Joseph Grunda challenged Smith's recall, insisting he did not know what happened in the Cleveland cemetery.

They quizzed Michael Smith about his testimony that Jaloweic stopped the car at a gas station on the way to the cemetery and bought beer at 3 a.m.

Ohio law prohibits liquor sales after 2:30 a.m.

They also were skeptical that Jaloweic, Raymond Smith and Lally were partying with crack cocaine and beer as they drove into Cuyahoga County, as Michael Smith had testified.

"What if I told you that according to the deputy coroner's testimony, there was absolutely no alcohol in Ron Lally's system?" Cleary asked Smith.

"I don't know how [there was not]; he was drinking," Smith remarked.

Glavas, who is presiding over the trial, scolded spectators earlier in the day, saying he had a report that someone had yelled at jurors.

As Michael Smith left the courtroom, Raymond A. Smith III began coughing loudly, and deputies claimed he shouted to intimidate his brother. Raymond A. Smith III insists Michael has lied.

But Raymond A. Smith III said he did not send a message. He said his cough forced him to leave the trial earlier.

He said he plans to be in court when the trial resumes Monday.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4225

Brother's threat results in ban from courtroom

Ginger Parker
The Chronicle-Telegram



Michael Smith

ELYRIA — A judge banned a man from the courtroom Friday after the man threatened his brother, who had just testified that their father and a friend murdered a drug informant.

As Michael Smith, 29, was leaving the courtroom, his brother, Raymond A. Smith III, coughed loudly and mumbled, "Oh, shoot," as Smith passed by, said a Sheriff's deputy.

Courtroom doors were immediately locked after Michael Smith and the jurors were dismissed. Inside, Common Pleas Judge Kosma J. Glavas questioned Raymond A. Smith III, who denied making a threat.

"I didn't make no remarks," Smith said.

But Chief Assistant Prosecutor Jonathan E. Rosenbaum told Glavas he also heard the threat.

During Michael Smith's testimony, his family had grimaced and frowned. At one point, Raymond Smith III was overheard muttering to himself: "I can't believe this."

An angry Glavas, who had warned spectators earlier in the day not to make any remarks in court, reprimanded Smith and banned him from the courtroom.

See **SMITH,** A11

SMITH

From A1

Michael Smith, a convicted felon, was testifying at the trial of Stanley Jalowiec, charged with murdering Ronald Lally. Lally was a one-time confidential informant for the Elyria Police Department. If convicted, Jalowiec could face life in prison or the death penalty.

Jalowiec, 25, of Elyria is the second of three men to go on trial for Lally's death. Michael Smith's father, Raymond Smith, 55, and a second brother, Daniel D. Smith, also were charged with aggravated murder. Raymond Smith was found guilty and sentenced to death in January by Glavas. Daniel Smith is scheduled for trial next month.

Michael Smith gave police a lengthy police statement about the murder and a sworn deposition last summer. His life was threatened and he went into hiding. Police said they could not find him, and Rosenbaum used the deposition to help convict the father last December.

On Friday, Michael Smith took the stand and told jurors he came out of hiding and surrendered to police last week. He has since been held in the Elyria City Jail on a probation violation.

Appearing aloof and unemotional, the younger Smith related Lally's murder in a Cleveland cemetery on Jan. 19, 1994.

Michael Smith said, he, Jalowiec and his father drove Lally from Elyria into Cleveland under the premise they were taking him to the bus station.

During the ride, Michael said his father brandished a gun in Lally's face and asked why he had told police about their drug dealings.

"He asked Ron, 'Why'd you set my son up?' and Ron was saying, 'I didn't, I didn't,' " Smith told jurors. "Dad wasn't going for that answer and said, 'We heard the tape and I know your voice.' "

Michael Smith said he was surprised to see his father pull the gun on Lally and said he had no idea what was going on.

Michael Smith said Jalowiec was driving and that his father told him to pull into Woodlawn Cemetery.

"We pulled in and it was real dark," Michael Smith testified. "Dad got out and put the gun in Ron's face and he told Ron, 'You'll never snitch on nobody again,' and shot him.

"I heard Ron say, 'You shot me in the head,' " Michael Smith said.

Defense attorney Edward Cleary raised doubts that Lally could have spoken, since the bullet went through his throat and lodged in his spinal cord.

But Michael Smith told jurors Lally's words and the sound of the gunshot haunted him for months afterward. He said he suffered nightmares, attempted suicide and experienced extreme guilt because he did nothing to help Lally.

"I dropped my head and just sat there (in the back seat)," Michael Smith said.

He said his father began to beat Lally and then asked Jalowiec and Michael Smith if either one had a knife. Jalowiec took a small knife from his key chain and joined the elder Smith outside the car, Michael testified.

He said he heard his father and Jalowiec trying to put the body in the trunk.

"I could hear them say, 'He ain't gonna fit, he's too big,' " Michael Smith told jurors.

Cleary was critical of Michael Smith's testimony. He suggested that the younger Smith testified to please police officers.

Cleary also questioned how Michael Smith knew the men killed Lally if he didn't actually witness the murder.

Michael's response was: "I know that three people got out of the car and only two got back in."

The trial will resume Monday. Raymond Smith is expected to take the stand.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4226



BRUCE BISHOP / CHRONICLE

BACK TO JAIL: Stanley Jalowiec of Elyria, who is accused of killing a police informant, is helped into a sheriff's cruiser Tuesday during a break in jury selection for his murder trial.

Death-penalty dilemma facing murder-trial jurors

Ginger Parker
The Chronicle-Telegram

ELYRIA — The first step in a trial that could send Stanley Jalowiec to the electric chair focused on whether prospective jurors had the nerve to recommend the death penalty.

Jalowiec, 25, of Elyria, is charged with killing a drug informant two years ago in a Cleveland cemetery. He is one of three men charged in the slaying, and prosecutors said Jalowiec played a key role in beating and driving a car over Ronald Lally, 30, of Elyria.

If convicted, Jalowiec faces the death penalty. Jurors in the case would have to recommend whether to let him die or spend life in prison. If the jurors recommend the death penalty, Common Pleas Judge Kosma Glavas would make the final decision. Glavas is hearing the case because prosecutors said the killing was planned in Elyria.

On Tuesday, Jonathan Rosenbaum, an assistant county prosecutor, questioned jurors individually on the issue of the death penalty. In many cases, prospective jurors said that if there was enough evidence, they could do that.

Others, however, said they couldn't.

"If the law and evidence required it, could you sign your name to a piece of paper condemning this man to death?" Rosenbaum asked one man.

After a pause, the man looked up and replied, "No, I don't think so."

The process is expected to take a few days.

Lally was found dead Jan. 19, 1994, in the Woodlawn Cemetery in Cleveland. Prosecutors said two men — Raymond Smith and Jalowiec — beat Lally on the morning Smith's son, Daniel, was to go to trial. Raymond Smith shot Lally, and Jalowiec beat him and drove a car over his body, prosecutors said.

STANLEY

From C1

Raymond Smith was convicted of aggravated murder and sentenced to death row in January. Prosecutors said Daniel Smith, who was not with his father or Jalowiec, helped plan the murder. He is scheduled to go to trial per month.

At Raymond Smith's trial, prosecutors introduced a deposition from a second son, Michael, who detailed the killing. After cooperating with police, Michael Smith disappeared.

The deposition said:

- Jalowiec drove Michael Smith, his father and Lally to Cleveland. Lally thought they were taking him to a bus station so he could leave town and not testify against them.
- Instead, Jalowiec drove into Woodland Cemetery, stopped the car and Raymond Smith ordered Lally out of the car at gunpoint. The two men began to argue. Moments later, both Raymond and Jalowiec began beating Lally, who was begging for his life. Raymond Smith then shot Lally.
- As Lally lay in the cemetery, Jalowiec drove the car over him two or three times before leaving.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4227

Capital murder trial to begin

ELYRIA — Opening statements in the capital murder trial of Stanley Jalowiec are scheduled to begin this morning, after prosecutors and defense ended the process yesterday of selecting 12 jurors and two alternates.

Jalowiec, 25, is one of three Elyria men accused of killing Ronald Lally, a 30-year-old crack addict and police informant who was scheduled to testify against Jalowiec and the others in a 1994 drug trial.

Raymond Smith, 55, was sentenced to death in January for his part in Lally's death. Smith's son, 23-year-old Daniel Smith, is scheduled to go on trial April 9.

The three men are accused of killing Ronald Lally in a Cleveland cemetery on Jan. 19, 1994.



MORNING JOURNAL/MICHAEL BLAIR

ON TRIAL — Stanley Jalowiec in court yesterday.

Testimony begins in murder trial

By GREGORY KORTE
Morning Journal Bureau Chief

ELYRIA — A friend of Stanley Jalowiec testified yesterday that the 25-year-old Elyria man boasted about his role in the killing of a police informant.

"He said they stomped him and ran him over in a car," said witness Terry Hopkins, who said he spoke to Jalowiec the day after the killing. "It was kind of like they were bragging about it."

Jalowiec is one of three Elyria men accused of killing Ronald Lally, a 30-year-old crack addict and police informant who was scheduled to testify against Jalowiec in a 1994 drug trial.

Raymond Smith, 55, was sentenced to death in January for his part in Lally's death. Smith's son, 23-year-old Daniel Smith, is scheduled to go on trial April 9.

And although police said the case is nearly identical to their successful case against Raymond Smith, this trial could be different.

Jalowiec defense rests with no witness called

ELYRIA — Defense lawyers for Stanley Jalowiec rested their case this morning without calling a single witness in his trial on charges of murdering drug informant Ronald Lally in 1994.

The trial began last week before Common Pleas Judge Kosma Glavas.

In an earlier trial, Raymond Smith, 55, was convicted of aggravated murder in Lally's death and is on death row, while his son, Daniel Smith, is scheduled for trial next month.

Prosecutors have alleged that Jalowiec, 25, and Raymond Smith took Lally, of Elyria, to Cleveland on Jan. 19, 1994, and killed him in Woodland Cemetery because they believed he had told police about their drug dealings.

Prosecutors said Daniel Smith helped plan the killing.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4228

Son says he heard dad shoot, kill man

By GREGORY KORTE
Morning Journal Bureau Chief

ELYRIA — Michael Smith saw his father climb out of a car with a gun and heard him kill Ron Lally, Smith told a packed courtroom yesterday. Lally was going to testify against the father in a drug case

Smith testified at the trial of Stanley Jalowiec, a 25-year-old Elyria man accused of driving the car that took Lally to his death in a Cleveland cemetery. If convicted, Jalowiec could get the death penalty.

Smith's father, 55-year-old Raymond Smith, was convicted of aggravated murder in January and was sentenced to die.

But Michael Smith didn't testify in that case, because he was hiding from police who wanted him for violating his probation for robbery. He is expected to testify against his brother, Daniel, who's also charged with aggravated murder.

Yesterday, Michael Smith testified that he was there in the early hours of Jan. 24, 1994, when Lally was killed.

Smith said he didn't actually see the shooting as he sat in the back seat of the car because he "put (my) face in (my) hands and stopped looking at the world." Raymond Smith ordered Lally out of the car at gunpoint, and Lally pleaded for his life.

"After I heard the gunshot, I heard Ron say 'You shot me in my head!' " Michael Smith said.

Afterward, the three tried to put Lally's body in the trunk, Michael Smith said. But the body wouldn't fit, so Jalowiec got back behind the wheel and backed over it three times.

Jury picks begin in murder trial

By GREGORY KORTE
Morning Journal Bureau Chief

ELYRIA — Stanley Jalowiec squirmed in his seat yesterday as prosecutors and defense lawyers began the process of selecting jurors for his capital murder trial.

Jalowiec, 25, is one of three men accused of killing Ronald Lally, a 30-year-old police informant who was scheduled to testify against Jalowiec and the others in a 1994 drug trial.

As lawyers questioned prospective jurors individually on the subject of the death penalty, Jalowiec shifted in his seat and repeatedly looked toward the door.

Jonathan Rosenbaum, Lorain County's chief assistant prosecutor, asked 30 or so prospective jurors to look Jalowiec straight in the eyes while answering his question:

"If the law and the evidence required it, could you sign your name to a piece of paper which condemns him to death?" Rosenbaum asked. Many said yes without hesitation.

Jury selection is expected to take at least two days.

Raymond Smith, a 55-year-old Elyria man, was sentenced to die in January for his part in Lally's death. Smith's son, Daniel Smith, 23, is scheduled to go on trial April 9.

The three men are accused of killing Ronald Lally in a Cleveland cemetery on Jan. 19, 1994.

But because the murder plot allegedly began in Lorain County, the three face trial in Lorain County Common Pleas Court.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4229

Suspect wants new judge assigned to murder trial

Ginger Parker
The Chronicle-Telegram

ELYRIA — A man charged with murdering a police drug informant says the judge assigned to his trial should be disqualified because he may be called as a witness.

The attorney for Stanley Jalowiec, 25, of Elyria filed a motion Monday asking Common Pleas Judge Kosma J. Glavas to disqualify himself from hearing the case, which is set to go to trial March 12.

Jalowiec is charged with the aggravated murder of Ronald Lally — a one-time drug informant for the Elyria Police Department. If convicted, Jalowiec could face the death penalty.

Glavas is attending a judges' conference this week and was unavailable for comment.

In his motion, Jalowiec's attorney Joseph C. Grunda did not explain why he would ask Glavas to testify. Grunda did not return messages left at his office Monday.

Glavas was the judge during the trial last year of Raymond Smith, 56, who was convicted and sentenced to death in Lally's murder.

If Glavas refuses to disqualify himself, Grunda could ask the Ohio Supreme Court to decide whether Glavas could hear the case.

In an earlier motion, Jalowiec argued that his case should be tried in Cuyahoga County because the victim's body was found there. Glavas denied the motion.

Lally's body was discovered in a cemetery in Cleveland on Jan. 19, 1994. He had been beaten, shot in the head and run over by a car. His throat also had been slit.

Police said Jalowiec, Raymond Smith and Smith's son, Daniel, killed Lally because they suspected he told police about their drug dealings. Raymond Smith was convicted in December of aggravated murder and sentenced to death Jan. 6 by Glavas.

Daniel Smith also is charged with aggravated murder and could face the death penalty. He is scheduled to go on trial April 9 in Glavas' courtroom.

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Murder suspect asks for new judge

Ginger Parker
The Chronicle-Telegram

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Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4230

Lorain County

ELYRIA

JUDGE WON'T HAVE TO TESTIFY

Lorain County Common Pleas Court Judge Edward Zaleski ruled yesterday that fellow Judge Kosma Glavas will not have to testify in a murder trial. Defense lawyers for Stanley Jaloweic had wanted to ask Glavas about his granting of shock probation to Terry Hopkins, one of the state's witnesses against Jaloweic. Ohio Supreme Court Justice Thomas Moyer on Friday denied Jaloweic's request that Glavas be prohibited from hearing the case in his courtroom. The trial is expected to begin today, but defense lawyer Joseph Grunda had sought a delay, saying Glavas has failed to rule on motions filed eight months ago. Glavas ruled on 21 other defense motions yesterday, including Jaloweic's request to prohibit deputies from wearing uniforms in court. Jaloweic, 25, is accused of murdering police informant Ronald Lally on the morning Lally was to be a key witness in a drug-trafficking case.

Cuyahoga trial sought by slaying suspect

Ginger Parker
The Chronicle-Telegram

ELYRIA — An Elyria man accused of killing a police informant filed a motion Wednesday asking that his trial be moved to Cuyahoga County.

Stanley Jalowiec, 25, said in his motion that the case should be tried in the neighboring county because the victim's body was found there.

"If they feel they have such a strong case against me, then why won't they try me in Cuyahoga County?" Jalowiec said in a telephone interview.

Jalowiec could be sentenced to death if convicted of aggravated murder. He is accused of killing Ronald Lally, a onetime informant for the Elyria police.

Lally's body was discovered in a cemetery in Cleveland on Jan. 19, 1994. He had been beaten and run over by a car.

Police said Jalowiec and two other men killed Lally because they suspected he told police about their drug dealings. One of the other men, Raymond Smith, was convicted in December of aggravated murder and sentenced to death.

Chief Assistant County Prosecutor Jonathan E. Rosenbaum argued in Smith's case that the plan to murder Lally developed in Lorain County, meaning it should be tried here.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4231

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4232

Judge Glavas declines motion to take himself off Jalowiec trial

Ginger Parker
The Chronicle-Telegram

ELYRIA — A judge has refused to disqualify himself from hearing a murder trial although the defense attorney says he may call the judge as a witness.

Judge Kosma J. Glavas denied a motion Thursday to remove himself from presiding over the trial of Stanley Jalowiec, 25, of Elyria, who is charged with helping to kill a police informant.

Jalowiec's trial is set to begin Tuesday in Common Pleas Court.

Joseph C. Grunda, Jalowiec's attorney, had filed the motion Monday, saying he wants to call Glavas to testify. He would not say what information Glavas could offer or why he would be called as a witness.

Glavas also presided over the aggravated murder trial of Raymond Smith, 56, last year. Smith, Smith's son, Daniel, 24, and Jalowiec were arrested by police in connection with the slaying of Ronald Lally — a one-time drug informant for the Elyria Police Department.

Raymond Smith was sentenced to death by Glavas Jan. 6. If convicted, Jalowiec also could face the death penalty.

Daniel Smith's trial is scheduled for April 9, also in Glavas' courtroom.

Grunda said Glavas would not be asked to testify about the Raymond Smith trial.

Grunda said he will file a motion with the Ohio Supreme Court asking that Glavas recuse himself from the case. The Supreme Court justices will make the final decision.

Lally's body was found in a Cleveland cemetery in January 1994. He had been beaten, shot in the head and run over by a car. His throat had been slit.

Police said Jalowiec and the Smiths killed Lally because they suspected he told police about their drug dealings.

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Jalowiec could be sentenced to death if convicted of aggravated murder. He is accused of killing Ronald Lally, a onetime informant for the Elyria police.

Lally's body was discovered in a cemetery in Cleveland on Jan. 19, 1994. He had been beaten and run over by a car.

Police said Jalowiec and two other men killed Lally because they suspected he told police about their drug dealings. One of the other men, Raymond Smith, was convicted in December of aggravated murder and sentenced to death.

Chief Assistant County Prosecutor Jonathan E. Rosenbaum argued in Smith's case that the plan to murder Lally developed in Lorain County, meaning it should be tried here.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4233

Single trial sought in Lally slaying

Ginger Parker
The Chronicle-Telegram

ELYRIA — A prosecutor wants to consolidate his efforts and try two men together in the slaying of a police informant.

Chief Assistant Prosecutor Jonathan E. Rosenbaum on Monday asked that a judge combine the trials of Daniel Smith and Stanley Jalowiec. Both are charged with aggravated murder and could face the death penalty if convicted.

Rosenbaum said one trial provides "judicial economy" and is in the best interest of the witnesses involved. Neither defendant, he said, made any conflicting statements about one another.

Common Pleas Judge Kosma J. Glavas will decide whether to grant Rosenbaum's request.

The pair are accused of murdering Ronald Lally, 30, of Elyria. Lally, a crack addict and drug informant for Elyria police, was scheduled to testify against Smith and his father, Raymond Smith, in a drug trial in January 1994.

Police found Lally dead in a Cleveland cemetery before he could testify.

Prosecutors have said the Smiths and Jalowiec drove Lally to the cemetery and beat him to death to prevent his testimony. Raymond Smith was convicted of aggravated murder on Dec. 6. His jury will reconvene on Jan. 3 to determine if he will spend life in prison or be executed.

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Separate trials ordered in informant's death

Ginger Parker
The Chronicle-Telegram

ELYRIA — A judge ruled Tuesday that two men charged with killing an Elyria drug informant should be tried individually.

Prosecutors had asked Common Pleas Judge Kosma J. Glavas to consolidate the trials of Daniel Smith, 24, and Stanley Jalowiec, 23. Both are charged with aggravated murder and could face the death penalty if convicted.

Glavas ruled that it was "in the interest of justice" for the two men to receive separate trials.

Smith and Jalowiec are charged in the slaying of Ronald Lally, a one-time drug informant for the Elyria Police Department.

Lally had told police about the drug dealings of Smith and his father Raymond. His body was found in a Cleveland cemetery Jan. 19, 1994 — the day he was scheduled to testify against the Smiths in court.

Raymond Smith also was charged with aggravated murder. He was found guilty Dec. 5 and is scheduled for sentencing Jan. 3 in Glavas's courtroom.

Jalowiec's trial is scheduled March 12. No trial date has been set for Daniel Smith.

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Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4234

Murder role denied

Man says he's being framed

Julie Wallace
The Chronicle-Telegram

ELYRIA — A man accused in the slaying of a police informant says he is not the brutal killer police and prosecutors make him out to be.

"I had nothing to do with this," said Stanley Jalowiec, 24, of Elyria. "I'm not a murderer. I love kids. I am a caring person. I have too much heart to do something brutal like that."

Jalowiec could receive the death penalty if convicted of an aggravated murder charge filed in connection with the death of Ronald Lally, whose body was found in a cemetery in Cleveland in January 1994. He goes to trial March 12.

See **TRIAL**, A4

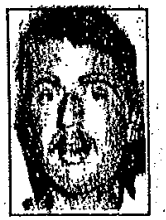


MARC LESTER / CHRONICLE

Stanley Jalowiec



Raymond Smith has been sentenced to die for his role



Victim Ronald Lally

TRIAL

From A1

Police say Jalowiec and Raymond Smith and his son, Daniel, killed Lally because he was scheduled to testify against the Smiths in a drug trial.

Lally had been beaten and shot. His throat was slashed, and his body was run over by a car.

Jalowiec contacted The Chronicle-Telegram on Monday after reading newspaper accounts of the trial and sentencing of Raymond Smith. Last week, Smith was sentenced to die for his role in the slaying.

He said police and prosecutors portray him as a ruthless killer. He contends he is the victim of an elaborate web of lies by witnesses, police and prosecutors.

At the Lorain County Jail, he pulls document after document from manila folders as he presents his argument. He has phrases highlighted in police transcripts, and he quickly flips through his copy of the state's penal code.

Jalowiec said he will present an alibi for his whereabouts the night of Lally's murder. He refused to discuss it during the interview.

He said he was an acquaintance of Daniel Smith. "I would see him in the bars," he said. He called Ronald Lally a friend but said he barely knew Raymond Smith.

He questioned the credibility of Michael Smith, another of Raymond Smith's sons who provided a statement incriminating his father and Jalowiec before skipping town. In that statement, Michael Smith said Jalowiec beat Lally and drove the car over him.

Elyria police Detective Al Leiby, who investigated the case, "programmed Michael to say the stuff," Jalowiec said. "(Michael) is a crackhead and a mental. People like that are weak in the mind."

"It's Detective Leiby. He's getting all these people to lie."

Leiby scoffs at Jalowiec's claims, as he did when Raymond Smith argued that he was set up in a similar fashion.

"It's just like Raymond," he said. "Raymond would have you believe there was a conspiracy by the prosecutors and police.

"Like we arranged for 15 people to lie in court under oath to convict these guys? It's just not possible to do that."

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4235

KILLER

From A1

Duane Whitely and the Cleveland Police Department, said police handled the case appropriately.

"I followed proper procedure, and Whitely and I spent 18 months on this investigation," Leiby said. "Ray Smith was an extremely evil man who involved his kids in drug trafficking and killed a government witness. The punishment fit the crime."

Smith, his son, Daniel, 23, and Stanley Jalowiec, 24, were charged in connection with Lally's death. Jalowiec and Smith are awaiting trial on charges of aggravated murder.

Lally's battered body was found in a Cleveland cemetery on Jan. 19, 1994, the day he was scheduled to testify against Smith and his son in a drug case.

The drug charges carried a maximum penalty of two years in prison, Glavas said.

Security was increased at the courthouse in anticipation of the verdict. Five deputies escorted Smith into the courtroom, where several plainclothes detectives already were stationed.

In addition, members of the county's SWAT team were positioned throughout the building. Glavas said some things were said to warrant to extra security, but he refused to elaborate.

Smith was convicted Dec. 5 of aggravated murder after the same jury heard several days of testimony and read a deposition by another of Smith's sons, Michael.

Michael Smith implicated his father in the crime. He said in the deposition that he sat in the car as Lally was killed and heard him promise not to talk if the men let him live.

He said Lally rode to Cleveland with Smith and Jalowiec because he thought they were taking him to the bus station so he could leave town before the drug trial.

Michael Smith disappeared before his father's trial, and detectives were unable to track him down to testify.

Smith's attorneys have said the deposition will be a key point to the appeal. Glavas said that the maneuver was unusual, but depositions have been used in place of live testimony before and held up on appeal.

JANINE EXNER / CHRONICLE PHOTO

Judge Kosma Glavas sentences Smith to death Friday afternoon for the slaying of a police informant.

EACTS TO SENTENCE: Delores Rogers of Detroit, an aunt of

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4236

Convict denies killing witness but won't plead for his life

By HOLLACE SILBIGER
PLAIN DEALER REPORTER

ELYRIA — Convicted murderer Raymond Smith never once pleaded for his life in a hearing to determine whether he will face death for his crime.

"If it's your choice for me to go to death row and sit there until I prove my innocence, then so be it," Smith told the jurors yesterday.

"You can take my freedom, you can take my life, but you can't take my pride," he added later.

The same jury that convicted Smith last month of killing a police drug informant will continue deliberating today on whether to sentence him to death or to life in prison for aggravated murder.

They could not come to a decision after more than an hour yesterday and were taken to an Elyria hotel for the night.

Smith, 56, of Elyria, is the first of three men to go on trial for the slaying of Ronald Lally.

Smith's son, Daniel D., 24, and another man, Stanley Jalowiec, 25, have also been indicted on charges of aggravated murder in the slaying and are awaiting trial.

Lally was a police informant in a drug buy that resulted in the arrests of Raymond and Daniel Smith. Lally was to be a key witness in their drug-trafficking trials, but was found dead in a Cleveland cemetery Jan. 19, 1994, the morning the trials were to start.

Prosecutors said Lally was stomped, run over by a car, cut along the throat and shot in the mouth.

Raymond Smith's statement yesterday, which was not under oath or subject to cross-examination, lasted about 30 minutes. He set aside a note pad he had brought to the stand and his voice rose to a yell at times as he criticized some witnesses and evidence brought against him during the trial.

"I have never in my life killed a bird, let alone another human being," Smith said. "I'm not made up of that caliber."

He contended that he had not received a fair trial because presiding Common Pleas Judge Kosma J. Glavas told jurors not to let the O.J. Simpson trial affect their decisions in his case.

"What does the O.J. trial have to do with me?" Smith asked the jury. "Is it because I am a black man accused of killing a white man?"

Glavas said he did allude to the Simpson trial, saying, "That was just another case, in California; this was a case in Ohio."

Smith also said that he did not know anything about Lally's death and that he gave a statement to police about it to help his son, Daniel, get off on some drug charges.



RAMON MENA OWENS / PLAIN DEALER

Raymond Smith

In his statement to police, Smith said he was at the Cleveland cemetery with the victim, but that a gun went off accidentally while Smith fought with Jalowiec.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4237

ectors used by firefighters
1 to the deadly gas.

Smith gets death in murder of informant

By HOLLACE SILBIGER
PLAIN DEALER REPORTER

ELYRIA — Convicted murderer Raymond Smith was sentenced yesterday to death for killing a police drug informant.

"We will have order," Lorain County Common Pleas Judge Kosma J. Glavas yelled after the sentence was read, banging his gavel to quiet Smith's relatives, who moaned, cried and yelled out.

Smith, 56, was permitted to speak after jurors left the courtroom. He accused The Plain Dealer of printing misinformation provided by police in an effort to frame him.

"I feel as though being in Lorain County and being hated by Lorain County law enforcement and the prosecutor I was found guilty of a murder charge when there was not sufficient evidence," Smith said.

SEE INFORMANT|2-B

mith gets death in murder

VFORMANT FROM 1-B

Elyria Detective Al Leiby, who investigated the case, was pleased with the jury's decision.

Chief Assistant Prosecutor nathan E. Rosenbaum said mith was not fit to live in the ommunity.

"He's an extremely evil man, and the punishment is appropriate for the crime," Leiby said. "Anyone who would involve his own children in drug trafficking and murder is an evil man."

"The state feels Raymond Smith feels he is above the law," Rosenbaum said. "Nothing is his fault. Everyone else is to blame."

Smith's son, Daniel D., 24, and another man, Stanley Jalowiec, 25, have also been indicted on aggravated murder charges in Lally's slaying and are awaiting trial.

The same jurors who convicted Smith last month of aggravated murder in the death of Ronald Lally deliberated for more than three hours before choosing the death sentence over life in prison for Smith's punishment.

Lally was a police informant in a drug buy that resulted in the arrests of Raymond and Daniel Smith. He was to be a key witness in their drug-trafficking trials but was found dead in a Cleveland cemetery Jan. 19, 1994, the morning the trials were to start.

Glavas affirmed their recommendation and spoke harshly to Smith.

"You were afforded a judge, a jury and a trial in this matter," Glavas said. "Mr. Lally was not. You acted as judge, jury and executioner."

Prosecutors said he was stomped, run over by a car, cut along the throat and shot in the mouth.

Glavas set Smith's execution date for a year and five days from yesterday. He will become the sixth Lorain County man on death row at the Mansfield Correctional Institution.

Members of the county's SWAT team stood in the courthouse hallways yesterday as police continued to investigate safety threats. However, no problems arose, Sheriff's Capt. Dennis Cavanaugh said.

Outside the courtroom, Smith's family clutched each other and wept. They spoke harshly of the media and declined to talk to reporters.

Cavanaugh has said police had learned from out-of-state sources of threats of explosives and harm to people involved in the case. He would not be more specific, saying that the threats were still under investigation.

No one from Lally's family was present.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4238

KILLER

From A1

decision.

"Now what does O.J.'s trial have to do with me?" he bellowed. "Is it because I'm a black man? I feel my constitutional rights were violated right there."

During a recess, Glavas said he raised the issue in the O.J. Simpson case because of the answers some jurors had written on their questionnaires. Glavas said he told jurors: "That was a case in California, and this is a case in Ohio."

After attacking Glavas, Smith accused Leiby of prying a statement out of his son, Michael, who is addicted to crack. In a deposition, Michael Smith said his father and Jalowiec beat and murdered Lally in a Cleveland cemetery.

"He allowed Leiby to influence him," Smith said. "Detectives know how to prey upon people who use cocaine."

Michael Smith disappeared after the deposition and never testified at the trial. Prosecutor Jonathan E. Rosenbaum gave the deposition to the jurors during trial deliberations. He gave the deposition to the jurors again Thursday night as they began deliberating the case's mitigating factors.

Smith and his family also criticized the media for fueling feelings of hatred during the case and playing up the conviction.

Rosenbaum did not cross-examine Smith because his statement was not sworn, but he did attack witnesses called by Smith's attorney, Harvey Bruner of Cleveland.

Two of the witnesses were William and Kim Hill, who are recovering crack addicts. They testified that Smith was a caring and compassionate man before his life fell apart because of crack.

Kim Hill referred to Smith as "Cousin Ray" and told how he befriended her in a bar when she was 14.

"I love Cousin Ray very much," she said. "He was a man who showed me compassion, when life was pretty cruel to me, and he didn't take advantage of me."

But Rosenbaum criticized Hill for describing Smith as a "compassionate" person. He grabbed one of the most graphic close-up photos of Lally's mutilated face and held in front of Hill.

"Is that the act of a compassionate person?" he asked.

Hill immediately turned her head away and asked the judge if she had to look at the picture. Glavas said she did.

Hill turned slowly back to the photo and quietly said, "That's a very sad picture."

Jurors will resume deliberating today at 9 a.m.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4239

Jan 5 9[illegible]

Killer lashes out

Ginger Parker
The Chronicle-Telegram

ELYRIA — To Raymond Smith, everyone was out to get him.

The judge, the cops and the media. They all played a role in finding him guilty of killing a police informant. At least that's what Smith said Thursday.

Smith, 56, of Elyria, marched to the witness stand and attacked the judicial system and the media for 45 minutes in an unsworn statement about why he should avoid death for killing Ronald Lally, 30, of Elyria.

The jury convicted him of aggravated murder Dec. 5, and now it must recommend to Judge Kosma Glavas whether Smith is sentenced to life in prison or death.

He told jurors that Glavas violated his constitutional rights by referring to the O.J. Simpson case. He said Elyria police Detective Al Leiby duped a critical statement out of his son, a crack addict. And he claimed newspapers fueled hatred in the case.

"You can take my freedom," he said. "You can take my life. But you cannot take my pride."

Prosecutors and police said Smith, his son, Daniel, and a friend, Stanley Jalowiec, beat, shot and drove a car over Lally in a cemetery in Cleveland.

The slaying came on the day Lally was to testify against Daniel Smith in a drug trial, prosecutors said. And after Smith's statement, they attacked the credibility of defense witnesses who said Smith was a compassionate man.

But to Smith, he was framed. He said Glavas told jurors before the trial that he hoped the O.J. Simpson trial did not affect their

See **KILLER,** A8



KIMBERLY BARTH / CHRONICLE

BEFORE TESTIFYING: Raymond Smith, left, talks with attorney Harvey Bruner.



GENE KREBS / CHRONICLE

CHECKING PARKING LOT: The Lorain Co. SWAT team provides extra protection after a bomb threat was received.

23

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4240

Killer says he was framed

Makes angry plea to avoid chair

By GREGORY KORTE
Morning Journal Bureau Chief

ELYRIA — Convicted murderer Raymond Smith lashed out at the jury that convicted him yesterday, telling jurors in a 45-minute monologue that police framed him for murder.

Hours later, those same jurors began deciding whether Smith will get the death penalty or spend the rest of his life in prison for killing Ronald Lally, a police informant set to testify against him in a drug case.

The jury's sentence is expected today.

Smith did not testify during his trial last month. But the 56-year-old Elyria man maintained his innocence yesterday, saying in an unsworn statement that police violated his rights, framed him for the murder and tricked him into saying he was involved in the killing.

"I'm not saying that I'm a law-abiding citizen. But I'll tell you one thing — murder is not in my program. I'm 56 years old and I haven't killed anyone yet. I'm not made up of that kind of material," he said.

Smith told the jurors that they were wrong in finding him guilty beyond a reasonable doubt, because the state's witnesses against him — including his son, Michael — were "crackheads and alcoholics."

"Michael Smith, my son who I dearly still love, was on drugs," he said. "This boy is on crack cocaine. He has hallucinations. But still, you're going to take his word because he's been programmed by the law to say the things he said?

"If it's your choice to send me to death row and I have to sit there until I can prove I'm innocent, then so be it," he said. "However you sentence me, I have to deal with it the best way I know how. You can take my freedom. You can take my life. But I'll tell you one thing — you can't take my pride."

Chief Assistant Prosecutor Jonathan Rosenbaum didn't get the chance to cross-examine Smith, because the law allows a defendant to make an unsworn statement during sentencing.

But Rosenbaum, who called Smith a "drug-pushing murderer," did challenge the numerous friends and relatives who testified that Smith was a decent, loving family man.

"I guess you would have had to come and sit down with us during Thanksgiving and see him talk to the kids," said Kim Marie Hill, 36, of Elyria, who said she's known Smith for 22 years. "He was someone you could talk to."

"About what?" Rosenbaum shot back. "Selling drugs? Using drugs? Killing informants?"

Mrs. Hill's husband William, Smith's cousin, implored jurors not to sentence Smith to die.

"He has to answer to a power greater than ourselves for any crimes he might have done," he said. "Even though he didn't give Ron Lally an opportunity, I hope you give him an opportunity to find his Lord again."



JAN 5, 96

22

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4241

Man found guilty in 1994 murder of drug informer

PLAIN DEALER REPORTER

ELYRIA — Raymond Smith was found guilty yesterday of planning and carrying out the murder of a police informant who turned him and his son in for selling drugs.

The jury delivered the verdict to Lorain County Common Pleas Judge Kosma Glavas at 2 p.m. after about 10 hours of deliberations.

Smith, 55, dropped his head as the verdict was read. The 15 members of his family who had waited tensely in the courtroom for 30 minutes, shook their heads and cried.

The victim's fiance, Sandra Williams, hugged her coat and rocked back and forth.

"Ladies and gentlemen, difficult job," Glavas told the jurors. "As Forrest Gump said, 'That's all I'm going to say about that' at this time. You still have more work to do in this matter."

Jurors must return Jan. 3 to decide if Smith should be put to death or spend his life in prison with possible parole in 20 or 30 years.

Glavas may accept or reject their decision.

If the jury imposes the death penalty, Smith could become the sixth Lorain County man on death row in Ohio.

Defense lawyer Harvey B. Bruner said he would appeal Smith's aggravated murder conviction.

Smith of Elyria was the first of three men to go on trial in the slaying.

His son, Daniel D., 24, and another man, Stanley Jalowiec, 25, have also been indicted of aggravated murder charges and are awaiting trial.

The victim, Ronald Lally, was a police informant in a drug buy that resulted in the arrests of Raymond and Daniel Smith. He was to be a key witness in their drug-trafficking trials, but was found dead in a Cleveland cemetery Jan. 19, 1994, the morning the trials were to start.

Prosecutors said he was stomped, run over by a car, cut along the throat and shot in the mouth.

Williams, who testified during the trial that Daniel Smith had threatened her before her fiance's death, said that Raymond Smith's conviction did not ease her mind about the murder.

"That someone else is going to die?" Williams said, referring to a possible death penalty sentence.



RAMON MENA OWENS / PLAIN DEALER

Raymond Smith, 55, of Elyria, prepares to be transported to Lorain County Jail yesterday after being found guilty of aggravated murder by a Lorain County Common Pleas Court jury.

Ruth Geiger, an aunt of Raymond Smith who said she was like a sister to him, was shaken up by the verdict. She said she knew he admitted to police that he was with the victim in the cemetery when a gun went off during a fight, but that he was wronged by the jury.

"I knew they were going to give him something, but not this," said Geiger, 48, of Elyria.

She said the evidence pointed to the other men facing charges in the slaying and she questioned why Raymond's other son, Michael, had not been charged as well.

In a deposition taken in June, Michael Smith said he was sitting in the back seat of a car while the victim was beaten and shot outside the car in the cemetery.

Michael Smith has been missing during the trial, although prosecutors said Monday that he was in another state in drug rehabilitation and was scared to come to Lorain County.

Geiger described Raymond Smith as a funny, beloved man known as "Hooks" who had problems with drugs and had no permanent home. She said she believes he got himself into a "fix" with his sons.

"Raymond was not, I repeat, he was not a killer," she said.

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Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4242

Accuser's statement questioned

Ginger Parker
The Chronicle-Telegram

ELYRIA — A prosecutor today questioned the statement of a man accused of killing an Elyria man who informed police about drug sales.

Raymond Smith, 55, of Elyria is charged with aggravated murder in the death of Ronald Lally on Jan. 19, 1994.

In a statement to police, Smith said Lally, 30, of Elyria, pulled a gun on him in a cemetery in Cleveland. Smith said the two men struggled, and the gun went off, hitting Lally once in the face.

But Jonathan E. Rosenbaum, an assistant county prosecutor, told jurors in closing arguments that there were holes in Smith's statement. He also showed them a picture of Lally's battered body.

"If he shot Ronald Lally once, why does the victim look like this?" Rosenbaum said, holding up close-up photo of Lally's face. "What about that gaping hole in his neck? Why is his face totally obliterated?"

Smith could face the death penalty if convicted. He is the first of three men to go on trial in Lally's murder.

Cleveland police found Lally

See **SMITH,** C3

...ne head with a golf club after ...cking McCarthy's ball off the tee.

SMITH TRIAL TESTIMONY

The state rested its case in a capital murder trial yesterday without ever calling its key witness to the stand. While Michael Smith, son of the murder suspect, Raymond Smith, is missing, his written testimony will be given to jurors to weigh. In it, he says he was sitting in the back seat of a car while the victim was shot and beaten outside the car in a Cleveland cemetery. Raymond Smith, 55, of Elyria, is one of three men charged with aggravated murder in the slaying. Closing arguments are expected Monday. Smith's other son, Daniel D., 24, and another man, Stanley Jalowiec, 25, have been indicted on the same charge in the slaying and are awaiting trial. The victim, Ronald Lally, was a police informant in a drug buy that resulted in the arrests of Raymond and Daniel Smith. Lally was found dead the morning their trials were to begin.

SMITH

From C1

beaten, shot in the head, slashed in the throat with a knife and driven over with a car.

Police say Smith and his son, Daniel, wanted Lally dead for telling police about their crack cocaine business. Lally was scheduled to testify against them in a drug-trafficking trial.

Rosenbaum says the Raymond, Daniel, 23, and their friend, Stanley Jalowiec, 24, planned Lally's death.

The three men tricked Lally into driving to the Cleveland with them on the premise he was leaving Northeast Ohio on a bus to prevent his testimony, according to a deposition by Michael Smith, Raymond's other son, who said he was with the men when Lally died.

Michael Smith's deposition says he sat in the car in shock while his father and Jalowiec murdered Lally. Michael Smith did not testify at the trial and has disappeared since giving the deposition.

Today, Rosenbaum said Michael Smith called Elyria police Detective Al Leiby and said he was willing to testify. He said he was worried about showing up at the trial because he has outstanding charges.

Raymond Smith's attorney, Harvey Bruner, said today that there was no evidence showing his client planned the death of Lally.

In fact, Bruner said, the majority of the evidence points to Jalowiec and that not one of Rosenbaum's witnesses testified about Raymond Smith's involvement in Lally's murder.

Bruner reminded jurors of the testimony they heard in the two-day trial. Jalowiec bragged about shooting Lally the next morning, according to one witness. Another testified seeing blood on Jalowiec's knuckles. And a Cuyahoga deputy coroner testified that Jalowiec's blood was on a knife found at the murder scene.

Bruner also reminded jurors to think about why Michael Smith mysteriously disappeared prior to trial.

"This man is not at this trial," he said. "Think about the things you aren't going to see — his look, his face, whether he looks you in the eye when he talks. Michael Smith doesn't want to face you."

Jurors were to begin deliberating this afternoon.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4243

Tipster begged for his life

Dec 2

Ginger Parker
The Chronicle-Telegram

ELYRIA — In the last moments of his life, Ronald Lally begged Raymond Smith to spare him and promised he would not testify against Smith on crack cocaine charges, according to a deposition made public Friday.

"I won't tell nobody," the deposition reported Lally as saying. "Don't kill me. Please don't kill me."

The deposition was given by Smith's son, Michael, who said he sat in the car while his father and Stanley Jalowiec murdered Lally in a graveyard near a Cleveland bus station.

Lally's battered body was found Jan. 19, 1994, lying face down in blood-splattered snow in Woodland Cemetery. Prosecutors say Lally was stomped, beaten, shot, run over with a car and had his throat slit.

"You could hear the thumps, the smacks and the stomps," said Michael Smith in the deposition.

The younger Smith was due to testify at his father's trial this week on homicide charges. But police have been unable to locate him.

Instead, Judge Kosma J. Glavas allowed prosecutors to enter Michael Smith's deposition as evidence in the case Friday. The trial got under way Thursday.

Besides Raymond Smith, Smith's other son, Daniel, and a

See TRIAL, A8

TRIAL

From A1

friend, Stanley Jalowiec, are charged with aggravated murder in connection with Lally's death. If convicted, all three could face the death penalty. Daniel Smith and Jalowiec will be tried separately.

Raymond Smith and Michael Smith have told conflicting versions of how Lally died.

Raymond Smith says Lally, 30, picked him up in Elyria and pulled a gun on him in the car, demanding to know the whereabouts of Daniel Smith. Raymond Smith said Jalowiec was driving and that the three went to the Cleveland cemetery.

There, Lally forced Raymond Smith out of the car at gun point and a struggle ensued. Lally dropped his gun and Jalowiec grabbed it. Smith and Jalowiec began to fight and the gun went off, shooting Lally. Smith said he then ran out of the graveyard.

But Michael Smith's version indicates that his father and Jalowiec drove Lally to Cleveland after picking him up in Elyria.

This is what Michael Smith wrote in his deposition:

During the ride, Raymond Smith brandished a gun and told Lally he knew he had spoken with police about the Smith family's drug operations. The two men said they would give Lally money and take him to the Greyhound bus depot so he could leave town and not testify at their upcoming trial on drug charges.

Instead, they drove to the cemetery near the bus station, parked and turned off the lights. Raymond Smith pointed a gun at Lally's face and ordered him out of the car.

Michael Smith said he remained inside the car and heard his father arguing with Lally.

"I heard a gun shot," Smith said "I heard Ron say, 'Oh, you shot me in the head. You shot me in the head.'

"At that point, my father told us to get out of the car. Stan got out of the car and helped my father beat him (Lally) and then they said something about the gun being jammed."

Once Lally was dead, Raymond Smith and Jalowiec tried to stuff the body in the truck but it wouldn't fit.

"At this point everybody got back in the car and Stan backed the car over Ron two or three times," Michael Smith said in his deposition.

As the three men rode back to Elyria, Michael Smith said his father dismantled the gun and threw pieces out the window on state Route 2.

Since giving the deposition to police in August, Michael Smith has disappeared, police Detective Al Leiby said.

But Raymond Smith's attorney Harvey Bruner says prosecutors are deliberately hiding Michael Smith so he won't have to testify.

Police said Michael Smith was fearful for his life.

Chief Assistant Prosecutor Jonathan E. Rosenbaum said Raymond Smith was present when his son gave the deposition. Rosenbaum said Raymond Smith commented at the time: "I raised him (Michael Smith) and now I'm gonna kill him."

Gerald Mielcarek, a private investigator, testified that Raymond Smith's statement was not a threat but a question.

"He stated: 'That's my son, I raised him,' and then he shrugged his shoulders and said, 'And now I'm gonna kill him?' I took it as a question."

Closing arguments will begin at 8:30 a.m. Monday.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4244

PAULA ARTMAN / CHRONICLE PHOTOS

REACTING TO VERDICT: Raymond Smith is escorted out of Common Pleas Judge Kosma Glavas' courtroom Tuesday afternoon after a jury found him guilty of aggravated murder. Right, Smith's aunt, Ruth Gelger, reacts to the verdict.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4245

Def 6

Anger rife in verdict aftermath

ger Parker
Chronicle-Telegram

ELYRIA — Angry shouts re heard in the courtroom esday when Raymond A. ith was found guilty of gravated murder, an offense nishable by death.

"It's a bunch of bull, Daddy," led Smith's daughter as she d 12 other supporters were ving the courtroom.

Another man stormed out door and yelled an insult out the verdict at Chief Assis- t Prosecutor Jonathan E. senbaum.

Jurors found Raymond ith guilty after deliberating out 10 hours. He was con- cted in the aggravated murder Ronald Lally, 30, of Elyria. A rmer drug informant, Lally as scheduled to testify against mith and his son Daniel, 23, in drug trafficking case.

But on the day of the trial — Jan. 19, 1994 — Lally's battered body was found lying face down in blood-splattered snow. He had been beaten, stomped, shot in the head, had his throat slit and had been run over with a car, according to testimony.

Smith, his son Daniel and their friend Stanley Jalowiec were all charged with aggravated murder. Smith was the first to go on trial out of the three men.

Jalowiec is scheduled to stand trial March 12.

"It reinforces my belief in the justice system," said Elyria Police Detective Al Leiby after the verdict. Leiby worked on the case with Detective Dwayne Whitely for about 18 months.

Extra security was in the courtroom when the verdict was announced.

Smith showed no reaction to the verdict.

See VERDICT, A6

(5)

VERDICT

From A1

But Lally's fiancee, Sandra Williamson, closed her eyes and began to cry as the verdict was announced. She did not want to comment.

"Nothing I say is going to bring him back," she said before leaving the courtroom.

Out in the hallway, Smith's aunt, Ruth Geiger, complained to family members about the verdict.

"They knew that white boy killed him," Geiger said, crying.

She was referring to Jalowiec, whose name was mentioned several times throughout the trial. One witness testified that Jalowiec bragged about the murder.

A Cuyahoga County deputy coroner testified that Jalowiec's blood was on the knife used to slit Lally's throat. Another witness testified to seeing blood on Jalowiec's knuckles after the men returned from Cleveland.

In a statement to police, Smith said Lally a pulled a gun on him in a car driven by Jalowiec. The three men went to the cemetery, where Lally forced Smith out of the car at gunpoint, according to statement to police.

The two men struggled and Jalowiec intervened. While Smith and Jalowiec struggled the gun went off, hitting Lally once in the face, the statement said.

But jurors apparently didn't believe Smith's statement.

The most incriminating piece of evidence against Smith was a deposition given by his other son, Michael, who said he sat in the car while Lally was murdered.

The deposition said Lally willingly rode to Cleveland with Smith and Jalowiec. Lally, who was a drug addict, thought the men were taking him to the bus station on Jan. 19, 1994 so he could leave Northeast Ohio and not testify in the case.

But Jalowiec instead drove to a nearby graveyard, where Smith ordered Lally out of the car at gunpoint, Michael Smith said in the deposition. Lally began to beg for his life but the men showed him no mercy.

"I won't tell nobody," the deposition reported Lally as saying. "Don't kill me. Please don't kill me."

Moments later Michael said he heard a gunshot, the deposition said.

"I heard Ron say, 'Oh you shot me in the head," Michael said in the deposition. "You shot me in the head."

Jalowiec got out of the car and helped Smith beat Lally, according to the deposition. Later, the two men tried to stuff Lally in the trunk but he wouldn't fit, the deposition said.

"At that point, everybody got back in the car and Stan backed the car over Ron two or three times," Michael Smith said in his deposition.

Michael Smith said his father dismantled the gun and threw pieces out the window on state Route 2 as the three men returned to Elyria.

Michael disappeared before his father's trial, but Michael Smith called police Saturday and said he was afraid to show up because he has a warrant for his arrest on a probation violation charge, said Rosenbaum.

Raymond Smith will return to court on Jan. 3 at 8:30 a.m. for a mitigation hearing.

Jurors will hear testimony from both defense and prosecution witnesses on whether Smith deserves the death penalty. The jurors will then either recommend life in prison or death for Smith.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4246

Witness: Men 'bragged' about murder

ır Parker
hronicle-Telegram

YRIA — Soon after killing a ce informant, Raymond h, his sons and a friend ged about the slaying to friends, according to testi- today in Common Pleas t.

ymond Smith, 55, of Elyria, e of three men charged with ıg Ronald Lally on Jan. 19, Lally was beaten, run over car and shot in the mouth. If icted, Smith faces the death lty.

erry Hopkins, a friend of the h family, testified that Ray- d Smith's son, Daniel, oached him about killing , 30, of Elyria. Hopkins said el Smith worried that Lally telling police about the h family's drug business.

"He asked if I would take care of this thing for somebody," Hopkins said today.

"What's that mean?" asked Jonathan Rosenbaum, an assistant county prosecutor.

"To kill somebody," Hopkins said. "I didn't want any part of something like that."

That wasn't the last Hopkins heard of Lally.

He testified that in January 1994, on a day he can't remember, Raymond Smith and his two sons, Daniel and Michael, as well as Stanley Jalowiec of Elyria met Hopkins and a woman at Daniel Smith's apartment.

"Stan said they killed the victim, and they shot him, ran over him with a car and cut him with something," Hopkins testified.

"What tone did they tell you this?" Rosenbaum asked.

"Like they were bragging about it," Hopkins said.

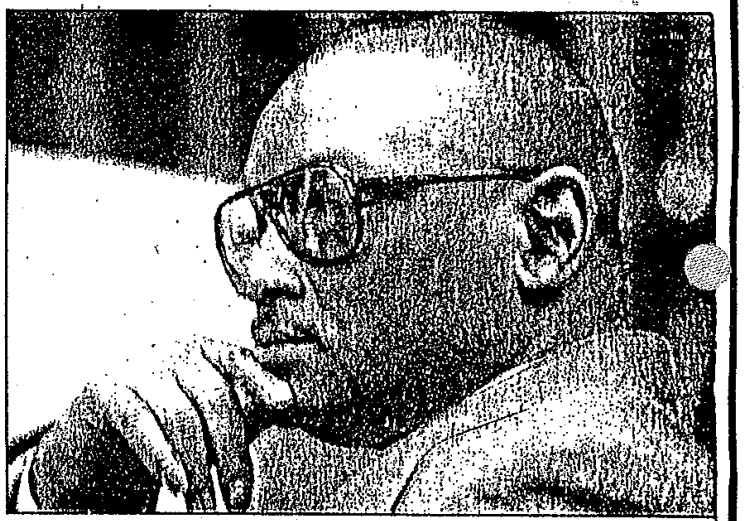
Daniel Smith and Jalowiec also are charged with aggravated murder in the slaying. They have not yet gone to trial.

Harvey Bruner, the attorney for Raymond Smith, said Hopkins mentioned that only Jalowiec bragged about the death. Hopkins said, "They were all talking about this."

Hopkins was sentenced to five to 15 years in prison in January on charges of attempted burglary and attempted felonious assault. He was released on shock probation in September, which Bruner attributed to Hopkins' testimony in this case. Rosenbaum denied that.

Testimony was to continue through this afternoon.

See LALLY, C2



BRUCE P. BISHOP / CHRONICLE

MOMENT TO REFLECT: Raymond Smith listens to testimony during his trial Thursday.

LALLY

rom C1

On Thursday, Rosenbaum said ally's desire to inform on his aler cost him his life.

"What you have here is a bru- l, heinous, cold-blooded assassi- ation of a government witness," osenbaum said.

But Bruner said Raymond mith had nothing to do with Lal- 's death.

"There isn't one shred of evi- ence of a premeditated plan to ill Ronald Lally," Bruner said.

Premeditation must be proved to obtain a conviction for aggravated murder with the death penalty.

Bruner also has accused prosecutors of hiding Michael Smith, who also is to testify in the case. Prosecutors say they have no idea where Michael Smith is, and police are searching for him.

In the meantime, however, prosecutors will be allowed to use a deposition Michael Smith gave in June. Smith has received two death threats, including one from his father, Raymond, prosecutors said.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4247

Rosenbaum: Defendant's story untrue

Ginger Parker
The Chronicle-Telegram

ELYRIA — Jurors were expected to decide the fate today of Raymond Smith, the 55-year-old Elyria man charged with aggravated murder in the death of Ronald Lally on Jan. 19, 1994.

Jurors deliberated for four hours Monday and were sequestered overnight. They resumed deliberations at 9 a.m. today.

If they find Smith guilty of aggravated murder, he could face the death penalty. But jurors also could find him guilty of two lesser charges: murder or involuntary manslaughter. Neither of those offenses is punishable by death.

In a statement to police, Smith said Lally, 30, of Elyria, pulled a gun on him in a cemetery in Cleveland. Smith said the two men struggled, and the gun went off, hitting Lally once in the face.

But Jonathan E. Rosenbaum, chief assistant county prosecutor, told jurors in closing arguments that there were holes in Smith's statement. He also showed them a picture of Lally's battered body.

"If he shot Ronald Lally once, why does the victim look like this?" Rosenbaum said, holding up a close-up photo of the dead man's face. "What about that gaping hole in his neck? Why is his face totally obliterated?"

Smith is the first of three men to go on trial in Lally's death.

When Cleveland police found him, Lally had been beaten, shot in the head, slashed in the throat with a knife and driven over with a car.

Police say Smith and his son, Daniel, 23, wanted Lally dead for telling police about their crack cocaine business. Lally was scheduled to testify against them in a drug-trafficking trial.

Rosenbaum says the Smiths and their friend, Stanley Jalowiec, 24, planned Lally's death.



Raymond Smith

The three men tricked Lally into driving to Cleveland with them on the premise he was leaving Northeast Ohio on a bus to prevent his testimony, according to a deposition by Michael Smith, Raymond's other son, who said he was with them when Lally died.

In his deposition, Michael Smith said he sat in the car in shock while his father and Jalowiec murdered Lally. Michael Smith did not testify at the trial and has disappeared since giving the deposition.

On Monday, Rosenbaum said Michael Smith called Elyria police Detective Al Leiby and said he was willing to testify. He said he was worried about showing up at the trial because he has outstanding charges.

Raymond Smith's attorney, Harvey Bruner, said Monday that there was no evidence showing his client planned the death of Lally.

In fact, Bruner said, the major-

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See STORY, C2

STORY

From C1

ity of the evidence points to Jalowiec and not one of Rosenbaum's witnesses testified about Raymond Smith's involvement in Lally's murder.

Bruner reminded jurors of testimony they heard in the two-day trial. Jalowiec bragged about shooting Lally the next morning, according to one witness. Another testified to seeing blood on Jalowiec's knuckles. And a Cuyahoga County deputy coroner testified Jalowiec's blood was on a knife found at the death scene.

Bruner also asked jurors to think about why Michael Smith mysteriously disappeared before the trial.

"This man is not at this trial," he said. "Think about the things you aren't going to see — his look, his face, whether he looks you in the eye when he talks. Michael Smith doesn't want to face you."

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4248

Murder victim is called addict who wanted help

ger Parker
Chronicle-Telegram

ELYRIA — Ronald Lally was a ck addict who wanted to get p, Jonathan Rosenbaum, chief istant prosecutor, said today opening arguments in the rder trial of an Elyria man used of killing Lally.

Lally, he said, "volunteered services to go out and get his pplier," going to Elyria police June 1993 and offering to rm on the dealer who pro-ed him with drugs.

It was a decision that cost him his life, the prosecutor said. "What you have here is a brutal, heinous, cold-blooded assassination of a government witness," Rosenbaum said.

On Jan. 19, 1994 — a day with minus-46 degree wind chill — authorities found Lally's half-dressed body in a bloody patch of snow in a Cleveland cemetery. He had been run over by a vehicle. His throat was slit, and he had been shot in the mouth and beaten.

Authorities say Lally, 30, of Middle Avenue, was killed because Raymond Smith, 55, of Elyria; his son, Daniel, 23; and a friend, Stanley Jalowiec, 24, thought he was informing police on their drug business.

Jurors were shown photos of Lally's body.

Raymond Smith is the first of the three men to go on trial for aggravated murder in the case. If convicted, he faces the death penalty.

His attorney, Harvey Bruner, told jurors today that Smith says Jalowiec began to fight with Lally over a gun and it went off. "Raymond Smith got scared and ran," Bruner said.

Also, he said, "There isn't one shred of evidence of a premeditated plan to kill Ronald Lally." Premeditation must be proved to obtain a conviction for aggravated murder with the death penalty.

When the trial began Wednesday, Bruner accused prosecutors of hiding a crucial witness in the case. Rosenbaum called Bruner's claims "blatant lies."

The disagreement involved Michael Smith of Elyria, Daniel's brother, who was to testify today against their father, Raymond.

Police and prosecutors have not seen Michael Smith since June, when he gave a deposition as a precautionary measure to ensure his testimony would be available at trial.

Michael Smith has received two death threats. One threat came from his father, Rosenbaum said.

"Raymond Smith made

See **MURDER,** C2

MURDER

From C2

statement: 'I've raised the kid, and now I've got to kill him,' " Rosenbaum said.

Michael Beaman, a homicide detective from Cleveland, and Al Leiby, a police detective from Elyria, testified Wednesday that they have searched months for Michael Smith and can't find him.

Beaman and Leiby said they contacted dozens of people who know Michael Smith — his friends, his former wife and his former employers. No one knows where he is. Leiby described him as a transient.

But Bruner told Common Pleas Judge Kosma Glavas that he doesn't believe Michael Smith's location is a mystery.

"Frankly, I think they're trying to hide this man because they know he's going to change his testimony from the deposition," Bruner said. "I think that's exactly what they're doing."

Rosenbaum denied that.

"Mr. Bruner, I think, has stepped out the bounds of a fair argument with the accusations he has made," Rosenbaum said.

Glavas ruled the deposition can be used as testimony unless police locate Michael Smith before the trial's end.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4249

Killing silenced witness

Prosecutor says father murdered to help son

By HORACE SILBIGER
PLAIN DEALER REPORTER

ELYRIA — Ronald Lally was found dead the morning a drug trial he was to be a key witness in was scheduled to begin.

The body of the Elyria man, who was described in Lorain County Common Pleas Court yesterday as a cocaine addict-turned-police informant, was found bloody and bruised in the snow in a Cleveland cemetery on Jan. 19, 1994.

He had been stomped, run over by a car, slashed along the throat and shot in the mouth, Chief Assistant Lorain County Prosecutor Jonathan E. Rosenbaum said yesterday in opening statements in the trial of one of three men accused of the slaying.

Raymond Smith, 55, of Elyria, is charged with aggravated murder in the slaying. Lally was to testify at Smith's sons' drug trial but was found dead the day the trial was to begin, Rosenbaum told the jury.

"There was one thing they had in mind — that was to take his life," Rosenbaum said. "And they brutally, savagely did that." He told the jury that Smith should be put to death for the slaying.

Smith's son Daniel D., 24, and another man, Stanley Jalowiec, 25, have been indicted on the same charge and are awaiting trial.

Defense lawyer Harvey B. Bruner acknowledged that Raymond Smith was with Lally the night of his death. But it was Lally who had the gun, which went off during a fight between Lally and Jalowiec, Bruner said.

Raymond Smith then ran away, he said.

Bruner said his client had no reason for revenge because his son believed he would face only probation in the drug case. That case was ultimately dismissed.

"There won't be one shred of evidence of a premature plan to kill Mr. Lally," Bruner said.

In a strange twist, prosecutors are missing their key witness — another son of Raymond Smith who was with Lally the night he died.

Prosecutors do, however, have a deposition taken in June from the son, Michael. At the time, he told authorities he was afraid as a result of what he knew.

"We're still hoping to find him," Rosenbaum said.

He said outside of court that he has information that the defense is hiding Michael Smith.

Bruner, who earlier accused police of hiding Michael Smith, said he has no idea where the man is.

Another prosecution witness, Brian Howington, testified yesterday that he was with Lally and Jalowiec on a cold January night in 1994. Howington said he had been partying and smoking crack cocaine with the men that night but could not recall the exact date.

Howington said he let Lally and Jalowiec leave in his aunt's convertible around midnight but that it was Jalowiec and Raymond Smith who returned the car about five hours later. The car had been washed, Howington testified.

Jurors also heard from a Cuyahoga County deputy coroner that Lally had cocaine in his body at the time of his death. Another expert from the Cuyahoga County coroner's office testified that blood matching Lally's was found in the trunk of a convertible they tested. It matched the car Howington described.

Testimony is expected to continue today.

Plain Dealer reporter Stephen Hudak contributed to this report.

RAMON MENA OWENS / PLAIN DEALER PHOTOGRAPHER

Raymond Smith, left, sits in a Loraln County Common Pleas courtroom with his lawyers. Smith, 55, of Elyria, is on trial in the January 1994 slaying of Ronald Lally, a police informer.

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Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4250

Judge won't postpone Elyrian's murder trial

Ginger Parker
The Chronicle-Telegram

ELYRIA — A judge refused to grant a last-minute bid to postpone the trial of a man accused of killing another man he suspected of serving as a police informant.

Jury selection was expected to begin today in trial of Raymond Smith, 55, of Elyria. Smith could be sentenced to death if he is convicted of the aggravated murder of Ronald Lally, 30, of Elyria.

Lally's body was found Jan. 19 at the Woodland Cemetery in Cleveland. He had been shot in the mouth, beaten and run over by a car, police said.

Police say Smith, his son, Daniel Smith, 23, and friend, Stanley Jalowiec, 24, all were involved in Lally's death but will face trial separately.

Police say the men, all drug dealers, asked Lally to ride to Cleveland with them to buy drugs on the night of his death. They suspected Lally of telling police about their dealings, officers said.

On Monday, Attorney Harvey B. Bruner of Cleveland, representing Smith, asked Common Pleas Judge Kosma J. Glavas to postpone the trial. Glavas denied that request as well as another one to toss out statements Smith made to police during the investigation.

Bruner also wanted prosecutors barred from using a deposition provided by a witness, Michael Smith. Prosecutors said Smith deposition was taken in advance of the trial because he received a life-threatening message on his answering machine on June 2.

Michael Smith told prosecutors he felt his life was in danger and went into hiding after receiving the threat, court records show. Glavas rejected motion as well.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4251

sample request ripped

ELYRIA — A man accused of killing a onetime police informant says he shouldn't have to provide samples of his blood to the prosecution.

In a motion filed in Common Pleas Court on Friday, Stanley Jalowiec, 24, of Elyria, objected to the prosecutors' request for blood samples, saying it violates his constitutional rights.

■

Prosecutors asked Jalowiec, Daniel D. Smith, 23, and his father, Raymond A. Smith, 55, of Elyria, to provide blood samples.

■

Attorney Joseph C. Grunda, representing Jalowiec, also says drawing blood is "a very obtrusive and potentially harmful test," in court documents filed Friday. Judge Kosmia J. Glavas will decide the matter at a later date.

Prosecutors asked Jalowiec, Daniel D. Smith, 23, and his father, Raymond A. Smith, 55, of Elyria, to provide blood samples so the Cuyahoga County coroner could compare their blood to blood found near the body of Ronald Lally, 30, of Elyria.

Lally's body was found in Woodland Cemetery on Woodland Avenue in Cleveland on Jan. 19, 1994. He was shot in the mouth, beaten and run over with a car, police said.

The three Elyrians were charged on March 7 with aggravated murder in connection with Lally's death. Police say Lally and the three suspects were drug dealers in Elyria and Cleveland, and the trio killed Lally because they suspected he told police about their activities.

Lally was once an informant for Elyria police.

Blood sought from Elyrians accused of killing informant

Benjamin Gleisser
The Chronicle-Telegram

ELYRIA — Prosecutors are seeking to obtain blood samples from three Elyria men charged with killing a onetime police informant in Cleveland last year, according to court documents filed Friday.

Prosecutors say the Cuyahoga County Coroner's office wants blood samples from Daniel D. Smith, 23; his father, Raymond A. Smith, 55; and Stanley Jalowiec, 24, who were charged on March 7 with aggravated murder in connection with the slaying of Ronald Lally, 30, of Middle Avenue in Elyria.

Lally's body was found in Woodland Cemetery on Woodland Avenue in Cleveland on Jan. 19, 1994. He was shot in the mouth, beaten and run over with a car, police said.

See **BLOOD.** A6

BLOOD

From A1

The coroner wants to compare blood found at the crime scene and in the car used to transport Lally to the cemetery with the defendants' blood, the court record states.

Attorneys Daniel G. Wightman and Michael Duf are representing Jalowiec and the Smiths. Duff could not be reached for comment. Wightman declined to speculate about whether his clients would fight the prosecutor's request.

Police allege Lally and the three suspects were drug dealers in Elyria and Cleveland, and the trio killed Lally because they suspected he told police about their activities.

Lally was once an informant for Elyria police, said Cleveland homicide Detective Robert L. Moore.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4252

Ginger Parker
The Chronicle-Telegram

ELYRIA — An Elyria man who saw a police informer being killed has been ordered to tell all he knows before the murder trial begins.

Prosecutors say the eyewitness, Michael Smith, has received a death threat because of his plans to testify against his father and brother. They are accused of killing Ronald Lally, 30, of Middle Avenue.

Common Pleas Judge Kosma J. Glavas ruled Smith must give sworn testimony before the trial. The decision is a precautionary measure in case Smith is killed, said Elyria Detective Al Leiby.

"If something happens to him, we'll have his testimony," Leiby said.

Smith's brother, Daniel D. Smith, 23; his father, Raymond A. Smith, 55; and Stanley Jalowiec, 24, are charged with aggravated murder in Lally's death. If convicted, the Elyria men would face the death penalty.

Lally's body was found in the Woodland Cemetery on Cleveland on Jan. 19, 1994. He was shot in the mouth, beaten and run over with a car, police said.

Glavas' decision on Monday came after a heated argument Assistant County Prosecutor Jonathan E. Rosenbaum said Michael Smith has gone into hiding since receiving the threat on his answering machine June 2.

But defense attorneys questioned the validity of the threat because prosecutors do not have it on tape.

"We don't even know what it is..." said defense attorney Kenneth Lieux. "If we had a tape to listen to, that would be one thing. Is what we have here is hearsay upon hearsay...."

Leiby testified that the answering machine operated without a cassette tape and that the message was erased."

Defense Attorney Mike Duff argued, "What they're trying to do is get a statement from this guy to keep him from coming into court and looking them in the eye and testifying against them."

But Glavas interjected, telling Duff that Michael Smith's deposition will not take the place of his testimony during the Sept. 12 trial.

Voices were raised and tempers flared as the attorneys argued about where Michael Smith is staying and how much it costs to hide him.

"So OK, let's put him at your

See **TESTIFY,** C2

6-13-95

TESTIFY

From C1

court records that providing a safe house," Rosenbaum snapped at Attorney Edward Cleary.

Clearly angered by the attorneys talking out of turn, Glavas slammed his gavel several times and threatened to find them in contempt of court.

"This is nonsense," he yelled.

Rosenbaum said last week in and secret location for Smith is a "great expense." But it is necessary because "The defendants allegedly killed one witness and have nothing to lose by killing another," Rosenbaum wrote.

Cleveland [redacted] Daniel and [redacted] said [redacted] their arrest that they asked Lally to go with them to buy drugs, then beat him and kidnapped him and drove him to Cleveland.

Moore said the three suspects were drug dealers in Elyria and Cleveland. He said they killed Lally because they suspected he told police about their drug dealing.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4253

Slaying witness threatened

Cindy Leise
The Chronicle-Telegram

ELYRIA — Prosecutors say death threats have been made against a witness who plans to testify against three men charged with killing a police informant.

A court filing Wednesday said that the witness, Michael Smith, was threatened in the case against Daniel D. Smith, 23; his father, Raymond A. Smith, 55; and Stanley Jalowiec, 24. The three live in Elyria.

Michael Smith "fears for his life and the safety of his family," according to documents filed by Jonathan Rosenbaum, the chief assistant county prosecutor. The reports did not say if Michael Smith is related to Daniel or Raymond Smith, and Rosenbaum could not be reached for comment.

Daniel and Raymond Smith and Jalowiec are charged with killing Ronald Lally, 30, of Middle Avenue in Elyria. Lally's body was found in the Woodland Cemetery on Cleveland on Jan. 19, 1994. He was shot in the mouth, beaten and run over with a car, police said.

The Smiths and Jalowiec are charged with aggravated murder, and they face the death penalty if convicted. They are to stand trial Sept. 12.

Rosenbaum's court filing Wednesday objected to a request by a defense attorney for a delay in a deposition from Michael Smith.

However, the prosecutor's office would be willing to move up the date of the deposition "to convenience" defense attorney Michael Duff, Rosenbaum wrote.

Rosenbaum said that prosecutors have had to move Smith to a secret location "at great expense.

"The defendants allegedly killed one witness and have nothing to lose by killing another," Rosenbaum wrote.

[redacted]

Moore said Daniel and Raymond Smith and Jalowiec asked Lally to go with them to buy drugs, then beat him and kidnapped him and drove him to Cleveland.

Moore said the three suspects were drug dealers in Elyria and Cleveland. He said they killed Lally because they suspected he told police about their drug dealing.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4254

05-2-95

Lorain County

ELYRIA

WITNESS' STATEMENT SOUGHT

Prosecutors asked a judge yesterday to let them take the deposition of a man who allegedly witnessed a murder attributed to his father and brother. In a motion filed yesterday, Chief Assistant Prosecutor Jonathan E. Rosenbaum said he wanted the sworn statement of Michael Smith. "Michael Smith stated that he is afraid as a result of what he knows, and that he was present when Ron Lally met his demise." Rosenbaum wrote. Smith is the son of Raymond Smith, 55, and the brother of Daniel D. Smith, 23. The Smiths and Stanley Jalowiec, 24, all of Elyria, are accused of killing Lally, whose body was found in a cemetery in Cleveland. Police said Lally had been shot in the mouth, beaten and run over by a car because his associates believed he was acting as a police informant. The Smiths also are facing drug charges.

Witness hides from threats

Jun 8

Man to testify in murder case

By KATHLEEN WICKHAM
Morning Journal Writer

ELYRIA — Prosecutors are hiding a man who is allegedly receiving death threats because he is planning to tell all about what he saw the night his father and brother are accused of murdering an Elyria man.

Chief Assistant Prosecutor Jonathan Rosenbaum filed a motion yesterday urging Lorain County Common Pleas Judge Kosma Glavas to deny a defense attorney's motion to postpone a June 15 date to record the testimony of witness Michael Smith.

Smith's father, Raymond Augustus Smith, 55, and brother, Daniel Dean Smith, 23, as well as Stanley E. Jalowiec, 24, could face the death penalty if convicted of aggravated murder in connection with the Jan. 19, 1994, death of Ronald Lally, 30.

"Michael Smith stated that he is afraid as a result of what he knows and that he was present when Ron Lally met his demise," said Rosenbaum. "The defendants have allegedly killed one witness and have nothing to lose by killing another."

Rosenbaum said the state is paying to hide Michael Smith and his family because of the death threats until after Michael's deposition — which can be used at the three defendants' Sept. 12 trial — has been taken.

> "The defendants have allegedly killed one witness."
>
> Jonathan Rosenbaum, assistant prosecutor

Defense attorneys must be present at the deposition and one attorney, Michael Duff, indicated a conflict and asked for a delay.

Rosenbaum, however, said Michael Smith won't be safe until after his sworn statement is taken and wants Glavas to deny Duff's request.

Glavas has scheduled a June 12 hearing on Duff's request.

Lally was a police informant who was set to testify against the defendants the day after his murder about their involvement in a drug ring.

Lally's body was dumped at the Woodland Cemetery at East 69th Street and Quincy Avenue in Cleveland.

8

In Memory of
RONALD J. LALLY
6-1-63 - 1-19-94



If you go first and I remain
One thing I'd have you do
Walk slowly down that long, long path
For soon I'll follow you.
And I'll need to know each step you take
That I might walk the same
For somewhere on that lonely road
You'll hear me call your name.
All My Love Always
Sandy

3 Elyrians held

e Wallace
Chronicle-Telegram

ELYRIA — Three Elyria drug lers beat and shot a onetime ce informant and then drove a over him several times before dumped him in a cemetery year, police said today.
Daniel D. Smith, 23; his father, mond A. Smith, 55; and Stanley Jalowiec, 24, were indicted Tuesday by a Lorain County grand jury on aggravated murder charges in the death of Ronald Lally, 30, of Middle Avenue in Elyria.

Lally's body was found in the Woodland Cemetery on Woodland Avenue in Cleveland on Jan. 19, 1994. He was shot in the mouth, beaten and run over with a car, police said.

The indictment carries death penalty specifications, meaning a judge could sentence the men to die if they are convicted. They will be arraigned in Lorain County Common Pleas Court next week.

Cleveland homicide Detective Robert L. Moore said Lally and the three suspects were drug dealers in Elyria and Cleveland. The men

n drug slaying

ed Lally because they sus-ed he told police about their g dealing, Moore said.

"They made a plan to coerce out of his home to go and buy gs, then they beat him and kid-ped him and drove him to veland," Moore said. He said






SLAYING

From A1

Lally was once an informant for Elyria police.

The indictments were unsealed today. The three were served at the Lorain County jail, where they were being held on unrelated charges.

The charges were a result of a joint investigation by Elyria and Cleveland police.

Elyria police Detectives Al Lelby and Duane Whitely met weekly with Moore and his partner, Detective Michael Beaman, to discuss leads in the case, Moore said. Every lead was checked, no matter how insignificant it appeared at first.

"There was no doubt in my mind that we would solve this," Lelby said.

"You can't even imagine the number of hours that go into something like this."

Police initially suspected Jalowiec's involvement, and officers later tied him to the Smiths, Moore said.

An anonymous call led police to Lally's body in the cemetery. A second call provided his name, police said. He was last seen in Elyria 11 days before his body was found.

Toxicology reports indicated Lally had cocaine in his system when he died, police said.

At the time of the slaying, Lally's brother, William Lally, of Brooklyn, a Cleveland suburb, said he saw his brother at Christmas and that he had been doing as well as anyone with a drug problem could be.

William Lally has since moved and could not be reached for comment today.

Moore said he is proud that indictments finally were issued in the case, one of many murder investigations he handled throughout the year.

"No matter how much of a shady character Ronald Lally was, he deserves a proper burial and his perpetrators should be brought to justice," Moore said.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4256

County judges: System works

Ginger Parker
The Chronicle-Telegram

ELYRIA — In the wake of O.J. Simpson's acquittal, local judges contend America's judicial process is still the best there is, while defense lawyers say they hope the verdict sends a powerful message.

Even though Lorain lawyer Jack Bradley has made a career out of defending the accused, he said he was "devastated" by the verdict.

"Hopefully O.J. is not a legal disaster, and will be the first step to change the terrible system we've developed between police and prosecutors," he said.

The jury's decision prompted some debate about the conduct of police officers and about whether the judicial system failed.

Bradley and fellow defense lawyer Kenneth Lieux agreed the Simpson verdict sent a message to prosecutors across the nation: "Quit looking the other way when police lie," Bradley said.

"It should be a strong message to prosecutors that police misconduct shouldn't be tolerated," Lieux said.

Police Detective Al Leiby said he has seen no evidence of police misconduct. "Locally, I don't see it," he said. "I haven't seen it in Elyria."

The detective would not comment on former Los Angeles Police Detective Mark Fuhrman's role in the jury's decision.

"I want to know how long it will take the prosecutors in Los Angeles to put (Fuhrman) in O.J.'s cell because that's where he belongs," Bradley said.

But local Common Pleas judges defended the system.

"We do have the best judicial system in the world," said Common Pleas Judge Lynett McGough. "...I have tremendous respect for the jury system and I would not second-guess the jury's verdict."

McGough also said juries do not decide whether a defendant is innocent but rule on whether the state has proven the defendant guilty by reasonable doubt.

"So this jury has not found O. J. innocent," the judge said. "They have found that the state has not proven his guilt beyond a reasonable doubt."

Common Pleas Judge Kosma J. Glavas, who predicted Simpson's acquittal, agreed. Glavas said he believes Simpson is guilty and was dissatisfied with the verdict but, "I don't think I want to hang it on the entire judicial process. . . I don't think it (the verdict) was an indictment or endorsement on the entire system. This was California."

Common Pleas Judge Janas was guarded in his comments on the Simpson case but said he hopes the public realizes "it was unique in many ways."

Lieux said he was surprised by the jury's quick decision.

"I think they bought into (defense attorney Johnnie) Cochran's theory about police misconduct and race," Lieux said.

Former Lorain County Prosecutor Joseph Grunda Sr., who is now a defense attorney, said he also thought the case sent a powerful message about truth.

Grunda said not only police officers but also all others who take the witness stand should never stretch the truth to try and get a conviction — even if one's sure the defendant is guilty. Grunda said, the chance of getting caught lying is just too great and can taint the entire case, allowing a guilty person to walk free.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4257

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CHRONICLE TELEGRAM
ELYRIA, OH.
PM CIRC. 37,865

249
MAR-5-96

Suspect wants new judge assigned to murder trial

Ginger Parker
The Chronicle-Telegram

ELYRIA — A man charged with murdering a police drug informant says the judge assigned to his trial should be disqualified because he may be called as a witness.

The attorney for Stanley Jalowiec, 25, of Elyria filed a motion Monday asking Common Pleas Judge Kosma J. Glavas to disqualify himself from hearing the case, which is set to go to trial March 12.

Jalowiec is charged with the aggravated murder of Ronald Lally — a one-time drug informant for the Elyria Police Department. If convicted, Jalowiec could face the death penalty.

Glavas is attending a judges' conference this week and was unavailable for comment.

In his motion, Jalowiec's attorney Joseph C. Grunda did not explain why he would ask Glavas to testify. Grunda did not return messages left at his office Monday.

Glavas was the judge during the trial last year of Raymond Smith, 56, who was convicted and sentenced to death in Lally's murder.

If Glavas refuses to disqualify himself, Grunda could ask the Ohio Supreme Court to decide whether Glavas could hear the case.

In an earlier motion, Jalowiec argued that his case should be tried in Cuyahoga County because the victim's body was found there. Glavas denied the motion.

Lally's body was discovered in a cemetery in Cleveland on Jan. 19, 1994. He had been beaten, shot in the head and run over by a car. His throat also had been slit.

Police said Jalowiec, Raymond Smith and Smith's son, Daniel, killed Lally because they suspected he told police about their drug dealings. Raymond Smith was convicted in December of aggravated murder and sentenced to death Jan. 6 by Glavas.

Daniel Smith also is charged with aggravated murder and could face the death penalty. He is scheduled to go on trial April 9 in Glavas' courtroom.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4258

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CHRONICLE TELEGRAM
ELYRIA, OH.
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MAR-8-96

Judge Glavas declines motion to take himself off Jalowiec trial

Ginger Parker
The Chronicle-Telegram 8/49

ELYRIA — A judge has refused to disqualify himself from hearing a murder trial although the defense attorney says he may call the judge as a witness.

Judge Kosma J. Glavas denied a motion Thursday to remove himself from presiding over the trial of Stanley Jalowiec, 25, of Elyria, who is charged with helping to kill a police informant in 1994.

Jalowiec's trial is set to begin Tuesday in Common Pleas Court.

Joseph C. Grunda, Jalowiec's attorney, had filed the motion Monday, saying he wants to call Glavas to testify. He would not say what information Glavas could offer or why he would be called as a witness.

Glavas also presided over the aggravated murder trial of Raymond Smith, 56, last year. Smith, Smith's son, Daniel, 24, and Jalowiec were arrested by police in connection with the slaying of Ronald Lally — a one-time drug informant for the Elyria Police Department.

Raymond Smith was sentenced to death by Glavas Jan. 6. If convicted, Jalowiec also could face the death penalty.

Daniel Smith's trial is scheduled for April 9, also in Glavas' courtroom.

Grunda said Glavas would not be asked to testify about the Raymond Smith trial.

Grunda said he will file a motion with the Ohio Supreme Court asking that Glavas recuse himself from the case. The Supreme Court justices will make the final decision.

Lally's body was found in a Cleveland cemetery in January 1994. He had been beaten, shot in the head and run over by a car. His throat had been slit.

Police said Jalowiec and the Smiths killed Lally because they suspected he told police about their drug dealings.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4259

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MORNING JOURNAL
LORAIN, OH.
PM CIRC. 46,016

MAR-16-96

Son says he heard dad shoot, kill man

By GREGORY KORTE
Morning Journal Bureau Chief

ELYRIA — Michael Smith saw his father climb out of a car with a gun and heard him kill Ron Lally, Smith told a packed courtroom yesterday. Lally was going to testify against the father in a drug case.

Smith testified at the trial of Stanley Jalowiec, a 25-year-old Elyria man accused of driving the car that took Lally to his death in a Cleveland cemetery. If convicted, Jalowiec could get the death penalty.

Smith's father, 55-year-old Raymond Smith, was convicted of aggravated murder in January and was sentenced to die.

But Michael Smith didn't testify in that case, because he was hiding from police who wanted him for violating his probation for robbery. He is expected to testify against his brother, Daniel, who's also charged with aggravated murder.

Yesterday, Michael Smith testified that he was there in the early hours of Jan. 24, 1994, when Lally was killed.

Smith said he didn't actually see the shooting as he sat in the back seat of the car because he "put (my) face in (my) hands and stopped looking at the world." Raymond Smith ordered Lally out of the car at gunpoint, and Lally pleaded for his life.

"After I heard the gunshot, I heard Ron say 'You shot me in my head!' " Michael Smith said.

Afterward, the three tried to put Lally's body in the trunk, Michael Smith said. But the body wouldn't fit, so Jalowiec got back behind the wheel and backed over it three times.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4260

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MORNING JOURNAL
LORAIN, OH.
PM CIRC. 46,016

MAR-19-96

Defense mum, rests in Jalowiec murder case

By GREGORY KORTE
Morning Journal Bureau Chief

ELYRIA — Testimony in the capital murder trial of Stanley Jalowiec came to an anticlimactic end yesterday when the defense failed to call a single witness.

Raymond Augustus Smith, the 55-year-old Elyria man sentenced to die for his role in the 1994 killing of police informant Ron Lally, came from Ohio's Death Row in Mansfield yesterday to testify.

Smith even made it to the witness stand, where he sat wearing prison garb and handcuffs, before defense lawyer Joseph C. Grunda decided not to call him as a witness.

Lorain County Common Pleas Judge Kosma J. Glavas said he was told by Smith that he would refuse to testify, claiming his Fifth Amendment right against self-incrimination.

Smith's son, 24-year-old Daniel Smith, was also scheduled to testify. But attorney Michael Duff similarly advised him not to say anything under oath.

Jalowiec, 25, was the one who allegedly drove Lally to a Cleveland cemetery where Raymond Smith shot Lally, a 30-year-old crack addict who was set to testify against Smith's drug gang the next day, prosecution witnesses said.

Closing arguments will begin this morning, after which the jury will be sequestered until it reaches a verdict. If jurors find him guilty of aggravated murder, they will reconvene to consider whether he should get the death penalty.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4261

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PLAIN DEALER
CLEVELAND, OH.
AM CIRC. 456,727

MAR-19-96

Defendant, witness at murder trial chose to be silent

By STEPHEN HUDAK
PLAIN DEALER REPORTER

249

ELYRIA — After a death-row inmate invoked his Fifth Amendment rights yesterday, Stanley Jaloweic changed his mind and decided not to testify either.

Jurors are expected to begin deliberating this morning about whether Jaloweic helped Raymond A. Smith kill drug informant Ron Lally in a cemetery.

Smith, 56, was convicted last year of aggravated murder in Lally's death. He is appealing that verdict.

Defense lawyers Joseph Grunda and Edward Cleary wanted to call Smith and his son Danny before putting Jaloweic, 25, on the witness stand yesterday.

Grunda said Jaloweic elected not to testify after he learned both Raymond and Danny Smith planned to stay silent if called to the witness stand.

The Smiths met with lawyers who advised them to invoke the Fifth Amendment, which provides the constitutional protection against self-incrimination.

Grim-faced, handcuffed and wearing blue prison clothes, Raymond Smith was escorted from court by deputies as his family waved and shouted, "Love you."

He was never sworn in as a witness.

One of Smith's sons, Raymond A. Smith III, marched in protest outside the courthouse yesterday because he was banned from the courtroom Friday.

He carried a cardboard placard that read: "This is supposed to be a courthouse for fair and equal justice. All we have here is a railroad station."

The younger Smith was prohibited from returning to court by Lorain County Common Pleas Judge Kosma J. Glavas after a coughing fit at the end of Friday's session, which deputies interpreted as an attempt to intimidate a witness.

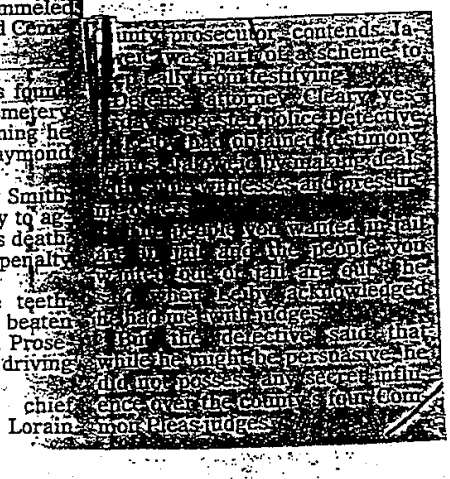
It followed the testimony of his brother Michael, who said their father and Jaloweic pummeled Lally to death at Woodland Cemetery.

Lally, 30, of Elyria was found dead in the Cleveland cemetery on Jan. 19, 1994, the morning he was to testify against Raymond Smith and son Danny, 24.

Jaloweic and Danny Smith, who has pleaded not guilty to aggravated murder in Lally's death, also could face the death penalty if convicted.

Lally was shot in the teeth, slashed across the throat, beaten and run over three times. Prosecutors say Jaloweic was driving the car that ran him over.

Jonathan Rosenbaum, chief criminal counsel for the Lorain



Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4262

sw Cleve PD Wed 3/20/96

Jury to resume deliberations in informer slaying

By STEPHEN HUDAK
PLAIN DEALER REPORTER

ELYRIA — Jurors are to resume deliberations today in a case that could send an Elyria man to death row for the slaying of a police informant.

The panel of six men and six women mulled over evidence for about five hours yesterday before they were shuttled to a hotel and sequestered for the night.

Jurors must decide if Stanley Jaloweic was a part of Raymond A. Smith's plan to kill confidential drug informant Ron Lally in January 1994.

Defense lawyers Edward Cleary and Joseph Grunda contend that Jaloweic had no idea that Smith planned to kill Lally when he drove to Woodland Cemetery in Cleveland.

Smith, 56, has been sentenced to die in the electric chair. His son, Daniel D. Smith, 24, is to stand trial April 9 in Lally's death.

Police say Lally, 30, was shot in the mouth, slashed across the throat, stomped and struck three times with the back tires of a convertible. His body was found in the snow in the Cleveland cemetery on Jan. 19, 1994 — the morning he was scheduled to testify that he bought crack cocaine from the Smiths.

Lally, who was a crack addict, had offered to help police arrest his suppliers because he was angry that his habit had led him to steal from his fiancee.

The fiancee, Sandra Williams, waited patiently yesterday among Jaloweic's relatives for the verdict. Lally's mother has been too ill to attend.

Defense lawyer Joseph Grunda urged jurors not to be swayed by the grisly photographs of Lally's wounds nor by Assistant Prosecutor Jonathan Rosenbaum's inflammatory rhetoric.

"The prosecutor's telling you there's a wrong, a person's dead, you have to find somebody guilty," Grunda said. "Stan doesn't even have a motive."

He reminded jurors that they could not convict Jaloweic just because he was in the cemetery when Lally was killed. He said they had to prove that he, too, plotted.

Grunda also attacked the credibility of the state's witnesses, some of whom were granted immunity from drug charges and some of whom were spared prison.

Jaloweic did not testify in the trial.

"This was an assassination," Rosenbaum said, holding up a police photo of Lally's beaten face to jurors, some of whom winced or looked away.

He argued that Jaloweic helped to concoct the plot, which had him drive a borrowed car to an empty field at 2:30 a.m. on the coldest night of 1994.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4263

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CHRONICLE TELEGRAM
ELYRIA, OH.
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MAR-20-96

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4264

Lawyers dispute Jalowiec witness quality

inger Parker
he Chronicle-Telegram 219

ELYRIA — Defense attorneys ay prosecutors relied on lying rug addicts to pin a murder harge on Stanley Jalowiec.

"I just hope the jury doesn't lectrocute someone based on the estimony of these people," dward Cleary, a defense attorey, said Tuesday.

But Jonathan Rosenbaum, an ssistant county prosecutor, icked apart the criticism: "A onspiracy conceived in hell is eldom witnessed by angels. Remember, the state doesn't get o choose its witnesses. They were chosen by the defendant."

Rosenbaum made the state ments in his closing arguments Tuesday. The case was turned over to a jury, and the attorneys expect a verdict today.

Jalowiec faces the death penalty if he is convicted. If that happens, the jury would recommend whether Jalowiec deserves to die. Common Pleas Judge Kosma Glavas would make the decision on whether Jalowiec goes to death row.

Jalowiec is charged with aggravated murder in the death of Ronald Lally, 30, of Elyria. He and two other men, Raymond and Daniel Smith, also are charged in the slaying, which happened two years ago.

Prosecutors said Lally was a key witness in a drug trial against the Smiths. On the morning of the trial, Raymond Smith and Jalowiec, a friend of the family, drove Lally to a cemetery in Cleveland. There, prosecutors said, Smith shot Lally and Jalowiec beat him and drove a car over him.

Jurors, who were sequestered overnight, began deliberating Jalowiec's fate Tuesday afternoon. They resumed deliberations this morning.

At Jalowiec's request, jurors will not consider a lesser charge. That means the verdict will be "all or nothing" Glavas said.

In closing statements, Grunda described some of the prosecution's witnesses as drug-addicted liars who testified in exchange for lesser sentences.

Rosenbaum acknowledged that some of the witnesses were not model citizens, but he told jurors they were a reflection of Jalowiec.

Jalowiec is charged with brutally murdering Ronald Lally, a one-time drug informant for the Elyria Police Department. Lally's body was found Jan. 19, 1994, in a Cleveland graveyard. His injuries indicated had been shot, stomped, beaten, run over with a car and had his throat cut, according to testimony.

Jalowiec is accused of beating and stomping Lally and then ramming into him with a borrowed car, according to testimony.

"If this is the case, how come he didn't have any blood on him?" asked Grunda. "How come he didn't have any injuries? Why weren't his clothes torn?"

But Rosenbaum told jurors that Jalowiec had the car washed before returning it, "so why can't they clean themselves up?"

Rosenbaum has characterized Lally's death as a "heinous, cold-blood assassination of a government witness."

Raymond Smith's second son, Michael, testified that he was high on crack cocaine and was there the night of the murder. He told jurors his father and Jalowiec killed Lally together, while he sat in shock inside the car.

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MORNING JOURNAL
LORAIN, OH.
PM CIRC. 46,016

MARCH-20-96

Jury gets Jalowiec murder case

By GREGORY KORTE
Morning Journal Bureau Chief

ELYRIA — A Lorain County jury is deciding the fate of Stanley Jalowiec, a 25-year-old Elyria man accused in a conspiracy to kill a police informant in 1994.

Jalowiec is charged in the death of Ronald Lally, 30, a crack addict and police informant who was scheduled to testify against Raymond and Daniel Smith in a drug case the day his bloodied body was found in Cleveland. Lally had been beaten, shot in the head and run over by a car, which witnesses said Jalowiec drove.

Raymond Augustus Smith, 55, has already been convicted and sentenced to die in the electric chair. Daniel Smith, his 24-year-old son, goes on trial next month.

The star witness in Jalowiec's trial was Michael Smith, another son of Raymond who testified he was in the car the night Jalowiec drove Lally and the Smiths to Cleveland and Lally was killed.

In closing arguments yesterday, Chief Assistant Prosecutor Jonathan Rosenbaum told jurors that he didn't need Michael Smith's testimony, but said Michael Smith's testimony was uncontradicted because the defense did not call any witnesses.

"Michael is obviously a very important witness. Michael Smith was there," he said. "And Michael Smith's testimony is completely supported by the physical evidence in this case."

Rosenbaum showed jurors photographs of bloody tire tracks through the snow in a Cleveland cemetery and described the killing as a "brutal and savage assassination."

But defense lawyer Joseph C. Grunda argued that the prosecution's case was weak.

"The more descriptive words they use shows how weak their case is," he told jurors as he tried to plant the idea of reasonable doubt in their minds.

Grunda asked questions he said the prosecution never answered: "If it's such a well-orchestrated plan, why is Michael there? It doesn't fit," Grunda said. "What motive does Stanley have in a Smith family problem?"

If jurors find Jalowiec guilty of aggravated murder, they will then have to hear mitigating evidence before deciding whether he should get the death penalty.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4265

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BRYAN TIMES
BRYAN, OH
PM CIRC. 11,869

MARCH-21-96

Man convicted of aggravated murder

249

ELYRIA, Ohio (AP) — A man was convicted in the beating death of a police drug informant.

Stanley Jaloweic, 25, of Elyria, was convicted of aggravated murder Wednesday in the Jan. 19, 1994, death of Ronald Lally, 30. The Elyria man had become a city police informant when he tried to end his own drug habit.

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YOUNGSTOWN VINDICATOR
YOUNGSTOWN, OH.
PM CIRC. 91,654

MAR-21-96

Elyria man guilty 249 in informant's slaying

ELYRIA, Ohio (AP) — A man was convicted in the beating death of a police drug informant.

Stanley Jaloweic, 25, of Elyria was convicted of aggravated murder Wednesday in the Jan. 19, 1994, death of Ronald Lally, 30. The Elyria man had become a city police informant when he tried to end his own drug habit.

The same Lorain Common Pleas Court jury that convicted Jaloweic must return April 9 to decide whether to recommend the death penalty. Defense lawyers Joseph Grunda and Edward Cleary did not comment on the verdict.

CHRONICLE-TELEGRAM
ELYRIA, OH.
PM CIRC. 37,065

MAR-21-96



LED T OF OURT: Stanley Jalowiec, bent over because of the handcuffs and leg irons he is wearing, is taken to Lorain County jail by sheriff's deputies. He was found guilty of murder

BRUCE BISHOP / CHRONICLE

Jalowiec finds 'joy,' but no 'justice' here

Ginger Parker
The Chronicle-Telegram

ELYRIA — Stanley Jalowiec smirked Wednesday after jurors convicted him in the murder of a police informant two years ago.

The 25-year-old Elyrian later explained his reaction by saying, "The Lord says any time you go through trials, look for joy."

Jalowiec's mother apparently could find no joy in the verdict. She left the courtroom crying and would not talk with reporters.

Jurors found Jalowiec guilty of aggravated murder in the death of Ronald Lally on Jan. 19, 1994. The jury will reconvene April 9 to hear additional testimony on whether Jalowiec should receive the death penalty or life in prison.

Jalowiec called a reporter Wednesday afternoon and said he was prepared for the guilty verdict.

"It was only obvious," he said. "I'm not gonna get justice in Lorain County."

Jalowiec has accused Elyria police Detective Al Leiby of strong-arming witnesses into testifying against him because he would not cooperate with police.

Leiby strongly denied the accusations. "People should keep in mind that desperate people say and do desperate things," he said.

Jalowiec said he plans to better himself whether he gets life in prison or is sent to Ohio's Death Row, where six other Lorain Countians are already awaiting execution.

"I currently passed the GED (General Educational Development) pre-test and am preparing to take that and go from there," he said. "I figure if I go to prison I can get in some school program and better myself."

Jalowiec, who dropped out of high school in the 11th grade, said he'd like to study law or work in a prison drug rehabilitation program.

Jalowiec is the second person convicted in Lally's murder. Raymond Smith, 55, of Elyria was found guilty in December, and Common Pleas Judge Kosma J. Glavas sentenced him to death.

Raymond Smith's son, Daniel, will go on trial on aggravated murder charges next month. Jalowiec said he may testify on Daniel Smith's behalf.

Lally, 30, of Elyria was a crack addict who told police about his drug dealings with Raymond Smith and Smith's son, Daniel, 24. Lally was murdered when he was scheduled to testify against the younger Smith.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4268

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DEFIANCE CRESCENT NEWS
DEFIANCE, OH.
PM CIRC. 18,546 (NO SAT)

MAR-21-96

Convicted of murder

ELYRIA (AP) — A man was convicted in the beating death of a police drug informant.

Stanley Jaloweic, 25, of Elyria, was convicted of aggravated murder Wednesday in the Jan. 19, 1994, death of Ronald Lally, 30. The Elyria man had become a city police informant when he tried to end his own drug habit.

The same Lorain Common Pleas Court jury which convicted Jaloweic must return April 9 to decide whether to recommend the death penalty.

Defense lawyers Joseph Grunda and Edward Cleary did not comment on the verdict.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4269

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URBANA DAILY CITIZEN
URBANA, OH.
PM CIRC. 7,790

MAR-21-96

Man convicted

ELYRIA, Ohio (AP) — A man was convicted in the beating death of a police drug informant.

Stanley Jaloweic, 25, of Elyria, was convicted of aggravated murder Wednesday in the Jan. 19, 1994, death of Ronald Lally, 30. The Elyria man had become a city police informant when he tried to end his own drug habit.

The same Lorain Common Pleas Court jury which convicted Jaloweic must return April 9 to decide whether to recommend the death penalty.

Defense lawyers Joseph Grunda and Edward Cleary did not comment on the verdict.

Lally was killed on the day he was due to testify against two alleged cocaine dealers.

One, Raymond Smith, 56, was convicted of aggravated murder last year and is appealing his death sentence. His son, Daniel, 24, must stand trial next month on an aggravated murder charge.

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BELLEFONTAINE EXAMINER
BELLEFONTAINE, OH.
PM CIRC. 11,100

MAR-21-96

Man convicted in beating death of drug informant

249 ELYRIA (AP) — A man was convicted in the beating death of a police drug informant.

Stanley Jaloweic, 25, of Elyria, was convicted of aggravated murder Wednesday in the Jan. 19, 1994, death of Ronald Lally, 30. The Elyria man had become a city police informant when he tried to end his own drug habit.

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Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4271

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ADVERTISER-TRIBUNE
TIFFIN, OH.
PM & SUN CIRC. 11,797

MAR-22-96

Man convicted in beating death249

ELYRIA (AP) — A man was convicted in the beating death of a police drug informant.

Stanley Jaloweic, 25, of Elyria, was convicted of aggravated murder Wednesday in the Jan. 19, 1994, death of Ronald Lally, 30.

The Elyria man had become a city police informant when he tried to end his own drug habit.

The same Lorain Common Pleas Court jury which convicted Jaloweic must return April 9 to decide whether to recommend the death penalty.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4272

CHRONICLE TELEGRAM
ELYRIA, OH.
PM CIRC. 37,065

APR-9-96

Killer's fate is resting with jury

Ginger Parker
The Chronicle-Telegram 3A9

ELYRIA — Convicted murderer Stanley Jalowiec pleaded with jurors today to spare his life.

Jalowiec, 25, of Elyria took the stand to provide an unsworn statement to jurors debating whether he spend his life in prison or be sentenced to death for his role in the January 1994 death of a onetime police informant, Ronald Lally.

"I ask that you spare my life so I can reform myself from these people," Jalowiec said.

The 11th-grade dropout choked up when he described his childhood dream of becoming a veterinarian and how he faithfully attended school as a child despite suffering from dyslexia.

He said health problems interrupted his perfect attendance from kindergarten to fifth grade. "I begged the doctors to let me go to school," he said.

He also told jurors he once took a job in a gay bar to help cover medical expenses for his girlfriend's second child, who was born deaf and required speech therapy. He described himself as a father figure to her children.

An unsworn statement — allowed by law in the sentencing phase of death penalty cases — means prosecutors do not have the opportunity question defendants about their remarks.

Jalowiec was convicted of aggravated murder last month. Prosecutors say Jalowiec helped Raymond Smith, 55, and his son, Daniel Smith, 24, kill the crack-addicted Lally for telling police about the Smiths' drug dealing.

Raymond Smith was convicted in December and sentenced to death in connection with Lally's death. Daniel Smith is awaiting trial.

Jalowiec and the Smiths drove Lally to Cleveland on the pretense of putting him on a bus to avoid testifying against Daniel Smith, prosecutors say. Instead, they stopped at a Cleveland cemetery and beat, stabbed and ran over the 30-year-old Lally.

During the 40-minute statement, Jalowiec blamed the Smiths for Lally's murder.

"Why would I do anything?" he asked. "I had no reason to kill this man. He didn't bust me. That's not my family ...It doesn't make sense."

He said the witnesses who implicated him in the case each were facing long prison sentences if they did not cooperate with authorities. He said Michael Smith, another of Raymond Smith's sons who testified against Jalowiec, covered his own involvement by blaming Jalowiec.

"He should be here saying this speech, not me," Jalowiec said.

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MORNING JOURNAL
LORAIN, OH.
PM CIRC. 46,016

APR-10-96

Jalowiec's family pleads for his life

249

By GREGORY KORTE
Morning Journal Bureau Chief

ELYRIA — Stanley Jalowiec's family testified yesterday that he was a clean-cut young man who never picked fights and loved children.

But prosecutors called on witnesses who said the 25-year-old convicted murderer dealt in drugs, smoked crack and beat an Elyria man in the head with a baseball bat in a fight outside a Broad Street bar.

Jurors will consider both portraits of Jalowiec as they decide today whether Jalowiec should be sentenced to death.

Jalowiec, once a go-go dancer in a gay nightclub, was convicted last month of aggravated murder in the death of Ronald Lally, a 30-year-old crack addict and police informant.

Lally was scheduled to testify against Raymond and Daniel Smith in a drug case the day his bloodied body was found. Witnesses said Jalowiec drove Lally to a Cleveland cemetery, where he was beaten, shot in the head and run over by a car.

Family members who testified on Jalowiec's behalf said yesterday that they still do not believe he had a role in the murder.

"I've seen my brother walk away from a lot of fights, a lot of people who tried to fight him. And I see him with my daughter," said Jalowiec's sister, 24-year-old Tammy. "I just don't see how — he wouldn't do this for one thing."

Crying, she told the jury, "I just want to tell you, please don't sentence him to death. It's not right."

> "I just don't want you to kill my son. To me, only God has the right to do that."
>
> Sarah Jalowiec

Jalowiec's mother, Sarah, also pleaded with the jury. "I just don't want you to kill my son. To me, only God has the right to do that."

But Chief Assistant Prosecutor Jonathan Rosenbaum countered by asking, "Who had the right to kill Ronald Lally?"

"He loves life. I can't see him taking it," Mrs. Jalowiec replied.

"Do you think you're biased because you're his mother?" Rosenbaum asked.

"I couldn't convict anybody based on what I heard," she said. "My son has never done crack in front of me, I'll tell you that. My son doesn't even smoke. You smoke crack, right? If he doesn't smoke, how can he smoke crack?"

Later, Lorain County Common Pleas Judge Kosma Glavas barred four women — including Jalowiec's mother and sister — from the courtroom. He said jurors complained about the women talking and giggling during testimony.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4274

PLAIN DEALER
CLEVELAND, OH.
AM CIRC. 456,727

APR-10-96

Convicted murderer asks jury to spare life

By STEPHEN HUDAK
PLAIN DEALER REPORTER

ELYRIA — Before they arrested Stanley Jaloweic in a drug informant's murder, Elyria police charged him for everything from jaywalking to assault.

"Detective Al Leiby basically set me up," Jaloweic said.

Jaloweic, 25, asked a jury yesterday to spare his life when they decide his sentence for the beating death of Ron Lally on Jan. 19, 1994.

Jurors were to return this morning to hear final arguments from Chief Assistant Prosecutor Jonathan Rosenbaum and defense lawyers Edward Cleary and Joseph Grunda.

The jury convicted Jaloweic of aggravated murder on March 20.

In a rambling, 90-minute speech to jurors, Jaloweic described his life as a dyslexic grade-schooler and arthritic vagabond who could not hold a job. When his arthritic knees allowed, he fetched range balls at his grandfather's golf course, washed limousines, trimmed trees and worked as a go-go dancer at a gay bar. He admitted he used drugs but denied he killed Lally.

> 'Why would I have anything to do with it? He didn't bust me. He didn't buy drugs from me. It was a family thing. I'm not part of the Smith family.'
>
> STANLEY JALOWEIC

"Why would I have anything to do with it? He didn't bust me. He didn't buy drugs from me," Jaloweic said. "It was a family thing. I'm not part of the Smith family."

If jurors choose capital punishment, Jaloweic would join co-defendant Raymond A. Smith on death row at the Mansfield Correctional Institution.

The morning his body was found in the snow at Woodland Cemetery in Cleveland, Lally was to testify he bought crack from Smith and his son, Daniel.

Both cases were dismissed.

Smith's son, Daniel D., has pleaded not guilty to aggravated murder. His trial was set to begin yesterday but was delayed while jurors decide Jaloweic's fate.

Jaloweic recounted a series of charges that are pending against him — including felonious assault, drug abuse, aggravated trafficking and arson.

"I'm pretty sure Leiby had something to do with this," he said.

But Capt. Dennis Cavanaugh, who oversees the Lorain County Drug Task Force, testified that Leiby had nothing to do with drug investigations of Jaloweic.

While Rosenbaum presented a picture of Jaloweic as a violent and remorseless crack dealer, his friends and family drew a different picture.

They described a man who befriended stray dogs and homeless people.

Jackie Chaffin, who shared a trailer with Jaloweic, said her toddler never called Jaloweic dad but loved him as much. "Stan was his best friend and still is," she said.

She said he also helped with her deaf newborn, Cody.

Edward "Pinky" Jaloweic, 79, recalled how his grandson rescued a family of pesky chipmunks who invaded the 13th hole on his golf course.

"He wouldn't kill a thing," Edward Jaloweic said. "He wouldn't even go hunting with us."

Sarah Jaloweic testified she, too, believed police — especially Leiby, the lead investigator — may have set her son up. She claimed she overheard Leiby at a grocery store vow to "fry" her son for Lally's murder.

Jaloweic's mother was among five women expelled from court during the testimony of Jeff Hicks, who claims Jaloweic broke his facial bones with a bat.

Lorain County Common Pleas Judge Kosmo Glavas said the jurors complained about the woman's actions.

When Hicks left the witness stand, he walked past the women in the hallway, showed them a scar under his jaw and told them to "remember this face."

"I don't know if it was a threat. It sounded like a threat to me," Jaloweic's mother said.

But Hicks said he was not trying to intimidate her. "I just wanted her to see what her son was really capable of and that's all," he said.



RAMON MENA OWENS / PLAIN DEALER

Stanley Jaloweic, 25, waits yesterday during a break in his death sentence hearing in Lorain County Common Pleas Court in Elyria.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4275

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CHRONICLE TELEGRAM
ELYRIA, OH.
PM CIRC. 37,065

APR-10-96

Jurors hear Jekyll-Hyde sides of killer

Ginger Parker
The Chronicle-Telegram

ELYRIA — Depending on who was testifying Tuesday, convicted killer Stanley Jalowiec was either a kindhearted son who would do anything for his family or a violent drug dealer.



Jalowiec

Jurors listened to about eight hours of conflicting testimony on whether Jalowiec deserves life in prison or the death penalty.

Last month, the jurors convicted Jalowiec of killing Ronald Lally, an informant for the Elyria Police Department.

Testimony and closing arguments concluded this morning. Jurors were expected to begin deliberations this afternoon. They will then make a recommendation to Common Pleas Judge Kosma Glavas, who will make the decision.

On Tuesday, several friends and members of Jalowiec's family told jurors that he is a good-natured, caring person.

"He would take (my son) to physical therapy and baby-sit the older boy," said Jackie Chaffin, Jalowiec's girlfriend.

His mother, Sarah, described her son as a "fun-loving kid," who used to bring home stray animals.

His father, Edward, told jurors that his son isn't capable of killing.

"I can't see how he could've done this," Edward Jalowiec said. "I do a lot of hunting, and he wouldn't even shoot a rabbit. That's the truth."

His sister, Tammy, said her brother wasn't the violent type and had seen him walk away from bar fights.

"I've seen my brother walk away from a lot of fights," she said, holding back tears. "And I've seen him with my daughter. He couldn't do this. I just ask you to please not sentence him to death."

But police and witnesses gave a different account.

Jeff Hicks said Jalowiec jumped him outside of an Elyria bar Jan. 27, 1994 — eight days after Lally was found dead in a Cleveland cemetery.

See **JURORS**, D2

JURORS

From D1

"I got hit by Stan," Hicks nervously told jurors. "He hit me with a bat or some kind of club."

The beating was so severe that Hicks was knocked unconscious. He said his friends told him Jalowiec kicked him in the head several times after he passed out on the pavement.

Deanna Butler, a prosecution witness, testified that she saw Jalowiec inside the bar bragging about how he kicked Hicks in the head.

"Stanley happened to be standing next to me," she said. "I heard him laughing to his friends and showing them how he kicked Jeff in the face."

Hicks was hospitalized after the beating. He had several broken bones in his face, and his jaw was shattered. Doctors wired his jaw shut, but an infection set in, Hicks said. He was hospitalized for three months and near death at one point, he testified. The injuries left him with a $20,000 medical bill.

Jalowiec's parents both testified that they never knew their son to take drugs — in particular crack cocaine.

But Sheriff's Capt. Dennis Cavanaugh, who is the leader of the county's drug task force, testified that police had bought crack cocaine from Jalowiec on Sept. 28 and Oct. 6, 1994.

Elyria police Detective Scott Sargent also testified he once frisked Jalowiec after a traffic stop, and a crack pipe fell out of Jalowiec's pants.

But defense attorney Joseph C. Grunda attacked Sargent's credibility by asking, "Isn't it true you've been convicted of lying under oath?"

Grunda was referring to Sargent's conviction of uttering in 1991. In that case, Sargent testified that he and another officer had a search warrant before they found 2 kilos of cocaine in a car. Witnesses, however, said the officers found the cocaine first and then went for a search warrant. His conviction has been expunged.

Rosenbaum immediately objected to Grunda's question. Glavas ruled that Sargent didn't have to answer.

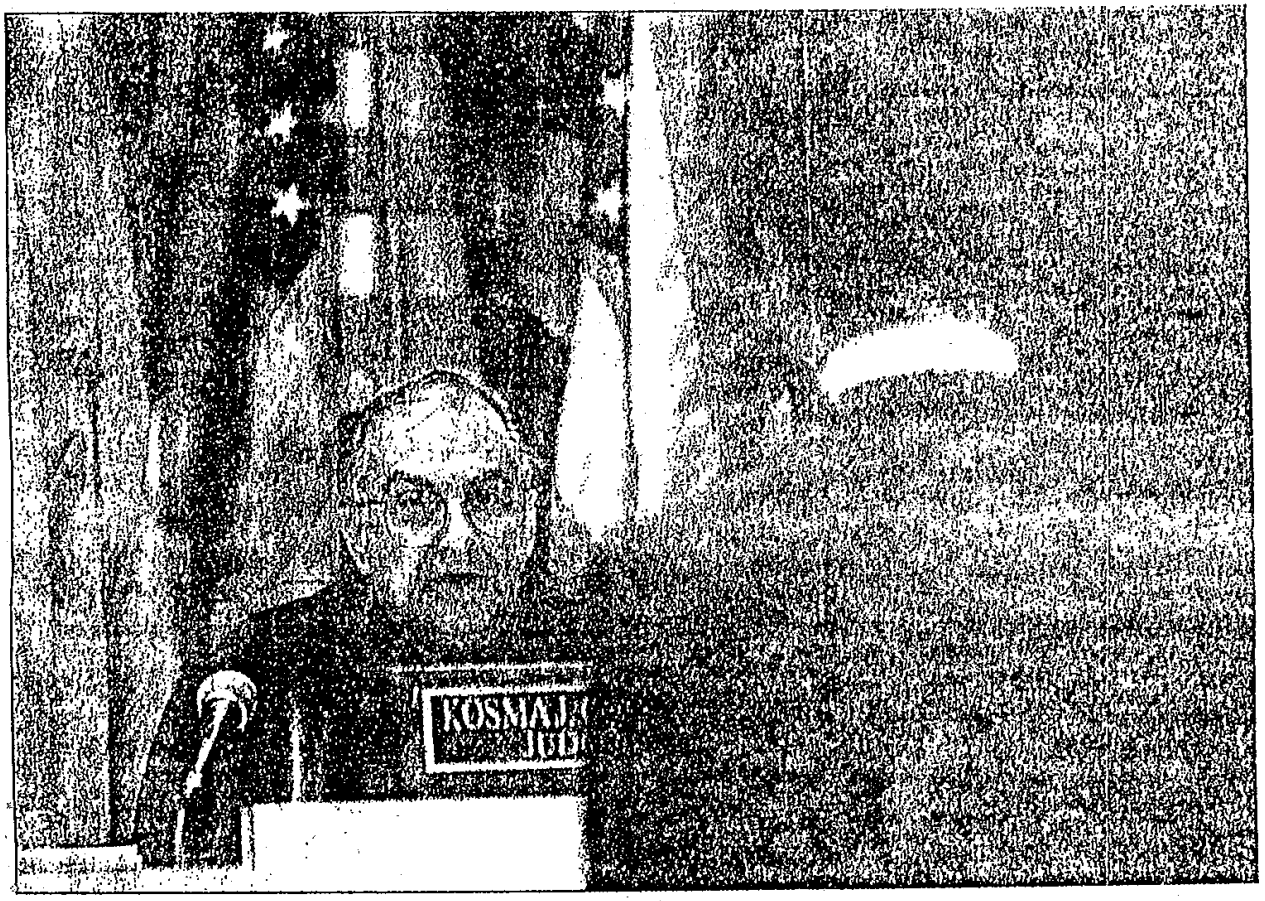
Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4276

9R1.

The sentence is DEATH



BRUCE BISHOP / CHRONICLE



SENTENCED TO DIE: Judge Kosma Glavas tells Stanley Jalowiec that anyone who did what he did deserves no mercy. In the top photo, Jalowiec is led out of the courtroom by Deputy Jerry Stanko after the sentencing

Judge shows no mercy for 'execution'

Ginger Parker
The Chronicle Telegram

ELYRIA — In sentencing Stanley Jalowiec to death, a judge remembered the life the Elyria man took and refused to be swayed by appeals for mercy.

Common Pleas Judge Kosma J. Glavas ordered Jalowiec, 25, to Ohio's Death Row for killing Ronald Lally, 30, a drug informant for the Elyria Police Department.

A jury deliberated three hours Wednesday before returning a recommendation for the death penalty.

"This man (Lally) deserved to live, not to be executed in the way he was," Glavas told Jalowiec. "And your hand played a vital role."

Lally's body was found Jan. 19, 1991, in a Cleveland cemetery. He had been shot, kicked in the head and slashed in the throat with a knife, police said. A car also drove over him three times.

"On the coldest day Cleveland has ever registered, they left him there half naked," Glavas said. "I do not feel that anyone who could do that to another human being

See DEATH, A6

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4277

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CHRONICLE TELEGRAM
ELYRIA, OH.
PM CIRC. 37,065

APR-11-96

DEATH

From A1

deserves mercy."

Jalowiec was one of three men charged in the killing. The first man tried in the death, Raymond A. Smith, 56, of Elyria was convicted and sentenced to die. The third man, Daniel Smith, 24, of Elyria also is charged with aggravated murder.

Prosecutors said Daniel Smith planned the slaying because Lally was to testify against him in a drug case. According to testimony, Raymond Smith and Jalowiec drove Lally to Cleveland and told him they would put him on a bus out of town to avoid testifying against the younger Smith.

Instead, the men drove Lally to Woodlawn Cemetery and killed him. Raymond Smith shot Lally, while Jalowiec kicked him in the head and drove a car over his body, prosecutors said.

Jalowiec joins six other men from Lorain County on Death Row. He becomes the 164th person to be sentenced to die in the state, according to state prison records. Ohio has not executed a person in 36 years.

Jalowiec showed no remorse Wednesday. After the sentencing, he turned and smiled at family and friends, who were crying.

As sheriff's deputies escorted him out of the courtroom, Jalowiec's mother, Sarah, called out and said, "I love you."

Jalowiec yelled back, "I love you, too."

In the past two days, jurors heard testimony on why Jalowiec should live. Jalowiec said he has dyslexia and a severe case of rheumatoid arthritis, which made it hard for him to keep a job.

But Jonathan E. Rosenbaum, an assistant county prosecutor, asked the jury to focus their attention on why they were hearing the case.

"Let's not forget in this case there was a victim, and he was a human being," Rosenbaum said.

He reminded jurors of Lally's death and the gory details of Jalowiec's "handiwork."

"This was a human being," Rosenbaum said, while holding the photo up to the jury. "He had a life."

Jalowiec's defense attorneys, Joseph C. Grunda and Edward Cleary, told jurors their client did not deserve the death penalty because he didn't pull the trigger.

"Stan didn't shoot the gun; Raymond did," Grunda said during closing arguments. "The most you have is Stan drove the car. They want you to believe he ran him over, but again that's not in the facts."

But Rosenbaum countered that on his rebuttal by telling jurors Lally died from the blows to the head — not the gunshot wound.

Cleary also argued against the death penalty and asked the jury to show mercy on Jalowiec.

"No one deserves to be killed by another," Cleary said. "Neither does he (Jalowiec)."

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 4278

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PLAIN DEALER
CLEVELAND, OH.
AM CIRC. 456,727

249
APR-11-96

Man sentenced to death for murder

249 By STEPHEN HUDAK
PLAIN DEALER REPORTER

ELYRIA — A judge ignored pleas for mercy yesterday and sentenced Stanley Jaloweic to die in the electric chair for the murder of a police informant.

Jaloweic, 25, faces death for killing Ron Lally, who was shot in the mouth, stabbed, beaten, run over and left half-naked in a cemetery on the coldest night of 1994.

"I do not feel anyone who does that to another human being deserves any mercy," Lorain County Common Pleas Judge Kosma J. Glavas said.

"This man deserved to live, not to be executed the way he was," Glavas said of Lally. "You had a vital hand in delivering him to his execution."

Jaloweic is the second man to be put on death row for Lally's death.

Raymond A. Smith, 56, is appealing his conviction and death sentence. Smith's son, Daniel, is scheduled to be tried for capital murder next week.

Lally, 30, was found in the snow at Woodland Cemetery in Cleveland on Jan. 19, 1994, the morning he was to testify that he bought drugs from the Smiths.

Glavas, who concurred with the jury's recommendation for death, admitted he had spent a sleepless night wondering how to punish Jaloweic.

But he said he was swayed by testimony of two men who said Jaloweic beat them with a bat outside a nightclub in Elyria a week after the murder.

Jaloweic said he planned to appeal.

He becomes the 164th person — all men — on death row in Ohio.

There has not been an execution in Ohio since March 15, 1963, when Donald L. Reinbolt died in the electric chair for killing a Columbus grocer.

Six men and six women deliberated about three hours yesterday before recommending that Jaloweic become the seventh Lorain County man on death row.

Jaloweic's parents, a sister and a friend, Ray Pasterczyk of Rocky River, had asked for mercy, saying they did not believe he was capable of such atrocity.

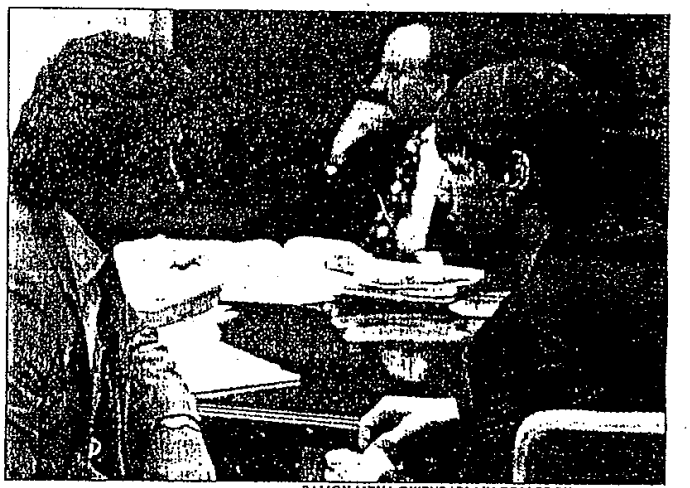
They described him as a lover of children and animals and someone who literally fainted at the sight of blood.

Defense lawyers Joseph Grunda and Edward Cleary asked jurors to remember that Lally was a witness against Raymond Smith and not Jaloweic.

"Stan didn't have the gun. Raymond had the gun," Grunda said. "Raymond was calling all the shots, what to do, when and how to do it."

But Chief Assistant Prosecutor Jonathan Rosenbaum first showed jurors a grisly cemetery photo of Lally that he called a "graphic depiction of this man's handiwork."

Then Rosenbaum urged the judge to uphold the jury's decision. "You should show him the same mercy that he showed — which is none," he said.



RAMON MENA OWENS / PLAIN DEALER PHOTOGRAPHER

Defense lawyer Joseph Grunda, left, talks to Stanley Jaloweic, 25, in Lorain County Common Pleas Court shortly before Jaloweic was sentenced to die in the electric chair for the murder of a police informant. In the background is Chief Assistant Prosecutor Jonathan Rosenbaum.

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Jalowiec v. Bradshaw
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CLEVELAND, OHIO 44115
216/241-0675

MORNING JOURNAL
LORRIN, OH.
PM CIRC. 46,016

APR-11-96

Death penalty dealt to 2nd man in killing

By GREGORY KORTE
Morning Journal Bureau Chief

ELYRIA — Stanley Jalowiec showed little emotion yesterday when a judge sentenced him to death for killing a police informant. Another man earlier also got the death penalty in the killing.

If anything, he appeared nonchalant when the verdict was announced. As he turned to face news photographers, a faint smirk crossed his lips.

"Tomorrow I've got a visit. Don't worry about it," Jalowiec told his grandfather as sheriff's deputies shackled him for the trip back to jail. "I'll see somebody tomorrow."

His mother wept softly as Jalowiec left the courtroom. "I love you," she called out.

"I love you, too," Jalowiec said, not looking back.

Jalowiec had kept his head up from the moment that the six-man, six-woman jury filed back into the courtroom after less than four hours of deliberations. None of the jurors made eye contact with the man they convicted as they took their seats.

One by one, all 12 jurors confirmed their recommendation that Jalowiec be sentenced to death. But ultimately, it was Lorain County Common Pleas Judge Kosma Glavas who was required to sentence the convicted murderer.

After the jury left, Jalowiec's attorneys pleaded with Glavas to show mercy and sentence the 25-year-old Elyria man to 30 years to life in prison.

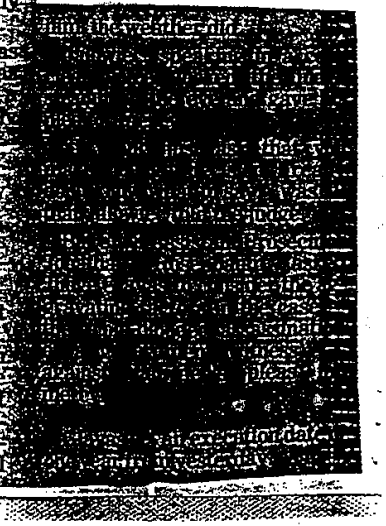
"I know it's highly unusual, but I would ask the court to go against what the jury recommended," said defense attorney Joseph C. Grunda. "Raymond Smith was the executioner here. The actual circumstances of who had the gun and who would have benefitted from this — I think the circumstances were different."

Smith, 55, was sentenced to die in January for his role in the murder of Ronald Lally, a crack cocaine addict and police informant who was scheduled to testify against Smith in a drug trial the day Lally's bloodied body was found. Smith shot Lally in the head, witnesses testified.

Jalowiec, who once worked as a go-go dancer in a gay bar, was the one who drove Lally to a Cleveland cemetery in the early morning hours of Jan. 24, 1994, witnesses said. There, Jalowiec repeatedly beat and kicked Lally and ran him over with the car.

Glavas said Jalowiec is just as guilty as if he had pulled the trigger.

"Mr. Lally deserved to live, not to be executed the way he was. And your client played a part in that execution," Glavas told the defense lawyers. "On the coldest day that Cleveland ever registered, they left him there half-naked. If the other factors did [illegible]



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EXHIBIT N

STATE OF OHIO)
RICHLAND COUNTY, OHIO)ss.

AFFIDAVIT OF
Raymond A. Smith

AFFJANT, Raymond A. Smith first Being Duly SWORN IN ACCORDANCE TO THE LAW DOSE HEREBY DEPOSE AND SAY:

1. On 07-05-94 I made a statement to Detective Leiby, Detective Beaman and Detective Hussain at the Elyria Police Department that regarded the killing of Ronald Lally.

2. In that statement I advised the detective's that Stanley E. Jalowiec was not involved in any way with the murder of Ron Lally and that he was not present at the cemetery when Ronald Lally was killed, I did not want to tell on my son Michael Smith who was present with me at the cemetery, because he is my son and I didn't want to involve him.

3. On 01-11-95 I Raymond A. Smith called Detective Alan Leiby, because I wanted to try to help my son Danny Smith get off 6 counts of Aggravated Drug Trafficking Charges.

4. I knew that Detective Alan Leiby would not help my son Danny Smith unless I made it look like I was going to cooperate with him, I didn't want to tell on my son Michael Smith who was actually with me and was the third person, so instead I said it was Stan.

5. I knew that Stanley E. Jalowiec was not involved in any way and had no personal knowledge of the murder of Ronald Lally, So I used Stan's name because if Detective Leiby went and questioned him he would not be able to tell Detective Leiby anything.

6. I am giving this affidavit to Stanley E. Jalowiec because I didn't expect him to be found Guilty because he really don't know anything about the murder, I had spoke to my son Michael and advised him what I was going to tell the police in case he was ever questioned and that is why he made a deal with the police and said that Stanley E. Jalowiec was involved.

7. I Raymond A. Smith said this before and I am now saying it Stanley E. Jalowiec was not involved with the murder of Ronald Lally, Stanley E. Jalowiec was not present when Ronald Lally was murdered, me and my son did not plan to kill Ronald Lally when it happened he tried to kill me and my son Michael.

8. The only reason I did not testify at Stanley E. Jalowiec's trial is because I was told that he was going to beat the case the night before by my son Danny Smith, so I didn't want to mess up my appeal.

9. AFFIANT sayeth further naught.

Respectfully Submitted,

By. Raymond A Smith
Raymond A. Smith
MANCI # 316-607
P.O. Box 788
Mansfield, Ohio 44901

Sworn to subscribe before me this 1st day of July, 1996.

NOTARY PUBLIC

JACQUELINE L. VISINTINE
NOTARY PUBLIC, STATE OF OHIO
My Commission Expires Apr. 5, 2000

FILED
LORAIN COUNTY

MAR 25 3 04 PM '97

CLERK OF COMMON PLEAS
DONALD J. ROTHGERY

ENTERED

JOURNAL ENTRY

COURT OF COMMON PLEAS

Lorain County, Ohio

Donald J. Rothgery, Clerk

Case. No. 95CR046840

STATE OF OHIO — Plaintiff — Attorney for Plaintiff

vs.

STANLEY JALOWIEC — Defendant — Attorney for Defendant

Date 3/24/97 J.E. Vol. 762 Page 1259

Court has taken Motion for Expert assistance under advisement. Court requests from counsel an approximate amount of money needed for said experts before making its ruling.

128

Judge

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Warden's Appendix Pg. 4284

FILED
LORAIN COUNTY

1997 APR 15 P 2:37

CLERK OF COMMON PLEAS
DONALD J. ROTHGERY

RECEIVED
APR 16 1997
JUDGE KOSMA J. GLAVAS

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

ENTERED

STATE OF OHIO	:	Case No. 95CR046840
Plaintiff-Appellee	:	JUDGE KOSMA J. GLAVAS
-vs-	:	
STANLEY JALOWIEC	:	MOTION TO AMEND THE RECORD PURSUANT TO APP. R. 9(C)
Defendant-Appellant	:	

Now comes the defendant-appellant, by and through undersigned counsel, and respectfully requests that this Honorable Court file an entry supplementing the record pursuant to App. R. 9(C).

The transcript in the defendant-appellant's case was unclear as to which jurors were dismissed through peremptory challenges by the defense. Defense counsel's affidavit as to which jurors be challenged is attached.

Respectfully submitted,

PATRICIA J. SMITH
Regis. No. 0059621
4403 St. Clair Avenue
Cleveland, OH 44103-1125
(216) 361-1112

KREIG J. BRUSNAHAN
Regis. No. 0031147
158 Lear Road, Suite A
Avon Lake, OH 44012
COUNSEL FOR DEFENDANT

Case No. 08-3249
Jalowiec v. Bradshaw
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CERTIFICATE OF SERVICE

A copy of the foregoing Motion was sent by Regular U.S. Mail to Gregorory White, Esq., Lorain County Prosecutor, 226 Middle Avenue, Elyria, OH 44035 on this 19 day of April, 1997.

PATRICIA J. SMITH
Counsel for Defendant

BRIEF IN SUPPORT OF MOTION

On March 8, 1995, defendant-appellant Stanley Jalowiec was indicted by the Lorain County Grand Jury on one (1) count of Aggravated Murder, in violation of Ohio Revised Code Section 2903.01(A)(1). Two specifications were included in the indictment. The first specification alleged that the appellant had a firearm on or about his person or under his control while commiting the Aggravated Murder. The second alleged, in pertinent part, that the victim of the Aggravated Murder was a witness to an offense and that the victim was purposely killed to prevent his testifying in any criminal proceeding.

Arraignment of the appellant occurred on March 14, 1995, at which time a not guilty plea was entered.

Trial by jury commenced on March 12, 1996. On March 19, 1996, after closing arguments and the charge to the jury, deliberations commenced. On March 20, 1996, the jury returned a verdict of guilty to the indictment, including both specifications thereto. The Court scheduled the penalty phase for April 9, 1996.

On February 14, 1997 the appellate brief was filed in the Ninth District Court of Appeals. Appellate counsel could not raise potential issues regarding the challenges as the transcript was unclear as to which party involved peremptory challenges to dismiss potential jurors.

The record in this case contained a list of jurors who were challenged and excused from jury service. The list simply contains handwriten names. There is no source of identifying which jurors were excused by the prosecution and which were excused by the defense. Attached to this motion is an affidavit from defense counsel identifying which jurors were challenged and excused on behalf

of the defense. Appellate counsel respectfully requests that this Honorable Court supplement the record with the attached journal entry.

Respectfully submitted,

PATRICIA J. SMITH

KREIG J. BRUSNAHAN
Counsel for Defendant

STATE OF OHIO

SS: AFFIDAVIT

COUNTY OF LORAIN

JOSEPH C. GRUNDA, being first duly sworn according to law, deposes and says that:

1. He was trial counsel for Stanley Jaloweic in a case known as State of Ohio vs. Stanley Jaloweic, Lorain County Court of Common Pleas Case Number 95CR046840;
2. Said case involved a charge of Aggravated Murder with Specifications;
3. Trial in said case commenced March 12, 1996, voir dire of the Jury commenced March 12, 1996, and a Jury was impanelled on March 13, 1996;
4. During the Jury selection process, the Trial Court instructed counsel for both the prosecution and defense to use a form known as a "Juror Strike Off List," attached hereto as **Exhibit "A"** and incorporated by reference herein;
5. This "Juror Strike Off List" was used for the purpose of exercising preemptory challenges;
6. Although not noted on the "Juror Strike Off List," the defense exercised peremptory challenges and excused the following Jurors (numerical references are to the "Juror

Strike Off List"):

#2 Dorothy Kulcsar
#4 Jason Supeck
#6 Sandra Mahl
#8 Daniel Sustar
#10 Colleen Kistlewicz
#12 Dorothy Jackson
#14 Jullianne Smarr

7. Although not noted on the "Juror Strike Off List," the prosecution exercised peremptory challenges and excused the following Jurors (numerical references are to the "Juror Strike Off List"):

#1 Beth Link
#3 Ronald Schmitt
#5 Mary Ann Alger
#7 William Howell
#9 Keith Myers
#11 Henry Husk, Sr.
#13 Lisa Smith

FURTHER AFFIANT SAYETH NAUGHT.

JOSEPH C. GRUNDA

SWORN TO BEFORE ME and subscribed in my presence this 7th day of April, 1997.

Danielle Thomas Brosley
Notary Public - State of Ohio
My Commission Expires 4-27-2001