**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

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Respectfully submitted,

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ON COMPUTER - HCG

IN THE SUPREME COURT OF OHIO
CASE NO. 99-1753

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

# MERIT BRIEF OF APPELLANT, STANLEY E. JALOWIEC

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IN THE SUPREME COURT OF OHIO
CASE NO. 99-1753

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| | : | LORAIN COUNTY COURT |
| Plaintiff-Appellee, | : | OF APPEALS NINTH |
| | : | JUDICIAL DISTRICT |
| -vs- | : | |
| | : | |
| STANLEY E. JALOWIEC | : | COURT OF APPEALS |
| | : | CASE NO. 96 CA 006445 |
| Defendant-Appellant, | : | |

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Case No. 08-3249
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## STATEMENT OF THE CASE

On March 8, 1995, the Lorain County Grand Jury indicted the Defendant, Stanley E. Jalowiec, on a one count indictment. The Court charged Aggravated Murder, §2903.01 (A)(1), with a firearm specification, and death penalty specification, O.R.C. §2929.03. Defendant pled not guilty at his arraignment.

On March 4, 1996, Defendant filed a motion to Disqualify Judge Kosma J. Glavas. Trial Court denied motion to Disqualify, and Defendant filed with the Ohio Supreme Court. Thomas J. Moyer, Chief Justice denied the motion for being not well-taken.

Defense presented no evidence and rested its case. Defendant was found guilty and mitigation trial was set for April 9, 1996. Jury returned a recommendation for the death penalty and Court ordered the Defendants execution for April 10, 1997.

Defendant appealed his case to the Court of Appeals for Lorain County. The Court of Appeals affirmed the conviction and death sentence on April 15, 1998.

Defendant filed a timely notice of appeal to this Court Case No. 98-1074. Defendant filed motion requesting leave to file a delayed application for re-opening with "good cause shown" in the Ninth Judicial District Court of Appeals on July 8, 1999. The Ninth Judicial District Court of Appeals on August 18, denied the motion.

Defendant filed a timely notice of appeal to this court Case No. 99-1753. This matter is not before the Supreme Court of Ohio as of right pursuant to Supreme Court Practice R. II (1)(A)(1) and Article IV, Section 2 of the Ohio Constitution.



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## STATEMENT OF THE FACTS

This trial and subsequent conviction of Stanley E. Jalowiec are both a sham and a grave miscarriage of justice. The trial and conviction of the defendant can never be viewed as having been protective of the fundamental due process rights by any stretch of the imagination. For the prosecutor to even try to convict a person who is actually innocent of a crime falls way below the fundamental due process rights guaranteed to everyone under the state and federal constitutions as basic inalienable rights, and to obtain such a conviction by suborning perjured testimony is clearly a fundamental miscarriage of justice.

The conduct of the judge, prosecutor and trial counsel comes no where close to a fair trial for the defendant. For the prosecutor to present inadmissible hearsay as evidence to the jury, state facts which are not supported by evidence and/or testimony to the jury and to have witnesses flat out tell lies under oath at the trial is simply in and of itself a gross violation of due process and a gross miscarriage of justice.

In their case the state contends that the defendant and the victim, Ronald Lally, during the early morning hours of January 19, 1994, borrowed a 1992 Chrysler LeBaron convertible owned by Corrinne Fike and then met and drove Raymond Smith and Raymond's son Michael to Cleveland in Cuyahoga County, Ohio. (Tr. 721, 781, 783). The purpose of the drive to Cleveland is contradicted by both the state and the state's principal witness. The state contends it was to kill the victim. (Tr. 474, 482).

But the state's main witness, Michael Smith, testified



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that it was not to kill Ronald Lally, but rather to get him to the bus station, put him on a bus and send him out of town, supposedly so he would not testify at a drug trial against his younger brother Danny Smith and his father Raymond Smith. (Tr. 782, 813, 815, 816, Depo. 23, 24). The state also claims that the victim had purchased drugs from the Smiths while wearing a wire for the police, more then 7 months earlier. (Tr. 495, 858, 859-860). It is the state's contention that Raymond and Danny Smith hired the defendant, Stanley E. Jalowiec, to assist them in the elimination of a Government witness. (Tr. 974, 982).

The state alleged that R. Smith ordered the defendant to drive the victim to a cemetery in Cleveland, where R. Smith then supposedly shot the victim, Lally. (Tr. 783, 784). The state further claimed that the defendant then supposedly struck the victim, Lally, repeatedly with the automobile, leaving him in the cemetery on January 19, 1994, in the extremely cold, early morning hours to die. (Tr. 785). The body of Ronald Lally was discovered later that same day in the cemetery by a visitor of the cemetery and the Cleveland Police Homicide and S.I.U. Units arrived on the scene at 9:45a.m.. (Tr. 612).

State witness Scott Ashley testified as an officer for the Elyria Police Department (hereinafter "E.P.D.") stated that the decedent, Lally, was a confidential informant (CI) for the E.P.D., commencing June 7, 1993. (Tr. 493-494). Ashley testified the Ronald Lally entered in agreement with the police as an informant on June 7, 1993. (Tr. 494). Lally signed the CI sheet on the same day, listing all the names of people who he could



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buy drugs from and did not list any Smiths. (Tr. 494, S.Ex. 9). Lally then allegedly bought drugs from Danny and Raymond Smith on that same day exclusively, instead of anyone he listed and/or named on the CI list. (Tr. 495, 502, 504).

The drug purchase between the victim and the Smiths was recorded and the tape was used as evidence in the defendant's trial. (Tr. 495, S.Ex. 10). As a result of the drug purchase made by Ronald Lally, the victim, Danny and Raymond Smith were arrested on August 12, 1993 and August 19, 1993 respectively. (Tr. 496, 497, S.Ex. #6 & #7). They were subsequently indicted by the Lorain County Grand Jury, however, both cases were then later dismissed because the state could not produce their witness/informant at trial. (Tr. 496-498, S.Ex. #4 & 5).

Yet on cross examination, Officer Ashley stated the defendant, Stanley E. Jalowiec, was not present nor was he part of the drug deals made to the Smiths by Lally. (Tr. 500). He also testified that the drug charges brought against the two Smiths did not pertain to or have anything to do with the defendant, Jalowiec. (Tr. 500). He also testified that the defendant's name was not included by Lally on his CI sheet. (Tr. 502, S.Ex. #9). Officer Ashley stated again that neither Raymond or Danny Smith were listed among the names on Lally's supposed list of known drug dealers. (Tr. 502-504).

State witness, Sandra Williams, testified that she was Lally's fiance and Lally's girlfriend for 13 years. (Tr. 508, 509). That Lally used drugs and stole things from her to support his habit, including her microwave in June of 1993, but he would



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not admit to her that he stole it. (Tr. 509, 510, 515, 516, 517). She also testified Lally had a apartment across from Elyria High School, yet she did not know her fiance's address after 13 years as his girlfriend. (Tr. 508, 509, 511). She claimed then that Danny Smith came to her yard on September 7, 1993 to threaten Ronald Lally and his family. (Tr. 511, 512, 514). But she then admitted that she did not even know who Danny Smith was in September of 1993. (Tr. 518). Only at a later date was she provided with a photograph and the name of Danny Smith by Detective Leiby. (Tr. 519).

The state used Williams further to present hearsay testimony, over objection by defense counsel, regarding what Danny Smith allegedly said on the day he came to her yard. (Tr. 512-514). She claimed Smith stated he knew where Ronald Lally's parents lived and it would be a shame if anything would happen to them or if their trailer got blown up. (Tr. 512, 514). She did testify truthfully in admitting that the defendant was not present, nor involved in the argument between her and Smith. (Tr. 520).

However this threat never occurred and the state's witness lied under oath. Under oath on a separate occasion, Williams testified that Danny Smith did not make any threats to her about the victim, directly or indirectly whatsoever. Instead, Smith told her only that he was mad and upset with her boyfriend, Lally. The defense was unable to show this perjury suborned by the prosecutor, nor was the defense permitted to an incamara of Williams' police statement, of January 3, 1995. (Tr. 515).



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Several days after this incident on September 15, 1993, the decedent, Lally, was said to have called the E.P.D. regarding claims that some drug dealers were loitering in the parking lot of Mr. Hero's establishment. (Tr. 524). There were no names ever mentioned regarding who the supposed drug dealers were, by Lally. (Tr. 524). State witness, Officer John Homoki testified that he personally responded to a disturbance call on September 15, 1993. (Tr. 524). He also testified that he observed the victim and Danny Smith loitering in the Mr. Hero parking lot not the defendant. (Tr. 524, 525). And he knew the victim, having worked with Lally at Avon Concrete. (Tr. 522).

Homoki testified that he had seen Ronald Lally on several previous occasions as an officer. (Tr. 523). Over objections Homoki testified that as he approached the area of the alleged disturbance he slowed his police car to see who was in the area. (Tr. 524, 525). Homoki then stated that the Defendant was walking away from and out of the area. (Tr. 524). Danny Smith and Ronald Lally were at Mr. Hero's, Smith standing directly in front of Mr. Hero's door and Lally hurrying towards Homoki's police car. (Tr. 524, 525).

Homoki then testified that Lally was in a very excited state. (Tr. 525, 526). Following a bad ruling by the trial court, Homoki continued to give hearsay and unqualified testimony in the form of direct quotations, supposedly made by Smith and Lally to each other, and Homoki, two and one half years previously. (Tr. 527-531). Officer Homoki, without taking any notes at the time, also testified with absolute certainty as



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to the physical condition of both Smith and Lally two and a half years earlier. (Tr. 527, 528).

Homoki testified further that Danny Smith made direct quotes to him two and a half years earlier regarding the victim. (Tr. 529, 531). Homoki testified Danny Smith stated to him that nothing was going on and Smith supposedly pointed at Ronald Lally and then stated to a uniformed policeman, "that snitch will get his." (Tr. 531).

On cross examination, Homoki testified that the defendant was crossing the street before he even arrived at the scene. (Tr. 531). He also testified that the defendant was heading away from the area and was not part of the conversation between him and Lally. (Tr. 532, 533). Furthermore he testified that the defendant was not part of the conversation between him and Danny Smith. (Tr. 532, 533).

Under oath Homoki testified as to direct quotes allegedly made by Danny Smith and Ronald Lally. (Tr. 527-531). The quotes Homoki testified to as having been said by Smith and Lally were in fact lies. Homoki was forced to admit that he made them all up when cross examined in a co-defendant's trial, where that co-defendant was found not guilty. Officer Homoki also admitted that his initial, written report concerning this incident had in fact, been written a year after the actual events, at the suggestion of Detective Leiby, when confronted with the police daily log in the same co-defendant's trial. This so called incident remains unproven to this day.

The prosecution also attempted, through Lynn Altpater's



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testimony, to create a false conspiracy by having her lie in her testimony that Danny Smith asked her to get something to knock a person put, which later turned in to poison. (Tr. 537). She also was allowed to speculate when she testified that it was to take care of somebody that was going to testify against him. (Tr. 538). This was stated only to deceive the jurors into thinking D. Smith wanted to relieve himself from being in more trouble then he was already in, on the drug charges. (Tr. 538).

Defense counsel was never permitted to review the statements Altpater made to police on two different occasions. Lynn Altpater, under oath in another trial, testified that this poison was not for use on any person, but in fact for some cats that were getting on Danny's car. She also testified in the same co-defendant's trial afterwards that Detective Leiby pressured her to say that the poison was for a person. This co-defendant was subsequently found to be not guilty.

Sharon Hopkins testified for the state that she went out to the bars in downtown Elyria at about ten or eleven o'clock in the evening. (Tr. 681). According to her, she went to Razzles with her brother Terry Hopkins, Danny Smith, his girlfriend Tammy and Terry's girlfriend Misty. (Tr. 681). She also testified the defendant Stanley E. Jalowiec was at the bar along with Raymond Smith and Michael Smith. (Tr. 681, 693, 695).

She testified that she had walked over to Danny Smith's apartment and Smith drove Hopkins and his girlfriend, Tammy, to Razzles. (Tr. 682). S. Hopkins states that she remained there until two-fifteen, 2:30 in the morning. (Tr. 682). After leaving



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the bar she claims she went to Mom's Open Kitchen, across the street from the bar with Danny Smith, Raymond & Michael Smith and Tammy. (Tr. 682, 696). S. Hopkins also claims her brother Terry and his girlfriend Misty went home directly from the bar. (Tr. 682, 700).

They were at Mom's Kitchen for about a half hour, then the five of them left in Danny's car. (Tr. 683, 684). Within the car, are Danny, Raymond, and Michael Smith, Tammy and herself. (Tr. 683). She then testified that she believed they were going home, but drove out on middle Avenue past the tracks outside the edge of town. (Tr. 683). Upon arrival, Michael and Raymond Smith were dropped off a little past the tracks. (Tr. 683, 702). She thought the two were going to a house that was there, but instead they went to the woods on the other side of the road. (Tr. 683-684).

S. Hopkins also testified that after Raymond and Michael Smith headed for the woods, Danny, Tammy, and herself drove to a parking lot on the other side of the tracks where they sat and waited five minutes until a convertible drove by. (Tr. 684, 705). She said the car was heading out of town and that she could see it was a convertible. (Tr. 684, 685, 706). S. Hopkins watched it go over the tracks but she could not tell where it went. (Tr. 685). She also testified that the convertible returned and passed their parked car then returned and a forth time before it headed toward town. (Tr. 685).

They then followed the convertible and signaled at some point for it to pull over. (Tr. 686, 707). According to S.



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Hopkins the car pulled over on a side street and S. Hopkins was told by Danny to ask if Smith's brother Michael was picked up. (Tr. 687, 688). Tammy was driving at this time, Danny was in the passenger's seat, while she sat in the back seat. (Tr. 686, 687).

S. Hopkins then claims she stepped one foot outside the car from the back seat and asked, the defendant, who she claimed stepped out of the convertible, "Did you pick up his brother?" (Tr. 687, 688). She claimed that the defendant was allegedly driving the car, but yet, she could not see who else was allegedly in the car. (Tr. 688, 689, 709). She also testified that she could not remember what the defendant allegedly answered, but was allowed to speculate illegally that he answered, yes. (Tr. 688). She also testified that there were a total of four people inside the convertible car which she claims defendant Jalowiec was driving, yet she claimed she could not see anyone else inside. (Tr. 689, 709).

Under cross examination S. Hopkins testified that she did not know what day the incident occurred. (Tr. 693). She also testified that on the alleged night at the bar the following people stuck together there as a group: The defendant Stanley Jalowiec, Danny Smith, Raymond Smith, Michael Smith, Terry Hopkins, his girlfriend Misty, Danny's girlfriend Tammy and Sharon herself. (Tr. 693).

State witness Terry Hopkins testified, over objection by defense that Danny Smith told him that he needed some help in collecting money. (Tr. 568, 569). Terry volunteered his services



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and was willing to beat someone up for Danny Smith to collect the money. (Tr. 569). He then testified that a few months later Danny approached him again allegedly about killing someone, but T. Hopkins said no to this claimed offer made by Danny Smith. (Tr. 569). T. Hopkins then testified that after he refused to help Danny with the second claimed request, Smith asked him if he knew anyone who might do such a act. (Tr. 570). T. Hopkins said he did know someone and he allegedly introduced Smith to Carl Hartman. (Tr. 570). He did not remember when these alleged events occurred, but testified that they went to Ridge Motel where Carl was supposedly staying. (Tr. 570). T. Hopkins then admitted that he was not present at the motel when Smith had this supposed conversation with Carl Hartman about killing someone. (Tr. 570).

Then on January 18, T. Hopkins testified that he had gone out drinking about 8:30-9:00p.m. with his sister Sharon, his girlfriend Misty, Danny Smith and Danny's girlfriend Tammy. (Tr. 571, 572, 591). He testified that they went to several bars and he had about 12 beers and two shots, he also testified that they closed the bar that night. (Tr. 572, 592, 593). He testified that they were doing the drinking at a bar called Razzle's. (Tr. 572, 593, 595). Furthermore he testified that after they were done drinking at 2:30 in the morning, they all went to Mom's Kitchen. Meaning, him, his girlfriend Misty, his sister Sharon, Danny Smith and Danny's girlfriend Tammy. (Tr. 572, 595).

T. Hopkins then testified that he left Mom's with Misty,



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leaving his sister, Danny and Tammy at the restaurant. (Tr. 573). T. Hopkins then went to his sisters apartment and waited for the others to return so he could go home to Danny Smith's apartment where he claimed to be staying. (Tr. 537, 596). Sharon, his sister, showed up at her house between 3:30-4:00a.m. and he assumed that Danny was home too because he had left them together. (Tr. 573, 596). It is at this time that T. Hopkins claims he was told that the victim had been murdered. (Tr. 574, 600, 601).

Over objection by defense, T. Hopkins testified that Danny Smith allegedly told him that they had killed Lally. (Tr. 574, 578, 600, 601). Of course, the other state witnesses testified that Lally was very much alive at this point in time, being driven to the bus stop in Cleveland and that Danny Smith at no time that night had ever been in contact with the victim whatsoever. (Tr. 683, 684, 686, 702, 779, 781, 782, 789, 792, 793, 810-811, Depo. 8, 9, 10, 12, 20, 21, 23, 24, 36, 38, 49, 81).

T. Hopkins testified that when he found out what supposedly occurred he went back to his sisters apartment from Smith's and the next day moved his stuff from Danny's. (Tr. 575). After returning to his sister's at 4:00a.m., he went back to Danny's apartment the following day where he claims he found the defendant, Stanley Jalowiec, Danny Smith, Michael Smith and Raymond Smith. (Tr. 574, 575, 577, 603).

Over objection by defense counsel, T. Hopkins stated hearsay testimony concerning alleged conversations that he supposedly



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heard take place at the Smith apartment. (Tr. 574, 577, 578, 601, 603). He claimed that the defendant made specific statements about his alleged role in a murder and made the statements in a bragging way. (Tr. 576, 577). Again over objection by defense, T. Hopkins testified to hearsay on that Danny Smith said the person that was killed, was killed because he wore a wire during a drug sale. (Tr. 578).

However, this testimony by T. Hopkins was also just the opposite to his previously, sworn testimony. Prior to this trial, T. Hopkins testified that he was unable to state what had been said exactly in this overheard conversation, or who had said what. Here again the prosecutors knowingly suborned perjured testimony in order to convict Jalowiec.

During cross examination, Hopkins testified that he did not make a report of what happened, but did make a statement to the police regarding this matter, six months apart or one year apart, depending upon which version one believes. (Tr. 580, 585-586). He then testified that he did not know the date these alleged events occurred. (Tr. 585-586). He testified that he was also at Mom's Kitchen after the bars closed and that he was there until 3:00-3:30a.m.. (Tr. 572, 573). He was positive that Danny Smith was with him at Mom's the entire time. (Tr. 572, 575). Yet, Hopkins stated that a mere half hour later, this same Danny Smith was confessing to him about a murder which supposedly took place in the intervening time period. (Tr. 574, 600, 601). He also stated matter of factly that Raymond Smith was not present at Mom's Kitchen that morning. (Tr. 572, 597).



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State witness Brian Howington testified that Joann Fike was his aunt and he lived with her. (Tr. 715). He also testified that his aunt used drugs with the Smiths and the defendant, and that he did drugs. (Tr. 716). He testified that his aunt's car was a Chrysler convertible LeBaron. (Tr. 717). He testified that she allowed Danny, the defendant, and anyone else who asked use the car. (Tr. 717, 737).

Howington claims he met the victim for the first time in January 1994. (Tr. 717). He testified that he thought Jalowiec was at his aunts house with him on January, '94 two and a half years ago and the two left to go downtown to the bars about 8:00p.m.. (Tr. 717, 718). He and Jalowiec supposedly had a few beers, when the defendant asked him to go over to a friend's house around 10:30 that evening. (Tr. 718). The defendant's friend according to Howington lived on Middle Avenue near Mr. Hero's Restaurant in an apartment. (Tr. 718).

Howington claims that the defendant's friend was the victim, Lally, and once in the apartment, they partied and smoked crack. (Tr. 719). He also testified that Lally and Lally's roommate were also at the apartment smoking crack. (Tr. 719). Then they allegedly went to Fike's in her car which was driven by Howington. (Tr. 719, 734). They supposedly arrived at his aunt's house about midnight. (Tr. 719). Howington, Lally the victim, and Jalowiec partied some more at Fike's house. (Tr. 719). They supposedly partied, shot pool and smoked crack at his aunt's house for an hour or so, then Jalowiec allegedly asked to borrow the car about 1:00a.m.. (Tr. 720). Howington also gave testimony



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that the defendant supposedly received a page prior to his asking to use the car. (Tr. 721). He also claimed Lally went with Jalowiec and the two left Fike's at about one o'clock in the morning. (Tr. 721).

Howington then states that Jalowiec allegedly returned to the Fike house in her car with Raymond Smith at about 5:00a.m.. (Tr. 722). He also testified that the condition of the car was frozen and covered with ice. (Tr. 722, 739). He further stated his aunt, Joann Fike, was not at home the night in question. (Tr. 730).

Under cross examination Howington testified that he did not make a statement until January 14, 1995, a year after the murder, and only after his aunt, Joann Fike, changed her statement on January 11, 1995 to include the defendant and he was granted immunity. (Tr. 726-727).

Howington then testified that he and the defendant were not with Terry Hopkins, Sharon Hopkins, Danny Smith or Tammy, at all that night and that they were not at Mom's Kitchen. (Tr. 731, 732). He also testified that the car was parked in front of Power Slams. (Tr. 731-732). Howington also testified that nobody forced the victim to go to his aunt's house nor did he or Jalowiec care if he went with them. (Tr. 734, 738).

There were no threats made or any mention of harming anyone. (Tr. 735, 736). He also testified that he did not even know the victim's name or even hear the defendant talking about a man named Ronald Lally the night they allegedly went out. (Tr. 735). He did not see any weapons on the defendant, no guns or



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knifes or anything like that. (Tr. 735, 736). He also testified that he did not know how the water and ice got on the car or if the car was washed. (Tr. 739).

States witness Joann Fike testified that she went out with a friend until 2:30a.m. on the alleged night Lally was killed. (Tr. 746-747). She said that when she returned home her car was gone and her nephew, Brian Howington, said he let the defendant use it to take someone home. (Tr. 747). Fike returned home at 2:30 in the morning, and her car did not reappear until three or four hours later. (Tr. 747). Raymond Smith was among those who returned the car and she testified to having seen ice and blood on it. (Tr. 747).

Under cross examination Fike testified that she gave a statement almost a year later when police impounded her car. (Tr. 751-752). She testified that in her first statement December 27, 1994 she told Detective Leiby that she lent her car to Danny Smith and his girlfriend Tammy. (Tr. 765). She also testified that she never let Stanley Jalowiec, the defendant, used her car, never ever. (Tr. 760-761). She also testified that the defendant did not even have a driver's license so she would not have ever let him use it. (Tr. 761).

She also testified that she was confused about the dates, times, and the events that allegedly took place and only became enlightened after Detective Leiby talked with her and provided details to her. (Tr. 765, 771).

Deputy Coroner, Heather Raaf, from the Cuyahoga County Coroner's Office also testified. (Tr. 640). She performed the



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autopsy on Ronald Lally for the Cleveland Police Department on January 20, 21, 1994. (Tr. 641). There is clear and self-evident proof that the murder of Ronald Lally did in fact, take place in Cuyahoga County and not Lorain County where this trial was held. (Tr. 612, 618, 624).

Over legitimate objections, the state used Dr. Raaf to enter into evidence the following exhibits: States exhibit 2B, depicting Lally's face after it had been worked on; 2C, depicting a close up of Lally's left eye being artificially forced open; 2F, depicting a close up of Lally's lower lip being artificially pulled down; 2G, depicting a close up of Lally's upper lip being artificially pulled upward; 2I, depicting the inside of Lally's lower face, after Dr. Raaf had pulled out Lally's larynx, trachea and all of his neck structures so that the jury will see Lally's spinal column by looking through his mouth; 2K, depicting his scalp peeled back from his skull; 2L, depicting the peeled back scalp of the victim from another angle; 2M, depicting Lally's scalp peeled back from the skull, redundant with the other two. (Tr. 644, 645, 646-2x, 648-649).

The state contends, as a part of their case, that the victim had been run into or over by a car multiple times while laying dead on the cemetery driveway. (Tr. 655, 785). However, the coroner saw nothing to indicate this and would only concede to the point that some of Lally's injuries were consistent. (Tr. 655, 657, 658). Of course such injuries are also consistent with dozens of possible explanations, including falling onto the ground or other hard flat surface. (Tr. 659, 660).



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Michael Smith testified that he was Danny's brother and Raymond's son. (Tr. 773, 787). Although the defendants were tried in late 1995 and early 1996, M. Smith claims he contacted Detective Leiby back in April of 1994, as the sole eyewitness to this murder. (Tr. 776). His reasons for coming forward are allegedly due to bad dreams and mental problems regarding the events in this murder. (Tr. 776). M. Smith testified that he was having bad dreams, kept remembering the details of the murder, couldn't go on with his life, tried to hang himself, couldn't bear the pain and so, he had to confess to Elyria Police Detective Leiby that he had witnessed a murder. (Tr. 776, 828, Depo. 19).

In his testimony, M. Smith says he was with his dad, Danny and Tammy at Mom's Kitchen. (Tr. 777, 778, 789, 791). M. Smith also made a deposition in front of all parties on June 16, 1995. (Tr. 793, 794). In his deposition, M. Smith also states he met father, brother and Tammy at Mom's Kitchen after the bars closed. (Depo. 7, 8, 20, 80). M. Smith was not out with Raymond or Danny Smith or the others at the bar. (Tr. 787, 788). That while at Mom's Kitchen, R. Smith made a phone call around 3:00a.m.. (Tr. 778, 791-2x, Depo. 8, 20, 80, 81). After eating, M. Smith left Mom's with his brother Danny, father Raymond and Tammy in Danny's car, a Ford Taurus. (Tr. 778, 792, 800, Depo. 8, 9, 20, 21, 81). He states that he and R. Smith were dropped off out on Middle Avenue. (Tr. 779, 793, 801, Depo. 9, 20, 81-82).

He and Raymond Smith sat in the back seat alone on the way there. (Tr. 793). M. Smith then says about 20 minutes later



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the defendant and Lally picked him and Raymond Smith up in Fike's LeBaron convertible. (Tr. 781, 803, Depo. 9, 10, 21, 83). Michael Smith claims that now the car stopped for gas at speedway and then he, R. Smith, Lally and Jalowiec drove to Cleveland. (Tr. 782, 803, 805-808, 815, Depo. 11, 12, 22, 87). M. Smith states that at this time R. Smith pulls a gun and threatens Lally for setting up his son Danny. (Tr. 781, 782, 805, 806, 807, Depo. 10, 11, 23, 87). Then it is decided to get high and take Lally to the Greyhound Bus Station to leave town. (Tr. 782, 783, 808, 809-813, 815, 816, Depo. 11, 12, 24, 87).

After driving around Cleveland and East Cleveland, they pull into the Woodland Cemetery, where R. Smith orders Lally out of the car. (Tr. 783, 784, 816-818, Depo. 12, 24, 25, 88). M. Smith then claimed in his deposition that he did not hear anymore words spoken by Lally or his father until after the gunshot. (Depo. 12, 25). But at this defendant's trial, 10 months later, M. Smith claims that he heard his father say, "you will never snitch on nobody again." (Tr. 784, 839). M. Smith also claims that Lally then spoke distinctly and loudly enough, after being shot by R. Smith through the lips, teeth, tongue and throat, for him to hear clearly from his position inside the car. (Tr. 784, 821, 822, Depo. 12, 14, 25).

It was brought out during the trial that the Woodland Cemetery driveway on which the LeBaron was parked was in fact a single lane in width, with hardpacked snow banks formed along its entire length and at the dead end in front of the car from being plowed, as confirmed by the prosecutor and Detective Beaman



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of the Cleveland Police Department. (Tr. 618, 620, 621, 623, 827, Depo. 62, 88, 91, St.Ex. 1-A, 1-B, 1-I, 1-J, 1-K, 1-M, 1-N).

At this point, M. Smith claims that the defendant allegedly was called upon to assist R. Smith and the trunk was opened in an attempt to stuff Lally inside, but supposedly, Lally was already stiff with rigor mortis, scant seconds after being killed. (Tr. 784-786, 840-841, Depo. 14, 15, 26, 90, 91). He then contends that his father and Jalowiec reentered the car and the defendant began driving back and forth, allegedly striking or running over the body repeatedly-depending on which time M. Smith relates this. (Tr. 785-786, 840-841, Depo. 14, 15, 26, 90, 91). He also claims that the car was unable to go around or over the body of the victim, who was 6'5" tall and weighed 210 pounds, because Lally was laying across the driveway widthwise behind the LeBaron, preventing their leaving. (Tr. 658, 785, 841, Depo. 14, 26, 91).

Yet, miraculously, they drove out of the cemetery and back to Elyria from Woodland Avenue after being able to turn the car around in this one lane, snow banked, dead end driveway. (Tr. 786, 827, Depo. 15, 62, 91). M. Smith was then driven back to D. Smith's apartment and dropped off. (Tr. 786, 827, Depo. 16, 26).

M. Smith stated that the murder occurred between 3:30-4:00a.m., so he was back home at Danny's about 5:30a.m. - 6:00a.m.. (Depo. 7, 20, 58). The various state's witnesses cancel out each other's testimony. Be that it may, the defendant,



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Stanley Jalowiec, was not involved in this crime, nor was he driving or in Corinne Fike's LeBaron on the night and early morning hours in question. In point of fact, the defendant has an alibi defense to the state's false accusations. He expressed his wishes to proving his innocence to his court appointed, lead counsel, Joseph C. Grunda but Grunda informed the defendant that he would not file a notice of alibi for his client, telling the defendant not to worry. And so, no defense was offered or presented to the jury in this trial. (Tr. 890, 897, 900, 901).

Only very recently has Jalowiec learned that his appointed counsel, Grunda, had his own agenda which in no way included giving this defendant the effective representation at trial that Jalowiec was entitled to expect under the provisions set forth in the Constitution of the United States. Grunda is guilty of the most flagrant violation of ethics and the Code of Professional Responsibility that one can imagine. To say a conflict of interest existed is a gross understatement. Grunda, lead trial counsel for the defendant in this capital case, was and is the legal counsel for one of the state's principals witness in this trial. (Appendix B).

On the night of January 18, 1994, Stanley E. Jalowiec was cleaning a basement in the home of Raymond Pasterczyk from approximately 6:30p.m. until 9:00p.m. in Rocky River. While at the Pasterczyk home, the defendant did other chores, all in the preparation for a birthday party which was to take place on January 20, 1994. In return or as partial compensation, the defendant's laundry was cleaned. Following the housework, Mr.



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Pasterczyk cooked dinner while Jalowiec cleaned up and showered. They sat down to dinner about 9:40p.m., after which, Jalowiec was driven home to drop off his laundry in Elyria and dropped off at a bar called Power Slams within walking distance at 10:50p.m..

After a few beers, the defendant purchased a six pack and walked to his mother's house, arriving there about 11:45p.m.. Both his older and younger brother were at home and the three of them sat drinking the beers. Jalowiec and his brother Rick then played with the family's computer from midnight until about 2:30a.m.. At that point Rick and Stanley decided to go to sleep, while his younger brother had fallen asleep around 1:00a.m..Rick slept on the couch while the defendant, Jalowiec, crashed out on the floor.

Mrs. Jalowiec, Stanley's mother, awoke for work at her usual time of 4:30a.m. and noted that her son, the defendant, was there on the floor sleeping that January 19, 1994. All of these alibi witnesses are absolutely certain of the date and times. Mrs. Jalowiec recalls specifically that her son was there on the floor asleep because it's also the birthday of her stepfather. And she also recalls this being the day of record breaking cold because the bathroom pipes had frozen that morning of the 19th and the pipes had to be thawed out, using a hair dryer. This is corroborated by Detective Beaman of the Cleveland Police Department. (Tr. 613).

The testimony of Officer Homoki in this trial was illegally used by the prosecutor in an attempt to create a premeditated



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conspiracy between the defendant and Danny Smith to kill Ronald Lally. (Tr. 524, 525, 527, 528, 530, 531, 532, 920, 921). In furtherance of this phony prior calculation conspiracy, the state also called Officer Ashley, Sandra Williams, Lynn Altpater, and Carl Hartman. (Tr. 492-498, 508-515, 535-539, 541-544, 564). Yet in each instance, these witnesses testified that the defendant was not involved in the matter testified to, completely unknown to the witness and/or not present at all. (Tr. 500, 502, 520, 532, 533, 539, 540).

This was also an attempt by the prosecutor to establish venue in order to have a "controlled" trial in Lorain County. (Tr. 891, 892). The only way to admit this testimony was to create an argument on September 15, 1993 between Danny Smith and the victim, conveniently recalled by Officer Homoki, a full two and a half years afterwards, without having made any report of this alleged argument at the time. (Tr. 527-531).

By alleging that D. Smith learned through discovery from the state that it was Lally who wore a wire while purchasing drugs from the Smith's, the state was able to claim a link and motive for this murder. (Tr. 495, 496). This is clearly false and impossible because the state's own evidence does not support this. Danny Smith did not receive discovery from the state on his drug case until October 20, 1993, as evidenced in the criminal docket sheets of the Smith case, 93CR044167, making the prosecutor's claim that Smith was aware on September 15, 1993 a good example of blatant misconduct.

Prosecutor Rosenbaum also went to great lengths in vouching



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repeatedly for the veracity and credibility of the state's witnesses. (Tr. 924, 926, 927-928-6x, 932, 973-3x, 978). All of the principal witnesses vouched for by Rosenbaum, contradict one another completely on all the major points of the evening in question which means that at least all are liars but one. A closer examination of the trial record should cause this Court to agree that prosecutor Rosenbaum knowingly suborned perjury in order to obtain Jalowiec's conviction in this case.

The Bar, Razzles: T. Hopkins states that he, Misty, D. Smith, Tammy and S. Hopkins were alone. drinking until closing time. (Tr. 572, 593). S. Hopkins claims that Jalowiec, R. Smith and Michael Smith were with the five of them, drinking until closing. (Tr. 681, 693). M. Smith claims that he was at another bar, Bugsy's alone and saw none of the above individuals while drinking. (Tr. 787-788, Depo. 78, 79).

Mom's Kitchen: T. Hopkins states that he, Misty, D. Smith, Tammy and S. Hopkins went to Mom's after the bar and that R. Smith and M. Smith were never at Mom's Kitchen that night. (Tr. 572, 595, 597, 598). S. Hopkins claims that she, Danny, Raymond, Michael Smith and Tammy go to Mom's after the bar and that her brother, T. Hopkins is lying. (Tr. 862, 696, 700). She also claims that she was talking with all four, wasn't talking with any of them, only talking to Tammy, not paying attention to any of them and, sat by herself at another table. (Tr. 698, 699). Michael Smith claims that only he, D. Smith, Tammy and R. Smith were at Mom's Kitchen eating breakfast and that Hopkins is lying about M. Smith not being there. (Tr. 777, 778, 792,



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Depo. 20, 45, 80).

The drive to Middle Avenue: S. Hopkins claims that she, M. Smith, and R. Smith sat in the back seat while D. Smith and Tammy were in front. (Tr. 683, 702, 705). M. Smith claims that he, Danny, Raymond and Tammy were in the car and not Sharon Hopkins. (Tr. 779, 792-793, Depo. 8, 20, 21, 82). At this point, S. Hopkins states that she, Danny and Tammy dropped R. Smith and M. Smith off in some woods on Middle Avenue, then parked themselves in a parking lot for 5-10 minutes. (Tr. 684, 685, 702-705). M. Smith claims he and R. Smith were dropped off by D. Smith and Tammy just on the road with houses all around there on Middle Avenue, past Wood Street. (Tr. 780, 793, Depo. 9, 20, 21, 47).

Then, S. Hopkins claims that she, Danny Smith and Tammy chased after a LeBaron, flagged it down, and got out to talk to the defendant supposedly. (Tr. 685, 686, 687, 688, 706, 707, 710). Michael Smith on the other hand states that upon entering this LeBaron, they drove directly to Speedway for gas without stopping or seeing and talking to anyone. (Tr. 781-782, 803, 804, 806, Depo. 22, 52, 57).

Michael Smith's story really gets strange at the cemetery. He claims that his father, Raymond, and the defendant beat and stomped on Lally. (Tr. 784, 840, Depo. 14, 25, 90). That R. Smith shot Lally in the head prior to this. (Tr. 784, 839, Depo. 25, 67). That the defendant ran into the body of Lally various times. (Tr. 785, 840-841, Depo. 14, 26, 70, 90). However, Michael Smith was forced to admit that he saw nothing at all and hadn't



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even turned around to watch. (Tr. 827, Depo. 65, 66, 68, 69, 71, 89, 90, 91).

It is fairly evident that Michael Smith has substituted an innocent man, Jalowiec, to play the role that had in fact been his own. Here is a man, M. Smith, consumed with guilt and remorse for his active role in this murder. (Tr. 831, Depo. 41, 43). He tried to hang himself after the murder, has been on prozak since May of 1994 because of his participation in the actual events, that he couldn't go on with his life; couldn't bear the pain and that he kept remembering the details of the actual murder. (Tr. 778, 828, Depo. 6, 19, 41, 42). These are not the actions of any witness or non-participant of a crime.

Then, there are M. Smith's claims that he heard Lally say quite clearly, one of these quotes, depending upon the version one wishes to review: "You shot me in my head, you shot me in my head."; "I won't tell nobody, please don't kill me, please don't kill me."; "I won't tell nobody, I won't tell nobody."; "I won't testify, I won't testify."; "I won't tell nobody, don't kill me. Please don't kill me."; "Oh, you shot me in the head." (Tr. 784, 821, Depo. 12, 67). Yet, Mr. Lally, the victim was already shot before all of these claimed phrases were uttered. (Tr. 784, 321, Depo. 12, 67). And when the body was examined, Lally was documented as having: a gunshot wound to his mouth from very close range, his lower lip physically crushed against his teeth, three teeth completely knocked out on the right side of his mouth from the bullet, a very large split in his tongue where the bullet passed through and a hole in his throat where



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the bullet passed on its way to dent the spinal column where it stopped and lodged. (Tr. 645, 646, 647, St. Ex. 2-E, 2-F, 2-H, 2-I, 2-J). Of course defense counsel Joe Grunda, with his personal agenda of protecting his real client, state witness, Terry Hopkins, would not raise the question of the probable impossibility of any speech, much less clear and distinctive speech. (Appendix B).

The testimony of T. Hopkins is contrary to all the other state witnesses attesting to the same points and rife with major contradictions. (Tr. 572, 573, 681, 683, 777, 787). He even contradicts himself on major issues. (Tr. 580, 587, 603). The motivation for all of Terry Hopkins perjury is evident. He had been convicted of attempted felonious assault and attempted aggravated burglary. (Tr. 568, 603, 604-606). He was then sentenced to 5 to 15 years and 3 to 10 years in state prison. (Tr. 605, 606). To bolster the state's attempts to frame this defendant and link Jalowiec to after the fact admissions, Detective Leiby told T. Hopkins that he would obtain shock probation for Hopkins from Hopkin's sentencing judge, Judge Kosma J. Glavas, for his testimony against the defendant, Jalowiec. (Tr. 608, 609, 610).

This is the same judge Glavas who is the sitting judge in the capital trial of Defendant Jalowiec. (Tr. 466, 467). The fact that the trial court gave Terry Hopkins shock probation to testify against Jalowiec is evidenced in the record of co-defendant, Danny Smith on page #363 of the trial transcript.

Naturally, Terry Hopkins also testified under oath that



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no promises were made to him to elicit his testimony by the Police. (Tr. 608). He was then caught in this lie and forced to admit that Detective Leiby did promise him shock probation. (Tr. 609).

The only witness that dosen't have an agenda within their testimony is Cleveland Police Detective Michael Beaman.

Then there is the infamous LeBaron convertible and the outrageous claims that it was under the control of this defendant. (Tr. 720, 721, 737, 747). Joann Fike, the owner was very certain that she loaned the car to Danny Smith and Tammy about 6:00-7:00p.m. that night, before she went out for the evening. (Tr. 760, 761). Fike was also very adamant about never, ever giving or loaning her car to Stanley Jalowiec, the defendant. (Tr. 761). Fike then made a police statement to this effect back on December 27, 1994. (Tr. 753). At this time she had yet to be compromised.

On the night of July 5, 1994, Raymond Smith gave his first statement/interview to the police. In it he does readily admit to being in a car with the victim, Ronald Lally on January 19, 1994. (July 5th St. 3, 4, 5, 6). However, R. Smith does identify the other mail in the car as being in his late twenties or early thirties. (July 5th, St. 7, 8). But, more importantly, Raymond Smith admits that Stanley Jalowiec knows nothing of the murder but also was not involved with the murder and was not even in the car. (July 5th, St. 33, 35). As for Howington, he has not made any claims at this point.

Then on January 11, 1995, Raymond Smith made a second,



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taped statement to Detective Leiby, over the telephone following a long talk with his son, Danny Smith and they are now trying to deal for Danny Smith. (January 11th, St. 1, 2, 3). And so, on January 11, 1995, a year after the murder, and only after Raymond notices that his son, Danny, is in serious trouble again for 6 more counts of drug trafficking he tries to manipulate the police and buy more time on the streets, by providing them with Jalowiec's name, an innocent man, who is unable to tell the police anything about the murder because he knows nothing about it. (January 11th, St. 3, 5).

Raymond Smith falsely implicated the defendant at 2:20p.m. on the eleventh day of January, 1995. (January 11th St. 5). Within hours of Smith's change up, Joann Fike calls the same Detective Leiby, telling him she wants to change her original statement too. (Tr. 759). And so, Fike also implicates the defendant on January 11, 1995. (Tr. 759). To cover this remarkable coincidence, we have Brian Howington, Fike's nephew, now coming forward to make a police statement on January 14, 1995, also implicating Stanley Jalowiec, the defendant. (Tr. 726).

Howington admitted that he smoked crack before, after and during the alleged night in question. (Tr. 716, 718-719, 731, 732, 733, 734, 740). To believe Howington can be so positive on so many details a year after the fact, although there was nothing unusual about the night the defendant was supposedly with his is clearly impossible. (Tr. 723-724, 736-737, 742). It is a known medical fact that crack cocaine induces extreme



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levels of paranoia. So this can explain Howington being granted immunity if he is caught committing his perjury. (Tr. 727).

Under cross examination, Howington lies by claiming he made his statement to police in the summer of 1994, missing the truth by seven months and three seasons. (Tr. 723). But, he claims to remember events very clearly two years later at the trial regarding things that allegedly occurred on the night in question. Aunt Fike then takes the stand and repeats the exact same lie, claiming her police statement was made in the summer of 1994, again missing reality by seven months and three seasons. (Tr. 751). So we are faced with two admitted crackheads, being supplied by the Smith family, being able to swear to a connection between the defendant and their car, who can not remember when they made statements to police and this is suppose to pass as credible testimony? (Tr. 719, 720, 721, 722, 737, 747). Not in this life time. Fike admits that the police enlightened her on what dates and times to recite, while her nephew is told to say anything he wants by being granted immunity. (Tr. 727, 771).

One thing weird was the relationship between police Detective Alan Leiby and Michael Smith. In M. Smith's testimony at the trial and in his deposition he claimed that he contacted Leiby because he was the only officer at the Elyria Police Department he knew. (Tr. 776, 828, 830, Depo. 5, 19, 27, 37, 74-75). The prosecutor and Leiby claimed that Michael Smith was not charged and will not be charged because there was no indication that Michael Smith was involved or had any knowledge



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of what was going on, and they believed he did not participate in the murder. (Tr. 875-877, 924-928, 929, 931-932). But, the state failed to tell the jury that before Ron Lally was killed, and after his father, Raymond, and brother, Danny Smith, were arrested, Michael Smith called Detective Leiby and told him that it was he, himself not his brother Danny that sold the drugs to Lally. (D. Smith's April 28, 1994 St. 11) And, when Leiby did not believe Michael Smith, he then implied to Leiby that he might do something to the victim. (D. Smith's St. 11). This clearly proves that Michael Smith was not only involved with the murder, but was probably the only participant in the murder and included the defendant, Mr. Jalowiec, to cover up his misdeeds, after the fact.



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PROPOSITION OF LAW NO. I

THE NINTH JUDICIAL DISTRICT COURT OF APPEALS ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT LEAVE TO TO FILE AN APPLICATION FOR REOPENING WITH "GOOD CAUSE" SHOWN PURSUANT TO APP. R. 26(B)(2)(b).

It was an abuse of discretion when the Ninth Judicial District Court of Appeals Lorain County, Ohio denied Appellants request for leave to file his Application For Reopening With "Good Cause" Shown, pursuant to App. R.26(B)(2)(b). Appellant had shown "good cause" in his request to the Court of Appeals, on April 15, 1998, the Court of Appeals rendered its decision and journal entry on Appellants direct appeal. (Appendix A).

The issues that Appellant Counsel raised before the Court of appeals were not completely and fully raised as addressed in Proposition of Law No. XIX., App. R. 26(B) states as follows:

> (B) Application for Reopening.
> (1) A Defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

App. R.26(B)(1) allows a defendant in a criminal case to file an Application For Reopening after the ninety day time limit, by showing "good cause". Appellant in this case did show "good cause". On April 24, 1998, the Court of Appeals appointed Patricia Millhoff and Nathan Ray as counsel of record to represent appellant on appeal to this Court. Appellant was informed of said counsel and contact was made. Appellant informed counsel that former counsel did <u>not</u> raise all meritorious issues related to appellants conviction and sentence, and that former



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counsel did not obtain a full and complete record from the trial Court; appellant further requested that counsel file in this Court a Motion Requesting that the proceedings be stayed, including in the motion a expedited ruling within the motion.

Mr. Jalowiec also explained in letters to counsel that the motion was to stay the proceedings in this Court so that an Application For Reopening could be filed with the Court of Appeals in a timely manner and in accordance to App. R. 26(B)(1).

Mrs. Millhoff visited Mr. Jalowiec at the Mansfield Correctional Institution on or about June 14, 1998, and she advised Mr. Jalowiec that she would file all the issues that were not raised with the Court of Appeals in this Court in his brief. Mr. Jalowiec expressed to Mrs. Millhoff that an Application For Reopening according to App. R. 26(B)(1) was the proper procedure for raising claims of ineffective assistance of appellant counsel.

Mr. Jalowiec, should not be held accountable for counsels failure to file his application for reopening, the errors that appellant would liked to have reviewed were never reviewed by the Court of Appeals. By denying the appellant a full review of his issues was an abuse of discretion. There was "good cause" for going beyond the time limit and it should have been allowed.

The "good cause" clause was included in the App.R.26(B) for a reason and the Ohio Courts should recognize and/or define just exactly what "good cause" means. Appellant is not an attorney and does not have the skilled training in finding the issues and briefing the issues in a timely fashion.



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The appellant has done everything that he could in order to educate himself in the law in order to prove his innocence and assist the attorneys in doing so. Appellant believes that counsel should be appointed to file Applications for Reopening when the appellant if fighting for his life, there should be an exception. This court should set an example for the Court of Appeals and remand the case back to the Court of Appeals for further briefing or decide the case on the merits and remand the case back to the trial Court for a new trial in order to prevent a miscarriage of justice.



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PROPOSITION OF LAW NO. II

**DEFENDANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL WHEN THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION, PERSONAL MATTER JURISDICTION AND VENUE TO INDICT OR HEAR THE CASE IN LORAIN COUNTY FOR A MURDER WHICH OCCURRED IN CLEVELAND, CUYAHOGA COUNTY OHIO.**

On March 8, 1995, the Lorain County Grand Jury indicted the Defendant on a one count indictment. The Court charged Aggravated Murder, in violation of O.R.C. §2903.01(A), with a firearm specification and death penalty specification, O.R.C. §2929.03. This murder occurred in Cleveland, Cuyahoga County, Ohio and not Lorain County, Ohio.

The Ohio Constitution guarantees to **every** defendant the right to know the nature and cause against him. **Ohio Constitution, Article I, Section 10.** A sufficient indictment is an entitlement under Ohio Law pursuant to Article I, Section 10 of the Ohio Constitution and the Sixth Amendment to the United States Constitution. State v. Sellards, 17 Ohio St.3d 169, 478 N.E.2d 781 (1985); State v. Gingell, 7 Ohio App.3d 364, 455 N.E.2d 1066 (1982). (Emphasis added).

A defendant is entitled to an indictment that states all of the elements of the charged offense, which informs him of the nature of the charge so that he may prepare a defense and which enables him to plead the judgment as a bar to later prosecution. State v. Fowler, 174 Ohio St.2d 362, 189 N.E.2d 133 (1963). Every element of a crime must be alleged for an indictment to charge a criminal offense, and a judgment of conviction based upon an indictment which does not charge an



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offense is void for lack of subject matter jurisdiction. State v. Cimpritz, 158 Ohio St. 490, 110 N.E.2d 416 (1953); State v. Wohlever, 27 Ohio App.3d 192, 500 N.E.2d 318 (1985); State v. Williams, 21 Ohio App.3d 12, 486 N.E.2d 113 (1984).

A conviction is void when the trial court lacks personal or subject matter jurisdiction. State v. Perry, (1967), 10 Ohio St.2d 175. As commonly used, "Jurisdiction" refers to the judicial power to hear and determine a criminal prosecution (or a civil dispute). This is called "Territorial Jurisdiction" or "subject matter jurisdiction."

In this case the indictment reads in part as follows:

> "The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, 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."

A clear reading of this indictment verifies the defendant is charged for a murder **occurring in Lorain County, Ohio.** (Emphasis added). But, a clear reading of the record demonstrates the defendant was tried for a murder that clearly took place in Cleveland, Cuyahoga County, Ohio. (Tr. 612, Depo. 12, 24, 53, 62). Thus this indictment is defective and should be ordered void.

The question of subject matter jurisdiction is so basic that it can be raised at any stage before the trial court or any appellate court, or even collaterally in subsequent and



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separate proceedings. State v. Shrum, (1982), 7 Ohio App.3d 244, 245, 455 N.E.2d 533.

It is well settled that a judgment rendered by a court that lacks jurisdiction is void ab initio. Patton v. Diemer, (1988), 35 Ohio St.3d 68, 70, 581 N.E.2d 941, 944.

Ohio Revised Code, §2941.03(D) provides:

> **Sufficiency of Indictment or Information**
> (A) An indictment or information is sufficient if it can be understood therefrom:
> * * *
> * * *
> (D) That an offense was committed at **some place** within the jurisdiction of the court. (Emphasis added).
> * * *

An indictment must contain words which are "sufficient to give the accused notice of all the elements of the offense which he is charged." Crim. R. 7(B). Furthermore, the indictment must contain "the essential facts constituting the offense which the accused will be tried." State v. Coburn, (1992), 84 Ohio App.3d 170, 172, 616 N.E.2d 567, 568 (Citing Section 10, Article I of the Ohio Constitution). A Bill of Particulars can not cure defects in indictments: rather, purpose of a Bill of Particulars is merely to provide greater detail to accused of nature of charge against him or her, not to provide missing pieces in indictment. State v. Lewis, (1993), 85 Ohio App.3d 29, 619 N.E.2d 236, 66 Ohio St.3d 1407, rehearing denied 615 N.E.2d 630, 67 Ohio St.3d 1470.

A defendant has a Constitutional right to be tried in the jurisdiction in which the crime was committed. United States



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v. Johnson, 275 U.S. 6, 65 S.Ct. 249, 98 L.Ed. 236 (1944); United States v. Winship, 724 F.2d 1116, 1124 (5th Cir. 1984).

The prosecution has the burden of proving by a preponderance of the evidence that the trial is occurring in the same district as that within which the crime took place. United States v. Davis, 666 F.2d 195, 198, (5th Cir.); United States v. White, 611 F.2d 531 (5th Cir.) Cirt. denied, 446 U.S. 992 (1980).

The prosecution in this case presented NO evidence whatsoever that the charged offense occurred **in Lorain County, Ohio**, as a matter of fact, the prosecution proved only the opposite. (Emphasis added).

Michael Beaman, Cleveland Police Detective testified that he was called to investigate the death of someone on January 19, 1994. (Tr. 611). He further testified that he was summoned to the scene at approximately 9:55a.m. and the location was called woodland Cemetery. A cemetery in the heart of the East side of Cleveland. (Tr. 612).

This testimony clearly shows the victim was found in Cleveland, Cuyahoga County, Ohio. Also it does establish that the body of Ronald Lally was found in Cuyahoga County, and not Lorain County.

Michael Smith on the other hand establishes clearly, via his testimony that the murder for which the defendant is charged had occurred in Cuyahoga County, not Lorain County. Michael Smith testified that Ronald Lally, the decedent, in this case agreed to leave town with a bus ticket and was not going to testify against the Smiths in a drug trial. (Tr. 782, 783, 812-



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13, 815, 816, Depo. 11, 23-4, 38, 53-2x, 54, 55, 86-7).

M. Smith says that on the way to Cleveland, everyone was smoking crack and drinking beer and that he suggested that they go to East Cleveland to get some additional crack for Lally to take with him on his trip. (Tr. 783, 810, 816, 817, 818, Depo. 12, 24, 54, 57, 60). So everyone went to East Cleveland. (Tr. 783, 816-2x, 817, 818, Depo. 12, 24, 59).

He further testified that from East Cleveland the car drove to Woodland and pulled up in the cemetery. (Tr. 783-84, 817-18, Depo. 12, 24, 57, 59-60, 62, 87, 88). This clearly and unequivocally establishes that the victim was not only alive when he arrived at the cemetery, but the crime for which the defendant was charged with occurred at the cemetery in Cuyahoga County, Ohio and not Lorain County, Ohio.

O.R.C. §2901.12 states in 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 of the offense was 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 any element was committed, the offender may be tried in any such jurisdiction.
>
> (H) When the offender, as part of a course of criminal conduct commits offenses in different jurisdictions, he may be tried for all of those offenses or any element of one of those offenses occurred. Without limitations



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> 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 the point of origin or destination.

Although venue is not a material element of the offense charged, venue is a fact which must be proved in criminal prosecutions unless it is waived by the defendant. State v. Draggo, (1981), 65 Ohio St.2d 88, 90, 418 N.E.2d 1343. The defendant in this case did not in any way wave venue, as a matter of fact he filed a motion Pro Se requiring that the trial be moved to Cleveland, Cuyahoga County, Ohio.

The State, through John Homoki, errioneously tried to create an element as having occurred in Lorain County by providing the court with alleged statements made to him by Ronald Lally and Danny Smith. As argued in that proposition of law the court permitted Homoki to testify over objections by counsel as to



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hearsay statements which were in fact lies. (Tr. 527, 528, 529, 530, 531).

By allowing this testimony, Rosenbaum tried to create a conspiracy between the defendant and the co-defendants. This was not possible, even if the defendant was present at Mr. Hero's on September 15, 1993. (Tr. 524, 525, 531, 532, 533). Homoki testified he was not part of the alleged conversations between himself, Lally and Smith. (Tr. 532-33-2x). In fact, Homoki, testified that Jalowiec, the defendant in this case, was walking away from the area upon Homoki's arrival to the alleged disturbance. (Tr. 524, 532-33).

By failing to establish an element occurring in Lorain County, the State failed to establish venue. In order to apply 2901.12 (A) to this case there must be an element committed in Lorain County.

The elements of the offense of aggravated murder, Ohio Revised Code §2903.01, as applied in this case, were set forth in the jury charge and are as follows:

> (1) On or about January 19, 1994;
> (2) The Defendant, Stanley E. Jalowiec;
> (3) Did purposely, and with prior calculation and design;
> (4) Caused the death of another person, Ronald Lally, and
> (5) Venue: In Lorain County. See O.R.C. §2903.01
> (Tr. 993).

O.R.C. §2901.12 sets forth the rules for determining venue. Defendant states that neither O.R.C. 2901.12 (A), (B), (G) or (H) apply in the case at hand.

In Toledo v. Taberner, (1989), 61 Ohio App.3d 791, 793 the court reviewed Ohio Law regarding the necessity of proving



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venue.

> "Therefore, unless the prosecution proves beyond a reasonable doubt that the crime alleged was committed in the county where the trial was held or the defendant waives this right, the defendant cannot be convicted. State v. Headley, (1983), 6 Ohio St.3d 475, 477, 6 OBR 526, 528, 453 N.E.2d 716, 718-719; State v. Draggo, (1981), 65 Ohio St.2d 88, 90, 19 O.O.3d 294, 295, 419 N.E.2d 1343, 1345; and State v. Navius, (1947), 147 Ohio St. 263, 34 O.O. 210, 71 N.E.2d 258, paragraph three of the syllabus."

By statue, the Ohio Revised Code §2903.01 defines prior calculation and design as follows:

> (A) No Person shall purposely, and with prior calculation and design, cause the death of another.

Ohio Revised Code, §2901.12 (A) provides:

> (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. (Emphasis added).

Lorain County prosecutor Rosenbaum violated the statue concerning prior calculation and design when the defendant was brought before a Lorain County Court of Common Please and illegally tried for capital murder. The State has only one so called witness in this case and one witness only-Michael Smith.

The State and Rosenbaum vouched time and time again for this witness, M. Smith. (Tr. 924-3x, 925-5x, 926, 927-2x, 928-2x, 929, 932, 973-2x, 978). And this Honorable Court has to believe that at some point in his testimony, Michael Smith must



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have told the truth about something. Then it is the duty of this Court to believe M. Smith's testimony in both his deposition and Jalowiec's capital murder trial must be truthful on the point of there having never being a single, solitary indication of prior calculation and design, Time and time again both prosecutor and the defense counsel attempted to show prior calculation and design through testimony elicited from Michael Smith. Yet time and time again, Michael Smith refuses to corroborate this falsehood which Rosenbaum must have in order to justify this trial taking place in Lorain County. (Tr. 782, 783, 808, 809-813, 815, 816, Depo. 11, 12, 24, 87).

And so, venue was never demonstrated by the Lorain County prosecutor's office. Thus, even the actual trial itself in this case was quite illegal and a total denial of the due process rights guaranteed to this defendant by the 6th and 14th Amendments of the United States Constitution and Ohio Revised Code §2901.12. This is a serious violation of due process and this conviction must be overturned.



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PROPOSITION OF LAW NO. III

DEFENDANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL WHEN THE TRIAL COURT EXHIBITED UNMITIGATED BIAS TOWARDS THE DEFENDANT THRU ITS ABUSE OF DISCRETION IN QUESTIONABLE RULINGS AFFECTING SUBSTANTIAL RIGHTS OF DEFENDANT.

A.

In this case, it was brought to the Court's attention by the defense that members of the jury pool were congregating in the hallways and did see the defendant handcuffed as well as being escorted by deputies while in restraints. (Tr. 34, 35). The court, then admitted matter of factly that this was a serious violation of Jalowiec's rights to a fair trial when Judge Glavas said, "Well, I am not sure how to rectify the prejudicial effect that it might have." (Tr. 35). Trial court then asked defense counsel what counsel wished and inferred a solution when the court stated, "Do you want to call a mistrial?" (Tr. 35). Defense counsel replied, "Yes, I am asking for a mistrial because there were several male, female potential jurors in the hall that were there and did see him with deputies, in handcuffs, and it might have a prejudicial effect on them." (Tr. 35).

However trial court's response was. "At this point Mr. Grunda, your motion for a mistrial is overruled." (Tr. 36). The court continued to say, "Certainly you have an opportunity to inquire of the prospective jurors as to whether or not they have been prejudiced because of this, okay?" (Tr. 36).

The prejudicial effect and any corrective measures were never mentioned again on the record. This was improper and



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interfered with the presumption of innocence of the defendant. By the court's failure to give any corrective instructions to the potential jury pool, the defendant was tainted and strapped with an indicia of guilt.

Certainly, this constitutes prejudicial and reversible error and denies to the defendant his right to a fair and impartial trial. In one decision it was stated that "freedom from shackling and manacleing of a defendant during the trial of a criminal case has long been recognized as an important component of a fair and impartial trial..." Odell v. Hudspeth, 189 F.2d 300, 302 (10th Cir. 1951).

Moreover, this accords with the general proposition on this subject:

> ...However, an accused should not be subjected, before conviction, to any more restraints then is necessary for this purpose. And there should be no conduct which would inflame the passion or prejudice of the jury against the accused. Accordingly, a defendant being tried for a criminal offense on a plea of not guilty is entitled, at common law, to make his appearance free from shackles or bonds, the right in this regard being recognized as an important component of a fair and impartial trial. 21 A Am. Jur. 2d, Criminal Law §844 at 291 - 92 (1981).

As poignantly observed by one court:

> His being restrained must carry various implications to even the most fair minded of juries. State v. Roberts, 86 N.J. Super. 159, 168, 206 A.2d 200, 205 (1965).

Coincidentally, in a habeas corpus case arising from Lorain



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County, a defendant was granted relief in a federal habeas corpus by reason of the fact that the court had the defendant shackled during the course of the trial. Woodards v. Cardwell, 300 F. Supp. 690, 695-98 (S.D. Ohio 1969), Aff'd, 430 F.2d 978 (6th Cir. 1970).

In other cases, it has been held that only where the court takes proper protective measures and instructs the jury to draw no inference of any type concerning the shackling or handcuffing of a defendant that no errors occurs. United States v. Acosta-Garcia, 443 F.2d 395, 396 (9th Cir. 1971). However, a duty devolves upon the court to declare a mistrial where jurors have seen the defendant in handcuffs and no corrective or protective measures have been taken so as to negate the inherent prejudice from this type of activity. See United States v. Wilkerson, 453 F.2d 657, 660-61 (8th Cir. 1971).

This type of prejudicial evidence that "cannot be cured by judicial solicited assurances from the jurors to the effect that each was not influenced thereby." State v. Greaven, Ohio St.2d 597, 600 (1973).

B.

The trial court again abused its discretion during the voir dire of a potential juror early on.

When defense counsel objected to prosecutorial questions directed at a potential jury, the court admonished counsel for speaking out. Judge Glavas stated, "Who ever is doing the questioning is the only one that is going to be able to object."



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"If you want to alternate, that is okay, but you do everything." (Tr. 57). This was a clear example of the trial court's abuse of discretion. The court, in effect, had ordered defense counsel to be gagged throughout the course of the trial. This order by the trial court had given to the defense while still in the first stages of jury selection. (Tr. 57). What the court did was to limit defense counsel's effectiveness to 50% by forbidding both counsel the ability to protect the interests of this defendant simultaneously. It stands to reason that is only one defense attorney is able to think and perform his duties at a time, then the probability of serious errors being unobjected to or even overlooked becomes astronomical. As this court is aware, State Law requires and demands that capital defendants be appointed two trial attorneys if indigent.

This constitutes plain error by the trial court as defense counsel was restrained from giving defendant Jalowiec the effective assistance to which he is entitled to under the Federal and State Constitution. This is a hybrid violation of the Plain Error Rule. Crim. R. 52(B) defines plain error as: Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. In this case it is the court who is committing the violations and so, as plain error, the conviction must be overturned.

"An abuse of discretion is evidenced by more then error of Law or judgment. It reflects an attitude of the court which is unreasonable, arbitrary or unconscionable." Lowe v. Sun Refining & Marketing Co., 73 Ohio App.3d 563, 568, 597 N.E.2d



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1189, 1192 (1992); Lehman v. Lehman, 72 Ohio App.3d 68, 71, 593 N.E.2d 447, 449 (1991); Rowe v. Rowe, 69 Ohio App.3d 607, 613, 591 N.E.2d 716, 719 (1990).

C.

The court also would not allow the defense counsel to use the state's witnesses' statements in some instances when conducting cross-examinations of said witnesses.

Sandra Williams in direct examination made reference to various, alleged threats stated to her by Danny Smith, and stated she had been robbed numerous times. (Tr. 509, 510, 511, 514). Yet no mention was ever made to even the possible existence of previously made statements. On cross-examination, Williams admits to making prior police reports and said reports are never even subject to in camera inspection. (Tr. 517, 518, 519). Lynn Aptpater also testified to criminal conduct and no mention or offer of prior statements was made. (Tr. 534 - 540). Carl Heartman, an admitted thug for hire, testified as to making several prior statements. (Tr. 544, 545). The court and both counsel of the state & defense reviewed them in chambers, finding a considerable amount of inconsistencies as the record indicated. (Tr. 546 - 551). However, in not having his statements in hand, defense counsel caused much confusion in his cross-examination of Hartman (Tr. 554, 555, 556, 557). Terry Hopkins admits to giving several statements to police. (Tr. 580-81). The trial court, after a request for an in camera inspection of them tells defense counsel that the court did not bother to study these statements but merely ran through it. (Tr. 581). Regarding Brian



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Howington's statement the court informs defense counsel that it found "no inconsistencies period." (Tr. 724). And regarding Joann Fike's two previously made statements in which one is used to completely change over facts given in the previous one, trial court states to defense counsel, "For the record, Mr. Grunda, the statements and questions have been given to the defense counsel and the Court earlier indicated for the record it found no ultimate inconsistencies." (Tr. 757-58).

The trial court has a clear obligation and duty to conduct itself in an impartial manner at all times in front of a jury. The Court further abused its discretion by this partiality shown to the prosecution witnesses. This bias of the trial court towards the defendant probably carries over from a resentment the court held toward the defendant's trial counsel. During the trial it was noted in an objection as stated by defense counsel:

> Grunda: "At this time, on behalf of the defendant, I will note a continuing objection to the fact that Judge Glavas was called as a witnesses in this case."
> Court: "As a result of a court order by another court."
> Grunda: "All of that because the hearing is a denial of due process, equal protection and fundamental fairness."
> Court: "That objection will -- be overruled."
> Court: "Now, Mr. Grunda, do you intend to carry that on as a continuing objection throughout the entire trial?"
> Grunda: "I wanted to make it once."
> Court: "Then it is done."
> (Tr. 466, 467).

In any case all prior recorded statements made by the various state witnesses most certainly should have been turned over to the defense as part of the prosecutorial discovery



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obligations. Especially when it is clear by the testimony of these same witnesses in the following trial of Danny Smith, that they, as a whole, committed perjury throughout their testimony in the Jalowiec trial.

In State v. Moore, 598 N.E.2d 1224, 74 Ohio App.3d 334 (10th Dist. G. (1991), the court ruled that, "For discovery purposes, 'witness statements' includes: written statement actually signed or otherwise adopted or approved by witness or party, mechanical recording of witness' words or transcription thereof, or substantially verbatim recital of such statements in continuous narrative forms."

Clearly this was prejudicial abuse of discretion by the court. One court has held that "...A reviewing court shall not reverse a trial court's judgment based upon an evidentiary ruling absent a showing that there occurred a clear and prejudicial abuse of discretion...." Patterson v. Ravens Metal Prods. Inc., 72 Ohio App.3d 216, 229, 594 N.E.2d 153, 161 (1991). The record in this case so reflects this claim. See also, Mason v. Swartz, 76 Ohio App.3d 43, 55, 600 N.E.2d 1121, 1128 (1991); Estate of Baxter v. Grange Mut. Cas. Co., 73 Ohio App.3d 512, 516, 597 N.E.2d 1157, 1160 (1992).

The Judge must not become an advocate and take the role of a partisan. United States v. Marzano, 149 F.2d 923, 926 (2d Cir. 1945). In this respect the judge must do nothing which "clearly signals to the jury the judge's partisanship." United States v. Nazzaro, 472 F.2d 302, 310 (2d Cir. 1973).

These actions can, either singularly or cumulatively, deny



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a fair trial and due process of Law. State v. DeMarco, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987).



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## PROPOSITION OF LAW NO. IV
## DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO BE TRIED BY AN IMPARTIAL JURY BY REASON OF PROSECUTOR MISCONDUCT SANCTIONED BY THE TRIAL COURT.

The Constitution guarantees to a defendant the right to be tried by an impartial jury of his or her peers. Likewise any criminal defendant in a state court is also guaranteed an "impartial jury" by the Sixth and Fourteenth Amendments to the United States Constitution. Duncan v. Louisiana, 391 U.S. 145, 153-4 (1968).

In this case, prosecutor Rosenbaum made calculated decisions not to refrain from misstating the sentencing statute of the Ohio Revised Code to the prospective jurors during the death qualification phase of voir dire. This misconduct was sanctioned by the court as evidenced in the following excerpts taken from the trial record:

> By Prosecutor Rosenbaum:
> Q. Do you see this fellow at the end of the table here?
> A. Yes, I see him.
> Q. 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?
> Defense Counsel: I would object to that question.
> Court: Overruled.
> Q. 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 evidence required it?
> A. If the law and evidence required it. (Tr. 56-57).
>
> By Mr. Rosenbaum:
> Q. And I also take it, if you would look at him, if the law and the evidence required it, you could sign your name to a piece of paper condemning this young man to death?
> A. Yes. (Tr. 109).
>
> By Mr. Rosenbaum:



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Q. Could you sign your name to a piece of paper condemning him to death if you felt the law and evidence required it?
A. Yes. (Tr. 132).

By Mr. Rosenbaum:
Q. You wand to clarify your answers regarding the death penalty?
A. I have no qualms about doing it, but I would have to be sure.
Q. If the judge would tell you that the law is proof beyond a reasonable doubt, which might be slightly less then total, absolute, convincing guilt, could you substitute that?
A. Yes? (Tr. 137).

By Mr. Rosenbaum:
Q. Sir, would you look at the defendant? If you thought the law and the evidence required it, could you sign your name to a piece of paper condemning him to death? If you thought the law and the evidence required it, could you sign your name to a piece of paper that condemns him to death?
A. Yes. (Tr. 163-64).

By Mr. Rosenbaum:
Q. If the law and the evidence required it, could you sign your name to a piece of paper that says he is suppose to die?
A. Yes. (Tr. 188).

By Mr. Rosenbaum:
Q. If you felt the law and the evidence required it, could you sign your name to a piece of paper condemning him to die.
A. I am sorry?
Q. If you felt the law and the evidence required it, could you sign your name to a piece of paper condemning him to die?
A. Yes. (Tr. 195).

By Mr. Rosenbaum:
Q. If the law and evidence required it, could you sign your name to a piece of paper condemning him to death?
A. Yes. (Tr. 200).

By Mr. Rosenbaum:
Q. If you thought the law and the evidence required it, could you sign your name to a piece of paper that condemns him to die?
A. Yes.
Q. Are you sure if the law and evidence required it, you could sign a piece of paper?
A. If the law and evidence required it, yes. (Tr. 205).



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By Mr. Rosenbaum:
Q. If the death penalty was up at election time, you had a chance to vote or repeal it or keep it, how would you vote?
A. I would keep it.
Q. If the law and evidence required it, could you sign your name to a piece of paper that calls for him to die?
A. I don't know that right now. (Tr. 216).

By Mr. Rosenbaum:
Q. I am asking you to go one step further. I am asking if you personally could enforce the death penalty in this case if the law and the evidence required it?
A. No, I don't think so. (Tr. 218).

By Mr. Rosenbaum:
Mrs. Jackson. (Tr. 300).
Q. If the law and the evidence required it, could you sign your name to a piece of paper that calls for his death?
A. Yes, sir. (Tr. 236)?

By Mr. Rosenbaum:
Q. If the law and the evidence required it, could you sign your name to a piece of paper that calls for his death?
A. If the law and the evidence require it:
Q. Right.
A. Yes. (Tr. 239-40).

By Mr. Rosenbaum:
Q. 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 guilt and the death penalty, could you sign your name to a piece of paper that might kill him?
A. I am not sure I would? (Tr. 243-44).

By Mr. Rosenbaum:
Q. Sir, would you look at the defendant, please. If you thought the law and the evidence required it, could you sign your name to a piece of paper that condemns him to death?
A. I could. (Tr. 249).

By Mr. Rosenbaum:
Q. Sir, would you look at the defendant, please.
A. Yes.
Q. If the law and evidence required it, could you sign your name to a piece paper which calls for him to die?
A. If the law calls for the, yes. (Tr. 255).

By Mr. Rosenbaum:
Q. Would you look at the defendant, please?



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A. Okay.
Q. Do you feel if the law and the evidence required it could you sign your name to a piece of paper condemning a man that young to death?
A. I really don't understand the question, sir. (Tr. 262).

By Mr. Rosenbaum:
Q. Could you look at the defendant, please? If the law and the evidence required you to do that, could you sign your name to a piece of paper condemning someone as young as him to death?
A. Yes, I could. (Tr. 275).

By Mr. Rosenbaum:
Q. Ma'am, could you look at this young man? Do you feel that if the law and the evidence required it that you could sign your name to a piece of paper that condemns him to die?
A. Yes, I could. (Tr. 282).

By Mr. Rosenbaum:
Mrs. Link. (Tr. 285).
Q. If you felt the law and the evidence required it, could you sign your name to a piece of paper condemning him to death?
A. I am not sure. I don't know, depends on the --(Tr. 291).

By Mr. Rosenbaum:
Mrs. Major. (Tr. 294).
Q. If you felt the law and the evidence required it, could you sign your name to a piece of paper that condemns this young man to death?
A. Yes. (Tr. 302).

By Mr. Rosenbaum:
Mrs. Brown. (Tr. 303).
Q. If you thought the state proved its case and the law and the evidence required it, could you sign your name to a piece of paper condemning someone that young to death?
A. Yes. (Tr. 308).

By Mr. Rosenbaum:
Mrs. Heckes. (Tr. 312).
Q. Would you look at the defendant, Please? If the law and the evidence required it in this case, could you sign your name to a piece of paper that called for this young man's death?
A. If there was the evidence to prove it, yes.
(Tr. 313-14).

By Mr. Rosenbaum:
Mr. Eubanks. (Tr. 332).
Q. If you are picked as a juror, you have to assume the



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law and the evidence requires -- you feel the law and the evidence requires the death penalty verdict, could you, as a person, sign your name to a piece of paper that condemns him to death? Look at him, could you do that? Look at him or is it too hard?
A. No, I can look at him. Yes, I could be fair.
(Tr. 336-37).

By Mr. Rosenbaum:
Q. Will you look at the defendant, please? If you felt that the law and the evidence required it, could you return a verdict condemning him to death?
A. Yes. (Tr. 347).

By Mr. Rosenbaum:
Q. Could you look at the defendant in this case, please, sir? If you felt the law and the evidence required it, could you return a verdict that condemned him to death?
A. If the circumstances warrant it, yes. (Tr. 362).

By Mr. Rosenbaum:
Mr. Husk. (Tr. 364).
Q. If you felt the law and the evidence in this case required it, could you return a verdict that called for this young man's death?
A. Yes. (Tr. 366).

By Mr. Rosenbaum:
Q. But look at the defendant, please. If you felt the law and the evidence required it, could you return a verdict of guilty that condemns him to death even though he is that young?
A. Yes, I could. (Tr. 370).

By Mr. Rosenbaum:
Q. Would you look at the defendant, please. If you felt the law and evidence in this case required a verdict of death, could you sign your name to a piece of paper that would cause him to die?
A. If the evidence was overwhelming, yes. (Tr. 377).

By Mr. Rosenbaum:
Q. Look at the defendant, please, that young man at the end of the table. If you thought the law as it exists today and the evidence require it, could you sign your name to a piece of paper which called for him to die?
A. I don't think so. (Tr. 381-82).

By Mr. Rosenbaum:
Mr. Taphous. (Tr. 385).
Q. Could you at the defendant, please? If you were picked as a juror and you felt the law and the evidence required it, could you sign your name to a piece of paper that condemns as young a man as him to death?



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A. If I felt the evidence and law required it, yes.
Q. The law and evidence require it.
A. Yes. (Tr. 387).

By Mr. Rosenbaum:
Mrs. Hoover. (Tr. 432).
Q. The situation I have given you is, the State proves its case, the law requires the death penalty, but you take one look at him and say, "I can't do it, no matter what you have said out here, I am not going to follow the law." Have you violated your oath of office?
A. Yes, definitely. (Tr. 432).

By Mr. Rosenbaum:
Q. Could you impose the death penalty on him if the law and the evidence required it?
A. Yes, I could. (Tr. 434).

By Mr. Rosenbaum:
Q. Mr. Meyers?
A. Yes, I could. (Tr. 434).

By Mr. Rosenbaum:
Q. Mrs. Alessio?
A. No problem. (Tr. 435).

By Mr. Rosenbaum:
Q. Mrs. Frantz, did I ask you that?
A. No problem. (Tr. 435).

By Mr. Rosenbaum:
Mr. Meyers.
Q. You will be able to carry out a death sentence if the law and the evidence requires it?
A. Yes, I would. (Tr. 436).

As the Supreme Court will note, there are no less than 37 separate instances of deliberate prosecutorial misconduct here in the form of outright lies being told to everyone of the prospective jurors who were not excused for cause by the trial court. (Emphasis added).

As this Honorable Court is aware, the law is the law. In this case, Rosenbaum is in clear violation of O.R.C. 2929.03 in his successful attempts at manipulating these prospective jurors, twelve of whom, in fact, were selected to sit on the



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panel in this trial as the actual jury.

As stated in O.R.C. section 2929.03 division (C)(2):

> If the indictment or count in the indictment contains one or more specifications of aggravated 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 upon the offender shall be death, 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 a panel of three judges that tried the offender upon his waiver of the right to trial by jury;
>
> (b) By the trial jury and the judge, if the offender was tried by jury. (Emphasis added).

Clearly, prosecutor Rosenbaum influenced all of these potential jurors, including those 12 impaneled for the defendant's trial, by causing them to believe that state law did in fact require death as the only sentence. This was very improper and illegal. The common layman has no reason to read and/or memorize Ohio's Criminal Code, nor can anyone with a reasonable mind expect such prospective jurors to be versed in sentencing guidelines. Prosecutor Rosenbaum, knowing this to be true, then took improper advantage of each and every prospective juror by implanting his sentencing criteria in their



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minds. In this manner, Rosenbaum was assured of a impaneled jury who, for the most part, would take his word as an officer of the courts and prosecuting attorney, that the law had only one sentence for Jalowiec if he were found guilty and that was death. (Tr. 56-57, 109, 132, 137, 163-64, 188, 195, 200, 205, 216, 218, 230, 236, 239-40, 243-44, 249, 255, 265, 275, 282, 291, 302, 308, 313-14, 336-37, 347, 362, 366, 370, 377, 381-82, 387, 432, 434 2x, 435 2x, 436).

The Supreme Court has a duty and an obligation towards the people to protect them from unfair trials and outrageous prosecutorial misconduct such as is evidenced here. Jalowiec did not have a chance to receive a fair trial because his jury panel and all of the prospective jurors had been likened to the fruit from the poisonous tree doctrine. Every member of this jury panel had been contaminated prior to their selection. In capital cases, the process of selecting jurors from the pool is to be predicated upon the Witherspoon Standard.. That court stated that the focus of questioning during voir dire should be determined if jurors are willing to consider all penalties that may be applicable even if they have conscientious scruples against the death penalty. Witherspoon v. Illinois, 391 U.S. 510, Id. at 322 fn. 21 (1968). Rosenbaum has all prospective jurors thinking there are no alternative sentences in existence.

We remind this Honorable Court that defense counsel did object to the first instance of this blatant mistatement of capital sentencing by Rosenbaum however, trial court overruled it, thus setting the pattern. (Tr. 56). "A defendant will be



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excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." People v. Arias, 13 Cal. 4th 92, 159 (1996); People v. Noguera, 4 Cal. 4th 599, 638 (1992). It is for this reason Jalowiec must have this conviction overturned and be granted a new trial.



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PROPOSITION OF LAW NO. V

**DEFENDANT WAS PREVENTED FROM RECEIVING A FAIR TRIAL AND DUE PROCESS BY REASON OF BIAS FROM THE COURT IN FAILING TO STRIKE POTENTIAL JURORS FOR CAUSE AS OBVIOUS BIAS WAS DEMONSTRATED DURING VOIR DIRE IN VIOLATION OF THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

The court interfered with the defendant's rights to a fair trial and due process by exhibiting obvious bias when refusing to strike potential jurors. During voir dire, the following questions and answers were given during the examination of Ms. Smarr.

By the court, Mr. Rosenbaum and Mr. Cleary:
Q. Susan,
Q. When do you start police officer training?
A. Hopefully in April.
Q. Now, you appear to follow a lot of these cases. You appear to follow a lot of these cases. You have Filliagi, Susan Smith, Judy Quinn, Henthorn and documentary programs. Is this of interest to you?
A. I watch it, yes. I read about it.
(Tr. 341, 342).

And still another unnamed juror was not hesitant in admitting her affiliation with the Elyria Police department.

By the Court, Mr. Rosenbaum, and Mr. Cleary:
Q. Ma'am could you tell me the name of some police officers you know from your work?
A. I know most of the older guys that have been on for a long time.
Q. Who would that be?
A. Joe Vankerkhove, George Wakeman, John Glover, Al Urban -- he hasn't been on that long -- Larry Adams, Eric Halverson -- I an just naming the guys that work there.
(Tr. 345, 346).

Q. Do you know John Homoki?
A. Yes.



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Q. Has he worked with you in any capacity?
A. Just a little bit at Holiday Inn.
Q. Now, you actually hire these police officers?
A. Elyria Holiday Inn does.
Q. But you are the manager.
(Tr. 347).

Q. The fact that you know him wouldn't influence your belief on his testimony one way or the other?
A. No.
Q. You indicated that because of your work and what have you, that you know a number of members of the Elyria Police Department because they are employed at the Holiday Inn?
A. Right.
Q. This is an Elyria Police Department case. Would the fact that you know some police officers influence you?
A. No.
Q. Do you think it would have any influence whatsoever?
A. You mean thinking I would get on?
Q. Do you think it would hurt your chances with them at all?
A. No.
(Tr. 349, 350, 351).

These prospective jurors went on to sit on the panel of this defendant's trial, thus denying Jalowiec any resemblance of his rights to be tried by an impartial jury of his peers. Jalowiec and all criminal defendants are guaranteed to be tried in state courts by impartial juries. This exception is a Qualified Right as expressed in the Sixth and Fourteenth Amendments to the United States Constitution. This right was recently upheld again in Morgan v. Illinois, 504 U.S. 719, 729 (1992).

As claimed by defendant, Jalowiec, the seating of these jurors by the trial court was a direct violation of Ohio Rules of Criminal Procedure Rule 24 (B)(11) and Rule 24 (B)(12).

As stated in Crim. Rule 24 (B) Challenge for cause: A person called as a juror may be challenged for the following cause:



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> Crim. R. 24 (B)(11) states: That he is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant. (Emphasis added.)
>
> Crim. R. 24(B)(12) states: 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 subsection (B)(11).

It is clearly stated on the record that these prospective jurors fall into the categories of (B)(11) and (B)(12) under Crim. R. 24. Yet these same prospective jurors came to be empaneled by the trial court in a blatant disregard of the Rules of Criminal Procedure. In so doing, the court further showed an abuse of discretion thus, denying the Constitutionally guaranteed Rights of an impartial jury of his peers to Jalowiec.

As evidenced by the trial record, Ms. Smarr is clearly the spouse of a Lorain Police officer. (Tr. 128-29). This violates (B)(12) of Crim. R. 24 because the police department is the "person" on whose complaint the prosecution was instituted, as defined in (B)(11).

The record also clearly shows that juror Susan (last name unknown) admitted to being enrolled in the local police officer training which was to commenced within several weeks of the trial's conclusion. (Tr. 341). This juror not being struck for cause by the trial court clearly violated the Crim. Rule 24 at section (B)(11).

And the most egregious violation of the trial court's



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discretion was in not dismissing yet another juror for cause when it is clear she was the employer of numerous police officers, including those testifying in the defendant's trial. (Tr. 345, 346). And this juror then admitted to being the overall supervisor of said officers. (Tr. 347). Again this juror is in direct violation of Crim. R. 24(B)(12).

The 4th District Court stated, "Abuse of discretion" connotes more then an error in judgment; it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. Lehman v. Lehman, 593 N.E.2d 447, 72 Ohio App.3d 68 Ohio App. (4th Dist. 1991).

Abuse of discretion connotes more than error of law or judgment; it implies that trial court's attitude was unreasonable, arbitrary or unconscionable. W.U.P.W. TV-36 v. Direct Results Marketing, Inc., 591 N.E.2d 1345, 70 Ohio App.3d 710 Ohio (10th Dist. 1990). See also Lowe v. Sun Refining and Marketing Co., 597 N.E.2d 1189, 73 Ohio App.3d 563 Ohio (6th Dist. 1992); Gilney v. Toledo Bd. of Edn., 596 N.E.2d 591, 73 Ohio App.3d 99 Ohio (6th App. Dist. 1991).

The Constitutional Amendments of the United States Constitution as well as the Criminal Rules of Procedure are clear on this point, are supported by case law. The record of the trial court in this case is also quite clear. Jalowiec was denied a fair trial by rights of expectation to an impartial panel of jurors when at least 3 of the panel were tainted from the start. This further abuse of discretion by the other members of the jury panel by the contamination of the total panel that



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should have assured Jalowiec of being tried by an impartial jury of his peers. This conviction cannot be upheld and should therefore be overturned. (Emphasis added).



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PROPOSITION OF LAW NO. VI

**DEFENDANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL WHEN THE PROSECUTOR TESTIFIED IN OPENING STATEMENTS IN VIOLATION OF THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 OF THE OHIO CONSTITUTION.**

Throughout the opening statement by the State, Rosenbaum testified as to various facts to the jurors, thus being able to elicit his opinions as facts. The testimony by the prosecutor was used to import upon the jurors the false belief that each of the points then stated to them, was in fact, a substantiated, evidentiary fact for the jurors to factor into their conceptions on the guilt of the defendant in this case.

The following excerpts are taken in context from prosecutor Rosenbaum's opening statement:

> "So what happens is, their conspiracy generates a plan in which Ron Lally would be hurried to a place where he would be kidnapped at gunpoint and taken to Cleveland and killed." (Tr. 475).
>
> "So what happens is, Stanley Jalowiec goes over to Brian Howington's house at 112 Greenway Court in the city of Elyria." (Tr. 475).
>
> "This night the defendant went over to Brian Howington's or actually Corrine Fike's apartment and they got her 1992 Chrysler LeBaron convertible and they took it." (Tr. 475, 476).
>
> "So Stanley and Howington go to Lally's apartment to pick him up and they smoke crack cocaine there and eventually they return about one in the morning to Corrine Fike's apartment at 112 Greenway and play pool for an hour." (Tr. 476).
>
> "While this is going on, Raymond Smith, Danny Smith, Michael Smith, some of their girlfriends, a person by the name of Sharon Hopkins and Terry Hopkins are in and out of there, too." (476).



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"Well, at the same time Danny Smith is driving a car that contains Sharon Hopkins, Danny, Michael Smith and Raymond and they leave downtown Elyria drive their car out past the railroad tracks." (Tr. 476).

"Michael Smith became so upset about what he saw the defendant and his father do to Ron Lally." (Tr. 478).

"They attempted to place him in the trunk after they killed him. He was too large that his body is in the trunk of that car and that his body contains hairs from Joann File's dog who had also been in the car at one time or another." (Tr. 482).

"Corrine permitted Stanley, the defendant, and the two Smiths, Danny and Raymond, to use her car so they could do whatever they had to do in exchange for crack cocaine in the past." (Tr. 475).

"What happens at this point in time, Raymond Smith pages Stanley Jalowiec." (Tr. 476).

"Stanley Knows then it is time to leave, so he takes Ron Lally with him and starts driving this convertible and he drives them out Middle Avenue." (Tr. 476).

This was absolutely improper and a direct violation of the defendant's rights of due process and a fair trial. The United States Constitution is absolutely clear on a defendant's inalienable rights with regard to confronting his accusers.

As stated in U.S.C.A. 6th Amendment, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,...; to be confronted with witnesses against him."

And Article I Section 10 of the Constitution of the State of Ohio states in part, "... To meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf..."

Rosenbaum deliberately and maliciously committed misconduct



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and denied this defendant the Confrontational Rights that were guaranteed him by these respective Constitutions of this State and these United States.

In United States v. Chalkias, 971 F.2d 1206 (6th Cir. C.A. 1992), it was held that prosecutors may not make remarks that are calculated only to arouse passions and the prejudices of the jury. Also, as stated in a ruling by the Cuyahoga Court of Appeals, "It is unprofessional for an attorney to ask any questions which implies the existence of a fact which he cannot support by evidence." Berlinger v. Mt. Sinai Medical Center, 589 N.E.2d 1373, 68 Ohio App.3d 830 (8th Dist. App. Ct. 1990).

The Ohio Supreme Court held such to constitute hearsay when one police officer testified as to what had been related to him by other officers and even included references to any reports made by other officers or governmental agencies because the defendant has been denied the confrontational rights guaranteed him by the Constitution. State v. Perryman, 49 Ohio St.2d 14, 358 N.E.2d 1040 (1976). See also Stewart v. Cowan, 528 F.2d 79 (6th Cir. 1976), and the rights of due process with respect to cross-examination.



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PROPOSITION OF LAW NO. VII

DEFENDANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL WHEN THE COURT PERMITTED SANDRA WILLIAMS, OFFICER JOHN HOMOKI, LYNN ALTPATER, TERRY HOPKINS AND MICHAEL SMITH TO RELATE HEARSAY AS EVIDENCE IN VIOLATION OF THE 6TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 AND 16 OF THE OHIO CONSTITUTION.

Sandra Williams testified extensively concerning hearsay statements and threats made to her by Danny Smith. As a result this extensive hearsay was offered and received over objections, in evidence.

1) Williams testified that Danny Smith came into her yard to threaten Ronald Lally and his family. (Tr. 511, 512).

2) Williams also testified that D. Smith stated he knew where Ronald's parents lived and it would be a shame if anything would happen to them. (Tr. 514).

3) She further testified that D. Smith told her the Lally trailer might get blown up. (Tr. 514).

This was emphatically untrue because Williams was committing perjury suborned by prosecutor Rosenbaum. In a co-defendant's trial, Williams testified that Danny Smith did not make any threats to her about the victim, directly or indirectly, nor the Lally family. (Appendix E-1). Instead, Williams testified that Smith told her only that he was mad and upset with her boyfriend Lally. (Appendix E-1).

Officer John Homoki testified at length on an unrelated incident from 5 months earlier. This hearsay was used to establish the conspiracy claims of the state, also over numerous objections by the defense. Officer Homoki testified that he



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recalled direct quotes made to him by both Danny Smith and Ronald Lally.

1) Homoki testified also to the mental state of Lally two and a half years previously without having taken any notes or made any reports at the time. (Tr. 525, 526).

2) Homoki testified that Lally told him that D. Smith was after him. (Tr. 526, 527).

3) Homoki also testified Lally told him he was an informant for the police. (Tr. 527, 528).

4) Homoki further stated that Lally told him that Danny Smith was after him for wearing a wire on a drug buy. (Tr. 528).

5) Homoki also testified that Danny Smith, upon questioning, replied that nothing was going on. (Tr. 529-30).

6) And Homoki was told by D. Smith that, "that snitch will get his.", while in his police uniform. (Tr. 531).

These alleged statements made by Lally and Smith to Homoki were complete fabrications. (D-1, D-2). Homoki lied under oath in claiming that any of the statements had been made. Again, in the subsequent trial of Danny Smith, Homoki admitted on the stand that he had made up all of the supposed quotations. (Appendices D-1, D-2, D-3). Homoki further admitted under oath in the Smith trial that his initial, written report concerning this alleged incident of September 15, 1993, had only been written near the end of 1994 from recollection at the suggestion of Detective Leiby.

Lynn Altpater was allowed to testify concerning hearsay and her interpretations of said hearsay, over objection.



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1) Altpater furthered the alleged conspiracy theory of the state when she testified that Danny Smith asked her to get him some poison in order to knock a person out. (Tr. 537).

2) Altpater was allowed to speculate in her testimony as she stated that D. Smith said he needed it to take care of somebody. (Tr. 537-538).

3) Altpater then went on to say that it was to take care of someone who was going to testify against Smith. (Tr. 538).

Again, we have a state's witness stating hearsay as evidence, sanctioned by the trial court and prosecutor Rosenbaum which turns out to be outright perjury. Lynn Altpater, testifying in co-defendant D. Smith's trial, stated matter factly that the poison requested by Danny Smith was never for use on any person, but for some cats which were walking all over Smith's car. (Appendices F-1, F-2, F-4). Furthermore, Altpater testified in this subsequent trial that Detective Leiby had pressured her to testify that the poison was for use on a person when Altpater testified in the trial of Jalowiec, the defendant in this appeal.

Terry Hopkins was permitted to base most of his testimony upon hearsay over objections by the defense.

1) T. Hopkins testified that Danny Smith stated to him that, he needed some help in collecting money. (Tr. 568-569).

2) T. Hopkins when testified that several months later, Danny Smith said, he wanted somebody killed. (Tr. 569).

3) T. Hopkins further testified that Smith then asked, if he knew anybody. (Tr. 570).



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4) T. Hopkins then testified Smith stated, that if he talked to Carl, that he would buy a BMW for him. (Tr. 570-571).

5) Then when asked what Danny Smith said, T. Hopkins answered, "He said that they had done it." (Tr. 574).

6) When asked by state what Stanley Jalowiec said, T. Hopkins replied that, "They stomped him and run him over with a car." (Tr. 576).

7) T. Hopkins then said that, "He said he stomped him and run him over with a car." (Tr. 576).

8) T. Hopkins then testified that they said "They shot him and cut him." (Tr. 577).

9) Then Hopkins was allowed to guess in his hearsay testimony by stating, "I think Raymond (Smith) said something that he was like a little nervous." (Tr. 577).

10) And finally when asked what Michael Smith allegedly stated to him, T. Hopkins replied, "That he had wore a wire on him on a sail charge." (Tr. 578).

Michael Smith also related hearsay when testifying during objections.

1) Michael Smith testified, "So I asked my dad what we were waiting on and he said, a ride." (Tr. 780 2x).

2) In asking M. Smith to draw his own conclusions to facts never in evidence, the prosecution asked, "Even though you didn't see the shot go off, do you know who shot Ronald Lally?". Michael Smith replied, "My father had the gun and so I would have to say it was him." (Tr. 841).

All this hearsay information was placed before the jury,



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which was also taking notes on the testimony being placed in evidence. This constituted improper evidence and was very prejudicial, denying Jalowiec's rights to a fair trial. There was no question that this evidence was hearsay. See Potter v. Baker, 162 Ohio St. 448, 494, 124 N.E.2d 140, 144 (1955); Ohio R. Evid. 801 (C); Ohio R. Evid. 803 (8); Ohio R. Evid. 804.

During the hearsay statements of Sandra Williams, the defense did raise objections to be overruled at each instance. (Tr. 511, 512, 513, 514). Officer Homoki's hearsay was not only objected to and overruled at each instance, but Homoki admitted in the Smith trial that he made up his hearsay testimony in the Jalowiec trial. (Tr. 523, 525, 526, 527, 528, 531). Lynn Altpater's hearsay testimony was objected to and overruled by the Court also. (Tr. 537, 538). Terry Hopkins' hearsay was also objected to and overruled by the court at least six times as well. (Tr. 569, 570, 574, 576, 577, 578). Michael Smith's testimony had been objected to and overruled as well by the trial court. (Tr. 778, 780, 841).

Trial court cited Ohio R. Evid. 801 (D)(2)(e) as its basis for the overruled objections. (Tr. 780). Defendant Jalowiec was not at no time either charged or indicted for any conspiracy charges. The trial court was in effect violating due process when it did abuse its discretion in all of these instances. Section (D)(2)(e) of R. Evid. 801 clearly states, "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy." The state failed miserably in its attempt to link



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Jalowiec into some sort of conspiracy, thus the trial court erred in its permitting all this hearsay to be placed in front of the jury.

By Defense Counsel Grunda to Officer Scott Ashley:
Q. Now, these two, State's Exhibit 4, which is regarding Raymond Smith, and State's Exhibit 5, regarding Danny Danny Smith, those are the only two cases that came from your dealings with Lally, correct?
A. The case you are talking about today, yes.
Q. Stan Jalowiec was not part of it, was he?
A. Not that morning, no.
Q. The only two people that were there were Raymond Smith and Danny Smith, right?
A. Correct.
Q. Stan Jalowiec was not at the residence, right?
A. That is correct.
Q. Since he wasn't there, obviously he is not charged with anything?
A. That is correct. (Tr. 500).

Q. Okay. And then when you type up, like the first sheet is a standard pre-printed form?
A. Correct.
Q. The second sheet then, you have a more detailed information regarding that individual person?
A. Correct.
Q. And that is when you expect him or what you expect to get out of him for working for you, right?
A. Correct.
Q. Okay. And that is on the second page where it says informant associations, right?
A. Correct. (Tr. 501-02).

Q. Now, nowhere in there is Stan Jalowiec's name mentioned?
A. No, it is not.
(Tr. 502).

By Grunda to Sandra Williams:
Q. Okay. And when the incident happened it was only Danny Smith doing this yelling or threatening or whatever, Right?
A. Right.
Q. Nobody else?
A. Nobody else.
Q. Correct.
A. Correct.
Q. Well, you said nobody else. Stan wasn't there was he?
A. No, sir.
Q. Stanley Jalowiec?



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A. No, sir.
(Tr. 520).
By Grunda to Lynn Altpater:
Q. Okay. Bottom line in all this, there was never any mention whatsoever of Stan Jalowiec, right?
A. No.
Q. And further, not only was there no mention of Stan Jalowiec with these conversations that you had with Danny Smith, Stan Jalowiec was never around, is that right?
A. When I had conversations with Danny?
Q. Yes.
A. No.
(Tr. 539, 540).

By Defense Counsel Cleary to Officer Homoki:
A. As I approached Sederis to turn right, I saw Stanley start to cross the street heading away from the area.
Q. Away from the area?
A. Yes, he was heading away.
Q. And he wasn't part of the conversation involving you or Mr. Lally?
A. No, He was not.
A. Nor was he part of any conversation involving you or Mr. Smith?
A. No, sir.
(Tr. 532, 533).

This subject has been considered by the Indiana Supreme Court in Glover v. State, 235 Ind. 121, 126, 251 N.E.2d 814, 818 (1969):

> Hearsay testimony that law enforcement officers use and rely upon for investigation into the gathering of competent material evidence of course is not evidence to be properly used in the trial of a criminal case.

In State v. Perryman, 49 Ohio St.2d 14, 358 N.E.2d 1040 (1976), the court permitted evidence from a police detective that information had been related to the police detective by other police officers. This was held to constitute hearsay.

A similar issue was considered in United States v. Figueroa,



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750 F.2d 232 (2d Cir. 1984). In this case a police detective was permitted to relate to the jury conversations made by a police informant to other persons. The government attempted to justify the evidence as not being hearsay because it was claimed it was not offered for the truth of what was being said. However, this claim was rejected by the court as follows:

> Anarella's testimony is clear albeit less egregious example of the evil identified and prohibited in Check. The government's primary witness in Check was an undercover detective, Spinelli. In his investigation of Check, a fellow police officer suspected of narcotics trafficking, Spinelli worked closely with Cali, a confidential informant who refused to testify at trial. Through some artful questioning, the prosecutor sought to introduce the content of the Cali-Spinelli conversations without engendering hearsay problems. Thus the prosecutor repeatedly inquired: "Without telling us what Mr. Cali said to you, what did you say to him?" Check, 585 F.2d at 671. Spinelli's responses-his alleged statements to Cali wholly incorporated information which Cali obviously had conveyed to him. Id at 675.
>
> The fact that the declarations in Check were offered and admitted without limitations, do to a mistaken belief by the prosecution and the trial judge that they were not hearsay because they were Spinelli's own statements, does not distinguish Check from the case. It is clear that here, as in Check, the government's purpose in offering the disputed testimony was to prove in truth of the matters asserted therein. See Id at 679. Anarell's testimony about the telephone calls was a transparent attempt to incorporate into the officer's testimony information supplied by the informant who did not testify at trial. Such a device is improper and cannot miraculously transform inadmissible hearsay into admissible evidence. Id. And, lest there be any misunderstanding by the jury, the prosecutor drove the information relentlessly home in his summation. The whole point of out decision in Check, see 582 F.2d at 674, was to stop prosecutors from circumventing the hearsay rule by the kind of atomization here sought to be defended. 750 F.2d at 240.

The allowance of this type of evidence and its consequent



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denial of confrontation and cross-examination was considered by the United States Court of Appeals for the Sixth Circuit in Stevens v. Bordenkircher, 746 F.2d 342 (6th Cir. 1894).

In this case, the court had admitted at the trial of a murder case a death certificate by a witness who did not actually perform the autopsy on the body in question. Since the person who actually prepared the death certificate was available for cross-examination and was not produced this was held to deny to the petitioner his right to confrontation and cross-examination. The Court of Appeals went on to rule that the allowance of this testimony through a witness who did not actually perform the observations or tests was improper and denied the federal constitutional right of confrontation and cross-examination. 746 F.2d at 348-49.

During the course of all this hearsay testimony the defense objected to its being entered in front of the jury on numerous occasions, only to be overruled by the trial court in every instance. (Tr. 512, 513, 523, 526, 527, 528, 529, 530, 537-538, 569, 570, 574, 576, 577-578, 578, 778, 780, 841). And although Sharon Hopkins could not recall the actual hearsay which prosecutor Rosenbaum attempted to elect from her, defense counsel objected three times to be overruled. (Tr. 687, 688-2x). Exceptions and continuous objections were also noted by the court. (Tr. 513, 527, 529, 687-688). The trial court erred in its overruling of these objections. These errors constitute plain error and this conviction should be reversed.

It is clear that a "verdict of a jury cannot be based upon



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testimony as to possibilities, as distinguished from probabilities, and the failure to exclude speculative testimony constitutes prejudicial error." Haase v. Ryan, 100 Ohio App. 285, 136 N.E.2d 406 (1955) at syllabus 1.

All that the prosecution presented in this case was a choice among suborned, perjured testimonies. Due process has been offended in this case as there is a complete lack of evidence, insufficient or otherwise, to establish the offense of aggravated murder with proof beyond a reasonable doubt. Both Jackson v. Virginia, 433 U.S. 307, 324 (1974) and Moore v. Duckworth, 443 U.S. 713 (1979) support these contentions of the defendant.

These violations of the Ohio Rules of Evidence constitutes an abuse of discretion by the trial court. In tandem with the prosecutors this is a further denial of the defendant's due process. "Exceptions to the hearsay rule are premised upon necessity and circumstantial guarantees of trustworthiness surrounding the declaration..." State v. Woods, 48 Ohio App.3d 1, 4, 548 N.E.2d 954 (1988). This is not the case here, as is evidenced by the examples cited in this proposition of law.



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PROPOSITION OF LAW NO. VIII

DEFENDANT WAS DENIED RIGHTS OF DUE PROCESS AND A FAIR TRIAL BY INSTANCES OF EXHIBITS INTRODUCED INTO EVIDENCE WHOSE SOLE PURPOSE WAS TO INFLAIME THE JURY IN VIOLATION OF THE 6TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A.

The defendant was denied his right to due process and a fair trial when various photographs and other exhibits were introduced, over objections, into evidence by Rosenbaum.

The prosecutor at no time was able to link this defendant to any of the prior acts of any of the parties. To the contrary, in every instance of admitted hearsay, when the witness was asked to place Jalowiec on the scene he or she was unable to do so. (Tr. 520-4x, 532, 533, 538, 540). All of the testimony was allowed over objections, thus causing prejudicial error during the state's case in chief. Although there was no conspiracy documented, the court allowed exhibits placed into evidence having nothing at all to do with the defendant.

1.) The recorded drug purchase between the Smith's and Ron Lally was admitted over objection. (Tr. 848).

2.) A previous arrest report for drugs of Raymond Smith was admitted over objection. (Tr. 848-49).

3.) A report of a prior drug arrest on Danny Smith was also admitted over objection. (Tr. 849).

4.) The former indictment of Raymond Smith for drug law violations was also admitted over objections. (Tr. 849-50).

5.) The former indictment of Danny Smith on drug law violations was admitted over objections. (Tr. 850).



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6.) Lighters and cigarettes found inside a cemetery on the ground were admitted over objection even though there was never any testimony that anyone at all smoked. (Tr. 851-52).

7.) Loose hairs found on the ground of the cemetery were also admitted over objections. (Tr. 852).

This is ridiculous. There are not even any links between these evidentiary exhibits and the case against the defendant, Jalowiec. Ohio's 5th District Court stated that trial court's decision to admit or exclude evidence will not be reversed unless there is clear and prejudicial abuse of discretion shown. Estate of Baxter v. Grange Mutual Cas. Co., 597 N.E.2d 1157, 73 Ohio App.3d 512 Ohio (5th Dist. 1992). The fact that each of the above named exhibits was not shown to be in any way relevant to this capital murder trial, does demonstrate clear and prejudicial abuse by the trial court.

B.

The prosecutor's also entered various photographs of the victim, which are extremely gruesome as well as prejudicial to the defendant and certainly had no probative value other then to inflame the already tainted jurors further.

1.) St. Ex. 2B, depicted Lally's face after it had been worked on by the coroner's staff. (Tr. 644).

2.) St. Ex. 2C, a close up of Lally's left eye artificially being forced open. (Tr. 645).

3.) St. Ex. 2F, a close up of Lally's lower lip being pulled down and held there artificially. (Tr. 646).

4.) St. Ex. 2G, a close up of Lally's upper lip being pulled



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up and held there artificially. (Tr. 646).

5.) St. Ex. 2I, depicting the inside of Lally's lower face after having had the larynx, trachea and neck structure pulled out in a sickening manner so the jurors would be able to see the victims spinal column simply by looking through his mouth. (Tr. 647).

6.) St. Ex. 2K, shows Mr. Lally's scalp peeled back from his scull - by the coroner. (Tr. 647).

7.) St. Ex. 2L, another angled look at the victim's peeled back scalp, as done by the coroner. (Tr. 648).

8.) St. Ex. 2M, also showing Lally's peeled back scalp; redundant as well as gruesome. (Tr. 649).

Again the defense did attempt to prevent undue prejudice to their client by objecting, but the court was still abusing its discretion. Defense objected to state's exhibits 2-A through 2-CC on the initial grounds of the grusomeness and repetitiveness of them. (Tr. 642). The objections were continued on the grounds of relevancy because the photograph were not true renditions, but rather, show the body after the modifications made by the coroner's staff. (Tr. 642-43). The trial court's response was, "Overruled and exceptions are granted." (Tr. 643).

Ohio Rules of Evidence Rule 403(A) generally provides that although relevant, evidence is not admissible if its probative value is substantially outweighted by the danger of unfair prejudice. The risk of unfair prejudice occurs when the evidence is so gruesome or is "charged with such immediacy or emotional impact" as to produce an inflammatory reaction by the jury



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against the defendant. State v. Benner, 40 Ohio St.3d 301, 311 n.2, 533 N.E.2d 701 (1988), Cirt. denied, 110 S.Ct. 1834 (1990); State v. Tingler, 31 Ohio St.2d 100, 285 N.E.2d 710, 713; State v. Hill, 12 Ohio St.2d 88, 90, 232 N.E.2d 394 (1967).

Under Ohio law, an additional element is involved in the balancing process when gruesome photographs are introduced in a capital prosecution. Such evidence is admissible only if "the probative value does not, in a simple balancing of relative values, outweigh the danger of prejudice to the defendant" and the photographs are not repetitive or cumulative in nature. State v. Morales, 32 Ohio St.3d 252, 513 N.E.2d 267, 273-74 (1987).

The Ohio Supreme Court has noted that this standard, which is stricter than the usual standard for the admission of evidence, "is justified in capital cases because gruesome photographs which depict the victim of the offense are charged with such immediacy and emotional impact that the risk of prejudice is enhanced proportionately, a risk that we are less willing to tolerate in a case where the defendant faces a penalty of death." State v. Benner, 40 Ohio St.3d at 311 n.2 (1988).

The trial record speaks for itself. The above cited exhibits are either totally irrelevant as stated in section A. or gruesome and gross, having no probative value. And as such, Jalowiec must be remanded for a new and fair trial and this conviction must be overturned.



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PROPOSITION OF LAW NO. IX

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT PERMITTED THE CORONER TO TESTIFY AS TO THE POSSIBILITIES THE TRUNK AND UPPER HEAD WOUNDS OFFERED INTO EVIDENCE COULD HAVE BEEN CAUSED TO THE BODY OF THE DECEDENT IN VIOLATION OF THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The testimony of Dr. Heather Neilson Raaf in describing how abrasions and marks came to be on the decedent's trunk and upper head was pure speculation which consisted of nothing more than possibilities.

Prosecutor Rosenbaum had questioned the deputy coroner, Concerning St. Exhibit 2-K, a picture of the decedent's scalp peeled back to show his skull. When questioned concerning various areas of bleeding and the number of separate blows depicted, she testified "Well, it is a little hard to say. I think it is fair to say you have to look at things on different surfaces as different blows. There might be one here, one here. That is two, three and possibly one up here, which is four." (Tr. 647-48). (Emphasis added.)

And when questioned concerning St. Exhibit 2-M, a picture of the decedent's scalped head, Dr. Neilson Raaf testified "2-M is looking down from the top and there are probably -- probably two out of the three of those at least were counted, and the others I am not sure." (Tr. 649). (Emphasis added.)

When questioned concerning St. Exhibit 2-U, she testified "I describe this as an incised wound, meaning a cut. It has very clean edges more characteristic of a cut than a skin split, although it has scrapes along the edges, so it is kind of an



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unusual injury, but the best I could do was, it mostly looked like a cut." (Tr. 651). (Emphasis added.)

When asked by the Prosecutor, "The injuries that Mr. Lally sustained, are they consistent in your opinion with being stomped and/or struck by a vehicle several times?" Dr. Neilson-Raaf replied, "Yes." (Tr. 655). (Emphasis added.)

Then when addressed by defense counsel on why she gave multiple causes for death, the deputy coroner replied, "I wouldn't want to say one way or the other for sure. I had to make it both." (Tr. 656).

This testimony by a medical expert as to possibilities is considered unacceptable. It was the Ohio Supreme Court's ruling in Stinson v. England, 69 Ohio St.3d 451, 633 N.E.2d 532 (1994), which required expert opinion regarding a causative event, including alternative causes, to be expressed in terms of probability irrespective whether the proponent of the evidence bears the burden of persuasion with respect to the issue. It would certainly be a grave miscarriage of justice to require a party in a civil case, which only requires a preponderance of the evidence, to comply with this strict evidentiary requirement but to require a lesser burden in a criminal case which requires proof beyond a reasonable doubt. In allowing this type of evidence should not be result oriented but governed by a uniform principle of law.

It is well established that a verdict can only be based upon probabilities and not possibilities. Based upon this and the other testimony, the verdict rendered in this case was based



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upon a possibility as opposed to a probability.

The basic functions of a jury in this regard are as follows:

> 1. As triers of issues of fact a jury is required to determine probabilities.
>
> 2. Such determination of probabilities can not be based on the testimony as to mere possibilities.
>
> * * *
>
> 4. To be admissible as proof thereof such testimony must relate to probability. Brandt v. Mansfield Rapid Transit, Inc., 153 Ohio St. 429, 92 N.E.1d (1950)

The Ohio Supreme Court has declared that medical testimony concerning an alleged injury and cause of death, which consisted of testimony that the combination of certain exposures could have caused death, was inadmissible. Thus, the Supreme Court declared the following:

> It is well-settled that the establishment of proximate cause through medical expert testimony must be by probability. At a minimum, the trier of fact must be provided with evidence that the injury was more likely than not caused by defendant's negligence... Opinions expressed with a lesser degree of certainty must be excluded as speculative. Shoemaker v. Oliver B. Cannon & Sons, Inc., 28 Ohio St.3d 367, 369, 504 N.E.2d 44, 46 (1986).

It is clear that a "verdict of a jury cannot be based upon testimony as to possibilities, as distinguished from probabilities, and the failure to exclude speculative testimony constitutes prejudicial error." Haase v. Ryan, 100 Ohio App. 285, 136 N.E.2d 406 (1955) at syllabus 1.



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In this case, all that the prosecution presented was a choice among possibilities and tales. This is insufficient even in a civil case to sustain the burden of proof and violates the due process rights of the defendant, Jalowiec, calling for a reversal of this conviction in the interest of justice.



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PROPOSITION OF LAW NO. X

DEFENDANT WAS DENIED A FAIR TRIAL DUE TO IMPROPER ARGUMENT BY THE PROSECUTOR WHICH PLACED THE CREDIBILITY OF THE PROSECUTOR IN ISSUE AND THE PROSECUTOR ATTESTING TO THE VERACITY OF STATE'S WITNESSES, VIOLATING THE 6TH AND 14TH AMENDMENTS OF THE DEFENDANTS CONSTITUTIONAL RIGHTS TO THE UNITED STATES CONSTITUTION.

A.

The prosecutors, during closing arguments, also attested to the truth and veracity of their witness in chief, Michael Smith, by asserting his credibility.

Prosecutor Rosenbaum made the following claims to the jurors throughout closing arguments:

> "They want you to discredit Michael Smith. He was the only one actually there and knows exactly what Stanley did, so they are going to discredit him." (Tr. 924).
>
> "Michael got a walk, Michael didn't get charged. He is the only one that didn't get charged. Well, he is right and Michael was a bystander. What evidence would I give to you that said Michael Smith deserves to suffer life on the death penalty? I have none." (Tr. 925).
>
> "Michael is probably telling the truth about something going wrong with the gun." (Tr. 927).
>
> "What evidence do you have that tells you that what Michael says about this is true? You have the gunshot wound photograph that demonstrates that." (Tr. 927-28).
>
> "You have the pictures of the separate blows to the head, of which there were at least 11. You have the coroner's testimony that the injuries are consistent with someone backing a car into him and being stomped. Which all confirms what Michael has to tell you about the defendant driving the car." (Tr. 928).
>
> "These things all tell you what Michael is telling you is actually what happen." (Tr. 928).
>
> "You have the knife that supports what Michael has to tell you." (Tr. 929).



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"What you have here is a set of facts that so dovetail that we know what Michael is telling us is true." (Tr. 932).

"If you look at what Michael told you happen, happened." (Tr. 973).

"My dad and Stanley, as Michael says did, will take care of it." (Tr. 973).

Rosenbaum also went on to vouch for state's witness Sharon Hopkins. Rosenbaum said to the jurors, "You know what Sharon is telling you is true." (Tr. 932).

The prosecutor may not vouch for the credibility of its witnesses. This type of argument has been condemned in a number of different decisions. In United States v. Modica, 663 F.2d 1173 (2d Cir. 1981), the prosecutor had vouched for the credibility of one of its witnesses. The court, acknowledging that this type of argument has been previously condemned in other decisions, held that this required immediate action by the court and not approval by the court in overruling an objection:

> This trial court erred in overruling appellant's objection. The judge should have stricken the remark and immediately instructed the jurors to the effect that they could consider no evidence other than that presented to them; that the prosecutor was an advocate, not a sworn witness; and that they must treat the prosecutor's assertion as to the witness's veracity as non-evidentiary argument that they were free to reject. 663 F.2d at 1179.

In State v. Liberatore, 69 Ohio St.2d 483, 590, 433 N.E.2d 561, 566-67 (1982), the Supreme Court reversed a criminal conviction where the prosecutor "...expressed personal opinions as to the credibility of the witness Mata [a prosecution witness]



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..."

This constituted improper bolstering of the witness in an attempt by the prosecutor to vouch for his own witnesses. United States v. Piva, 870 F.2d 753, 760 (11th Cir. 1989); United States v. Samad, 754 F.2d 1091, 1100 (4th Cir. 1984). It has been held that vouching generally occurs when the actions of the prosecutor are such that the jury would reasonably believe that the prosecutor was indicating a personal belief in the credibility of the witness. United States v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992). Thus, cases have held that the prosecutor may not, among other things, make explicit personal assurances that a witness is trustworthy or implicitly bolster the witness by indicating that information not presented to the jury supports the testimony. United States v. Sims, 719 F.2d 375, 377 (11th Cir. 1983). Cirt. denied, 465 U.S. 1034 (1984).

The actions of the prosecutor constituted improper witness vouching. This may occur when the prosecutor solicits assertions of trustworthiness from the government witness. United States v. Piva, 870 F.2d 753, 760 (1st Cir. (1989).

B.

Prosecutor Rosenbaum began his closing argument by inferring the defense attorneys would be lying when they give their closing argument.

Rosenbaum told the jurors that, "They want you to discredit Michael Smith." and "They are going to want to say that his testimony was purchased." (Tr. 924). And prior to either of



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defense counsel even beginning their closing arguments, Rosenbaum told the jurors, "So it is unfair for Mr. Cleary or anyone else to suggest that Michael got a break to purchase his testimony when we all know by his own standard that Michael should not have been charged in the first place." (Tr. 925-26). And the most egregious example of prosecutor misconduct was the statement to the jurors that, "The only way for him to escape his misdeed is for him to convince you that these people are crackheads, some of the states witnesses are felons or their testimony was purchased." (Tr. 922).

One court held that "Remarks in which are not warranted by the evidence and are designed to arouse passion or prejudice to the extent that there is a substantial likelihood that the jury may be misled may constitute prejudicial error." Jones v. Olcese, 75 Ohio App.3d 34, 40, 598 N.E.2d 853, 857 (1991). Furthermore, "A prosecutor is generally given a wide latitude to comment in his closing argument, but may not intentionally mislead the jury. ..." State v. Black, 75 Ohio App.3d 667, 674, 600 N.E.2d 389, 393 (1991).

In the above cited instances of prosecutor misconduct, both in vouching for the credibility of his witnesses and in the denigration of the defendant's counsel, defense did not raise timely objections, having long ago learned of the futility in raising any objections as evidenced throughout the trial record. "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." People v. Arias, 13 Cal. 4th 92, 159 (1996).



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In People v. Purvis, supra, 60 Al.2d at 348, 353, the court ruled, "A combination of 'relatively unimportant misstatements of fact or law,' when considered on the 'total record' and in connection with the other errors, required reversal."

Also, the prosecutor's statement in final argument that the defendant and victim were present at time of crime and that "(victim) can't talk, (defendant) won't," in context of discussion of element of aggravated murder charges requiring state to prove that defendant had purposely caused victims death, was improper, direct and adverse comment on defendant's refusal to testify. State v. Clark, 598 N.E.2d 740, 74 Ohio App.3d 151 (1st Dist. Ct. 1991).

In this case defense counsel had made attempts to correct the various instances of prosecutor misconduct through timely objections. In each instances however the court abused its discretion by overruling legitimately made objections. (Tr. 512, 513, 523, 526, 527, 528, 530, 537-78, 569, 570, 574, 576, 577-78, 578, 687, 688-2x, 778, 780, 841). Even continuous objections and exceptions were ignored by the court, thus, giving the proverbial green light to the prosecutors while stifling defense counsel. (Tr. 513, 527, 529, 687-688).

A prosecutor may not vouch for the credibility of a witness. United States v. Modica, 663 F.2d 1173 (2d Cir. 1981). This conviction must be therefore reversed.



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PROPOSITION OF LAW NO. XI

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT AMENDED THE INDICTMENT SO AS TO CHARGE THE DEFENDANT WITH THE SUBSTANTIVE OFFENSE OF CONSPIRACY AND OTHER FLAWED INSTRUCTIONS, IN DIRECT VIOLATION OF 14TH AMENDMENT.

A.

In the course of the State's case, the trial court allowed the prosecutor to introduce testimony alleging the false implications of a conspiracy. This was done through the testimony of State's witness, Sandra Williams. (Tr. 508-520).

The following proceeding occurred at a sidebar out of the hearing of the jurors:

| | |
|---|---|
| The Court: | This is one of the exceptions, right? |
| Mr. Rosenbaum: | Statements made in furtherance of the conspiracy. We feel we have established a conspiracy through Homoki. |
| Mr. Grunda: | Your Honor, first, he is not charged with conspiracy. |
| The Court: | He may not be. |
| Mr. Rosenbaum: | Doesn't have to be. |
| The Court: | In the indictment? |
| Mr. Grunda: | Yes, he does. Conspiracy is a separate charge. |
| Mr. Rosenbaum: | It is a separate crime under the Ohio revised code, conspiracy, as it exists for the evidentary rule has nothing to do with that and does not have to be a charge and I can get you case law on that. |
| Mr. Grunda: | Secondly, your Honor, there is no foundation to this. There is none at all. All he talked about so far has nothing to do with the defendant. |
| 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 think that you did that 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 Stan was involved. |



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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.

Mr. Grunda: Yes, I expect to that because for two reasons. One, there was not foundation properly laid. Two, he is not charged with conspiracy and it doesen't even come under the complicity section because he is not charged with that either.

The Court: Let's proceed.
(Tr. 512-514).

The testimony then continued with third party hearsay allegations which were objected to by the defense and overruled by the court. (Tr. 514).

However, this Sandra Williams is the same Williams who, while testifying under oath in the subsequent trial of Danny Smith, admitted that all of the above hearsay was false. She did so when she testified, matter of factly, that Danny Smith did not make any threats to her about the victim of the victim's family, directly or indirectly. Instead, Williams testified that Danny Smith told her only that he was mad and upset with her boyfriend, Lally, the victim. (Appendix E-1).

This perjury went unchallenged by the defense at the time only because the defense was not allowed an in-camera inspection of William's police statement of January 3, 1995. (Tr. 515).

Hearsay is not admissible except otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statue enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by the Rules of Evidence or other rules prescribed by the Supreme



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Court of Ohio.

Of the twenty two categories of hearsay exceptions found under Evidentiary Rule 803, not one permits this type of hearsay testimony. It goes without saying that the remarks alleged made by Danny Smith could have easily been verified by Danny Smith himself. As yet an untried co-defendant, the prosecutor was well aware that Smith was awaiting in the county jail and easily locatable. Taken in conjunction with the fact that state's witness, Sandra Williams, recanted these statements in the subsequent trial, this hearsay was plain error and the trial court abused its discretion in overruling defense objections to the testimony being admitted.

B.

In its instructions to the jury the court supported the prosecutor's conspiracy inferences when it said the following to the jurors:

> Statements or answers that were stricken by the court, or which you were instructed or disregarded, are not evidence, and must be treated as though you never heard them.
>
> You must not speculate as to why the court sustained the objection to any question, or what the answer to such question might have been. You must not draw any inference, or speculate on the truth of any suggestion included in a question or answer.
> (Tr. 986).

Cause as used in common law and in everyday life is defined as, anything producing an effect.

In its instructions to the jury the court instructed the



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jury concerning cause:

> "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 produced the death, and without which it would not have occurred.
> "Cause" occurs when the death is the natural and foreseeable result of the act, of 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 then 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.
> (Tr. 994, 995). (Emphasis added.)

This instruction transformed the case from a requiring proof of a specific intent to cause the death of another to one allowing the jury to convict merely on proof of negligence. Such an instruction was held to be erroneous and required a new trial in State v. Jacks, 63 Ohio App.3d 200, 578 N.E.2d 512 (1989). More recently, the Court of Appeals for Cuyahoga County, in City of Cleveland v. Bacsa, Case No. 59532 (January 9, 1992), ruled that a similar instruction in a criminal case was erroneous and required a new trial.

Moreover, the Ohio Supreme Court has ruled that this instruction on foreseeability in an aggravated murder prosecution should not be used in an indiscriminate manner.

In State v. Burchfield, 66 Ohio St.3d 261, 611 N.E.2d 819 (1993), the court stated as follows:



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> We are concerned, however, with the use of the OJI foreseeability instruction in this case. While OJI is widely used in this state, its language should not be blindly applied in all cases. The usefulness in murder cases of the foreseeability instruction is questionable, especially given its potential to mislead jurors. While the use of that instruction would not have led to our reversal of the conviction in this case, its unnecessary inclusion would have made the question closer than it needed have been. The OJI foreseeability instruction should be given more cautiously in future murder cases. 66 Ohio St.3d at 263, 611 N.E.2d at 821.

This was particularly harmful in this case because the court instructed the jury under vicarious liability theory of aiding and abetting. (Tr. 994-995). Under this theory the defendant was liable if he happen to be there but did not prevent the crime from occurring. This defendant is not paid to protect the public as a law enforcement officer. This instruction clearly lessened the requirement of proving a specific intent to kill. Ohio Revised Code 2903.01 (D).

Yet, the court further instructed the jurors, "No person can be found guilty of aggravated murder unless he or she specifically intended to cause the death of another person." (Tr. 993). The evidence in this case clearly does not support any such instruction by the court to the jurors. And so, the verdict in this case cannot stand and the conviction must be overturned on appeal.



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PROPOSITION OF LAW NO. XII

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE TRIAL COURT REFUSED TO RECORD THE ENTIRE PROCEEDINGS IN VIOLATION OF THE DEFENDANTS 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Defendant went to trial on March 14, 1996, with the expectation of being able to receive o fair trial and the lofty ideal of guaranteed due process, as is guaranteed to any person residing in the United States. Least of all, the belief that all sidebar and court proceedings would be recorded. The court denied this right of the defendant in clear violation of §2929.05 of the Ohio Revised Code and the Fourteenth Amendment to the United States Constitution which requires trial courts to keep a complete and accurate record of all proceedings which occur during the course of the trial. In a capital case, such a complete record is much more clearly required.

During this trial there were at least several instances in which the court had off-the-record side bar conferences that were not recorded. The trial record is therefore incomplete for purpose of even locating further errors to address. Consequently, what occurred during these proceedings was not available for review. (Tr. 13, 164).

Even more incredible and certainly a great deal more damaging to the defendant is his appeal is the is the unrecorded and nonexistent record of each and every preemptory challenge made by the state as well as the defense to both the regular jurors as well as the alternates. (Tr. 460-61).

The preemptory challenge proceedings are only reflected



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as follows:

By The Court:

Each side, the State of Ohio and the Defendant, will have six preemptory challenges for the regular jurors and one preemptory challenge for the two alternates. They will be exercised in rotation and, Mr. Rosenbaum you may commence with your challenges.

(Whereupon, fourteen jurors were sworn in as a group.)

And again, when the jury returned its verdict, the trial court abused its discretion by not recording those proceedings either. (Tr. 1018). Clearly the record indicates that the defendant requested the jury to be polled in accordance with §2945.77 of the State's Revised Code. Yet the record does not even hold the request made. Instead this process is reflected solely by a note from the court reporter as follows;

(Whereupon, the court asked each juror respectively on each count if these were their verdicts and all responded in the affirmative.) (Tr. 1018).

There was a major conflict between defendant and court-appointed counsel, only now being learned by the defendant, which resulted in ineffective assistance of counsel. No objections were raised to these violations of the Ohio Revised Code Rule 22 of the Ohio Rules of Criminal Procedure. Defendant was assuredly denied due process of law and his rights to have a complete appellate review of the proceedings thus denied to him.

Rule 22 of the Ohio Rules of Criminal Procedure provides



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that all proceedings in serious offense cases shall be recorded. Such a provision is mandatory. State v. Grewell, 45 Ohio St.3d 4, 543 N.E.2d 93 (1989).

Similarly, the Ohio Supreme Court has ruled that one convicted of an offense, especially a capital offense, is entitled to a complete transcript and the failure to so provide would deprive defendant of a Constitutional Right, this Supreme Court stated:

> Because of the forgoing consideration, we cannot countenance a situation where a person engaged in a contest with the state for his life be placed in the untenable position of having to present his case before an appellant court without a comprehensive record to assist him. Furthermore, we cannot allow the grave responsibility to review capital cases, placed by law upon the court of appeals and this court, to be crippled simply because a full record is unavailable. We therefore hold that section 16, Article I of the Ohio Constitution requires that a defendant in a capital case be afforded a complete, full and unabridged transcript of all proceedings against him so that he may prosecute an effective appeal. State ex rel. Spirko v. Court of Appeals, 27 Ohio St.3d 13, 18, 501 N.E.2d 625, 629 (1986).

Other courts have considered court proceedings which were mandated under Section 753(b) of Title 28 of the United States Code which provides for the recording of all proceedings in federal courts. In considering cases where portions of the proceedings were not recorded, courts have reversed convictions. The leading case is United States v. Selva, 559 F.2d 1303 (5th Cir. 1977).

The issue presented in Selva was "...Whether a criminal defendant, represented on appeal by new counsel, must demonstrate



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specific prejudice resulting from the failure to record a significant portion of a trial proceeding in order to prevail on appeal." 559 F.2d at 1305.

The court noted that the language of the statue "... is clear and its requirement is mandatory." 559 F.2d 1305. The court held that where trial counsel does not represent a defendant on appeal, "... the absence of substantial and significant portions of the record, even absent any showing of specific prejudice or error, is sufficient to mandate reversal." 559 F.2d at 1306. The court noted that when the same attorney represents a defendant both at trial and upon appeal, the court may require the defendant to articulate the prejudice that resulted from failure to record all proceedings. 559 F.2d at 1305.

The court in Selva relied in part upon the policy articulated by the United States Supreme Court in Hardy v. United States, 375 U.S. 277 (1964). In Hardy, an indigent defendant was represented by new counsel on appeal. No trial transcript was provided, only a "summary of the record." Noting that part of counsel's and court's duty on appeal is to point out and rule upon "plain errors or defects," it was held that the right to appeal would be illusiry if a complete record was not furnished or available.

Following its holding in Selva, supra, the Fifth Circuit in United States v. Brumley, 560 F.2d 1268 (5th Cir. 1977), reversed a conviction where bench conferences were not recorded, noting "... we suggest that if the trial court needs to confer



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with counsel about rulings to be made from the bench, the safe course is to execute the jury or retire to chambers and let the reporter record what takes place." 560 F.2d 1381. Accord, United States v. Smith, 591 F.2d 1105, 1108-09 (1979). In Ward v. United States, 694 F.2d 654 (11th Cir. 1983), the Eleventh Circuit, while affirming a conviction because the record was in fact complete, implicitly adopted the Selva standard. 694 F.2d at 666.

Further, the Supreme Court decision in Hardy v. United States, 375 U.S. 277 (1964), is instructive. In this case, the court considered furnishing to appellate counsel for a person convicted of a crime in a federal court, with only a limited transcript. The court noted that this was inadequate because counsel could not even perform the duty of counsel in these circumstances.

> The duty of counsel on appeal, as we noted in Ellis v. United States, 356 U.S. 674, 675, 78 S.Ct. 974, 975, 2 L.Ed.2d 1060, is not to serve as amicus to the court of Appeals, but as advocate for the appellant:
>
> "Normally, allowance of an appeal should not be denied until an indigent has had adequate representation by counsel. Johnson v. United States 352 U.S. 565, 77 S.Ct. 550, 1 L.Ed.2d 593. In this case, it appears that the two attorneys appointed by the Court of Appeals, performed essentially the role of amicus curiae. But representation in the role of an advocate is required. If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied." (italics added).

We deal here only with the statutory scheme and



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> do not reach a consideration of Constitutional requirements. We see no escape from the conclusion that either where the requirements of a non-frivolous appeal prescribed by Coppedge v. United States, Supra, are met, or where counsel on appeal was not counsel at the trial, the requirements placed on him by Ellis v. United States, supra, will often make it seem necessary to him to obtain an entire transcript.

The record in this case does show a clear abuse of discretion by the trial court in not recording any of the preemptory challenges. The defendant cannot know how many errors or defects existed in the proceeding. Clearly there was a good reason as to why every challenge had been omitted so as to prevent a review. Defense Counsel, Grunda, and his on going attorney/client relation with state's witness Hopkins has now been found out. (Appendix "B"). Is that part of the reason?



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PROPOSITION OF LAW NO. XIII

DEFENDANT WAS DENIED HIS RIGHT TO DUE PROCESS UNDER THE U.S. CONSTITUTION AMENDMENT 6 AND 14 AND A FAIR TRIAL BY REASON OF TRIAL COURT NOT DISMISSING JURORS FOR CAUSE.

The defendant has a Constitutional Right to be tried by a panel of jurors who are not predisposed to the death penalty over alternative sentences. Inherent in the Sixth Amendment right to a fair trial is the fundamental right to a panel of impartial jurors. Turner v. Louisiana, 379 U.S. 466 (1965). The Court in Turner further found the Fourteenth Amendment to the U.S. Constitution independently demands the impartiality of any jury. In 1981, the United States Supreme Court stated that:

> Voir dire plays a critical function in assuring the criminal defendant that his right to an impartial jury will be honored. Without an adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence, cannot be fulfilled. Rosales-Lopez v. United States, 451 U.S. 182 (1981).

The Supreme Court also held in Witherspoon v. Illinois, 391 U.S. 510, 522 (1968), that the state could make challenge veniremen for cause only if they made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude for the death penalty would prevent them from making impartial decision as to the defendant's guilt.

Following Witherspoon, the state prosecutors have freely



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exercised challenges for cause to exclude potential jurors who state unequivocally that they oppose the imposition of the death sentence. Hence the U.S. Supreme Court modified the Witherspoon standard to a less rigid one with their decision in Wainwright v. Wit. In the more recent ruling, the Supreme Court held that a prospective juror could be excluded only when the juror's view would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Wit, 69 U.S. 412 (1984).

And again, in 1992 the United States Supreme Court ruled:

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because if the juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the due process clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is impaneled and the death sentence is imposed, the state is disentitled to execute the sentence. Morgan v. Illinois, 504 U.S. 719 (1992).

The trial court had no misgivings about dismissing jurors who expressed opposition to imposing the death penalty on the defendant:

By the Court:
Q. Nancy Roth. -- do you have an opinion about the death penalty that is so strong that it substantially impairs your ability to impose that penalty at this point?
A. Yes.
Q. You do?
A. I do.



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Q. And would you tell us about that?
A. I am opposed to the death penalty. I am a member of business organizations that are opposed to it. It is part of my belief and my faith. I could never decide to take a human life.
Q. Could you take a human life at this point?
A. No.
Q. Next question is, again the same thing, to consider any penalty other then death?
A. No.
Q. You could do that?
A. Yes.
Q. But you could not consider the death penalty?
A. No.
Q. Under any circumstances?
A. No.
Q. Okay, Thank you. The Court will excuse you at this point. The Court will excuse you.
(Tr. 36, 37, 41, 43).

By the Court:
Q. Mrs. Porter, how are you?
A. Okay.
Q. Do you have any opinion about the death penalty that is so strong that it would substantially impair your ability to impose the death penalty?
A. Yes, I do, at this time.
Q. Could you explain that?
A. At this time I feel that the death penalty -- it is Biblical -- based on Biblical. This is the way I feel about it because how can a man say who should be put to death and, of course, i feel that way now because I have not had anybody killed or murdered or anything like that, you know, by anybody, but that is the way I feel right now. ...
Q. Well, of course, you know the Bible?
A. Yes.
Q. A number of people were put to death as far as the Bible is concerned?
A. Yes.
Q. And that is manmade?
A. Yes.
Q. Let's start all over. Do you have any opinion about the death penalty that is so strong that it substantially would impair your ability to impose it?
A. It would. I would have to say I could not do that.
(Tr. 43, 44, 45, 52).

By Mr. Rosenbaum:
Q. Or are your personal feelings so strong that you can't?
A. Yes, my personal feelings are strong.
Q. So you cannot vote for the death penalty?
A. No I could not.
Court: Thank you ma'am you are excused.



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(Tr. 57).

By the Court:

Q. Melissa... Do you have an opinion about the death penalty that is so strong it substantially impairs your ability to impose the death penalty?
A. Yes.
Q. Do you? Would you please tell us about that?
A. No matter how horrible the crime a person is accused of, I don't feel that I would be able to vote for the death penalty. It is murder and I don't believe in it.
Q. Now -- and again you have heard the question substantially impair you. You would, under no circumstances, consider the death penalty?
A. No.
Q. You would not?
A. No.
Q. Melissa, thank you for your answers and your candidness. I say that sincerely. You are excused and can go about your business.

(Tr. 67, 68, 73).

By the Court:

Q. Mrs. Deeks, are you nervous?
A. Very.
Q. Do you have an opinion about the death penalty that is so strong that is substantially impairs your ability to impose the death sentence?
A. Yes.
Q. You do?
A. Yes.
Q. Would you please tell us about that?
A. I just don't want to have to live wit the fact because of anything I said would put someone to death. I have a problem with that.
Q. But you could not under any circumstances vote for the death penalty. Is that what you are saying?
A. That is exactly how I feel. I don't want to be a vote to put anyone to death.
Q. Mrs. Deeks, thank you very much for coming and I will have to excuse you.

(Tr. 73, 74, 75, 77).

By the Court:

Q. Mr. Janowicz?
A. Yes.
Q. Do you have an opinion about the death penalty that is so strong that it substantially impairs you ability to impose the death penalty?
A. Yes, I do.
Q. You do have?
A. I am totally opposed to the death penalty. I couldn't feel right about imposing that penalty on someone. My Christian belief has me against it.



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Q. If I gave you the choice of doing one of those three, death, 20. 30 to life, you could not consider death, your views are that strong?
A. They are. I could not impose the death penalty.
Q. Thank you, Mr. Janowicz, you are excused.
(Tr. 78, 79, 81).

By the Court:
Q. Mrs. Martin, are you nervous?
A. A little.
Q. Now, let me ask you the question formally at this point. Do you have an opinion about the death penalty that is so strong that it substantially impairs your ability to impose the death penalty?
A. Yes, I do.
Q. You do?
A. Yes.
Q. But you would be able to impose the death penalty?
A. No, sir.
Q. Would you please tell us a little about that, why your views are as such? Again, let me say to you, the reason we are asking is for fairness and impartiality. We want to have nothing but fair and impartial jurors.
A. Okay. The family background that I was raised with and the beliefs that I have is that we do not judge anybody and I just feel I could not live with a decision on the death of someone else. I don't believe in it. I couldn't impose the death sentence on someone. I feel that I am not the person to judge, that God is the one that handles that and I could not impose the death on anyone and live with that decision ever.
Q. Thank you, Ma'am. You are excused.
(Tr. 96, 97, 98, 101).

By the Court and Grunda: Unnamed Juror.
Q. Are you nervous?
A. Yes.
Q. Do you have an opinion about the death penalty that is so strong that it substantially impairs your ability to impose that penalty?
A. Yes.
Q. You do?
A. Yes.
Q. You could not give consideration then to the death penalty whatsoever if you were given your choice, one, two or three?
A. Could I consider all three or automatically eliminate the death penalty? I would eliminate the death penalty period.
Q. You are saying your own beliefs are such then that even if the judge would say, "Here is your choices," you couldn't do that?
A. No.
Q. And I assume by that you couldn't consider the death



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penalty?
A. That is correct.
Q. Under no circumstances, no matter what the judge told you?
A. No.
Q. Thank you. You are excused.
(Tr. 101, 102, 103, 104).

By the Court: Unnamed Juror.
Q. Have a seat right there. Nervous?
A. Of course.
Q. Do you have an opinion about the death penalty that is so strong it substantially impairs your ability to impose the death penalty?
A. Yes, I do.
Q. But you could not consider or impose the death penalty, is that correct?
A. I couldn't because of my religious values.
Q. Give us a little more information on that.
A. I am a Catholic and we believe in right to life. I watched my father die in a nursing home last year. I was thankful that he had a living will, that I didn't have to make that decision for him. I would not be able to live with myself if I had to do that.
Q. I am going to have to excuse you. Thank you very much for coming.
(Tr. 104, 105, 106, 107).

By the Court:
Q. Mrs. Conway, I hope you had a good lunch.
A. I did.
Q. Now, let me ask you this question formally at this point and it is, do you have an opinion about the death penalty that is so strong that it substantially would impair your ability to impose the death penalty?
A. Yes, I do.
Q. All right. Now, could you please tell us why your feelings are as they are with the death penalty, why your feelings are the way they are?
A. I believe morally that I could never impose the death penalty on anyone and I definitely feel that I could impose the other two. It is the death penalty I don't believe in personally.
Q. You don't believe in it personally? Is your feelings so strong that you would never consider a death penalty?
A. I would never consider it.
Q. Thank you Ma'am, you are excused.
(Tr. 120, 121, 124).

By the Court and Rosenbaum:
Q. You are not nervous, are you, sir?
A. No, sir.
Q. Don't be, Mr. Pastron.
Q. Do you have an opinion about the death penalty that



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is so strong that it would substantially impair your ability to impose that death penalty?
A. At this time, yes.
Q. Well, okay. Could you please explain what you mean by "at this time"?
A. I don't feel that a person has a right to impose a death penalty on another person.
Q. So, what you are saying is that regardless of your religious beliefs, since it is only a recommendation, you could not sign your name to a piece of paper which actually condemns him to death?
A. If you put it that way, no, I would not do that.
Q. Your beliefs wouldn't allow you to hide behind the recommendation argument, will they?
A. No.
Q. Okay, sir. You will be excused.
(Tr. 150, 151, 156, 157, 158).

Yet the trial court completely ignored the United States Supreme Court in its decision in Wainwright v. Wit by refusing to even consider the dismissal for cause of the prospective jurors who clearly exhibited bias toward defendant Jalowiec during individual voir dire by a clear predisposition to automatically vote for the death penalty in every case, contrary to the Supreme Court's decision in Morgan v. Illinois, 504 U.S. 719 (1992): as evidenced below:

By the Court and Grunda:
Q. Mrs. Repko... Can you tell us what your views are on this?
A. Well, I feel that if the state has the death penalty and the person in that state commits a murder --
Q. A crime that calls for it
A. -- a crime that calls for it, that I feel that if a person that is dead, well they are not alive, and the person killed them are alive, so why should they be alive?
Q. When you were first telling the judge -- you talked about a murder, okay? When a person was dead, then why should the other person be alive?
A. Right.
Q. So, basically you are saying then you are in favor of the death penalty?
A. No, I wouldn't say I am in favor of it, I mean I feel



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that a person that has tooken a life should not be allowed to live because the person that the life was taken, they are not alive, so that is my point on that.

Q. All right. Now, would that make you more predisposed to vote for the death penalty?

A. No, no, I don't think so.

(Tr. 58, 59, 60).

By the Court and Grunda:

Q. Mr. Balog, how are you?

A. Okay.

Q. Nervous?

A. Yes.

Q. Do you have an opinion about the death penalty that is so strong that it substantially impairs your ability to impose that death penalty?

A. No.

Q. How about the other phases then? Do you have an opinion about the death penalty that is so strong that it would substantially impair your ability to consider the penalties other then death?

A. No.

Q. You could consider all three?

A. Yes.

Q. You could consider all three of those without any difficulty?

A. Yes.

Q. Now, what I am wondering is, based on your questionnaire okay, if you are more predisposed to finding for the death penalty, if you get to that because in the questionnaire they ask, "What are your views concerning the death penalty," and you said "Hang them high."

A. My feeling is very strong that after the whole process I don't necessarily believe that a person -- there is a difference between accusations and finding a person guilty. I do believe there are circumstances in our society that the hole process goes through and for certain crimes the guilt verdict is found and the process is done, that the death would -- is proper and I don't think it is used much as it should be.

Q. Okay. Again, to me it seems you are pretty strong on that.

A. Yes.

Q. And I am trying to see if your mind is set such when you get to that point you wouldn't -- you would just go right to the death penalty and not consider the others?

A. I think there is a certain point where I would tend to go on the death penalty after the proving is done.

Q. Without fairly considering the other two options that the Judge will tell you, would that be fair to say?

A. Not really. See, I am saying after giving fair consideration I would arrive at the death penalty, I an not automatically.



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Q. I am asking you then, you could consider all three?
A. Yes.
Q. Before you would do the death penalty?
A. I believe so, yes.
(Tr. 81, 82, 83, 84, 86, 87).

By the Court and Cleary: Unnamed Juror.
Q. Good morning. Are you nervous?
A. A little bit.
Q. Do you have an opinion about the death penalty that is so strong that it would substantially impair your ability to impose the death penalty?
A. No.
Q. Your questionnaire, I am going to read back one of your answers. You say here, when asked about your views concerning the death penalty. "I think if a person kills someone he or she no longer has the right to live and enjoy all of the comforts better then the average person can in jail, if they even go to jail." There seems to be a lot wrapped up in that one statement. You have pretty strong views?
A. Right.
Q. Let's say someone intentionally killed someone else. can you conceive of any situation where you would not, at this point impose the death penalty?
A. I don't think so.
Q. You would pretty much think if they killed then, they automatically deserve the death penalty for that?
A. Yes.
Q. -- and you had the choices of three possible penalties, are your feelings so strong regarding the death penalty that you would consider imposing only that, or would you consider the other two or would you consider only imposing the other two and not the death penalty? That is what we are after. Is your ability impaired, is it blocked, is it stopped in some manner, shape or form through your beliefs or what have you that you would not be able to impose anyone of those sentences?
A. I possibly could consider --
Q. I need a little more then that.
A. I could consider one of the others.
Q. You could consider all three of them?
A. Yes.
Q. It wouldn't be an automatic death sentence?
A. No.
(Tr. 107, 108, 109, 110, 113, 114).

By the Court and Grunda:
Q. Mr. Grunda?
Q. Good afternoon, Mrs. Hoover.
A. Hi.
Q. Now the judge explained to you if you get to that where you agree not to presuppose anything. If you get to that there is two different life sentences and the death



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penalty, okay? and I noticed in your answer to that, you said an eye for an eye?
A. Yes.
Q. You talked about people being treated too leniently. do you think that would influence you and make you more inclined to be in favor of imposing the death penalty?
A. No.
(Tr. 140, 142, 143).

By the Court and Grunda:
Q. Mrs. Kulcsar?
A. Right.
Q. I seem to notice the theme in your questionnaire ... all these questions seem to point to your belief that we are not doing enough about crime, letting people go, this type or thing. Is that what you believe?
A. That is more or less what I believe, yes.
Q. Now, my question to you is, would you let any of that sway your thinking in terms of what you would do as a juror in sentencing or in making a recommendation for a sentence?
A. I think so.
Q. You think you need to do your part to prevent Judges from being too lenient on behalf of the justice system and that is your role as a juror?
A. Yes.
Q. Now, you also say in here 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.
A. Right. I believe in that.
Q. Do you believe that perhaps they should try the guy before they execute him two days later?
A. If there is an eyewitness, if somebody saw them shoot that person, I think that they should be, eye for eye, tooth for tooth.
Q. And we should do away with some of the procedural rights and stuff?
A. Right.
(Tr. 165, 166, 167).

All five of these prospective jurors were in fact, seated on Jalowiec's jury in a deliberate and blatant disregard for the Constitution and the fairly recent rulings made by the United States Supreme Court. As seated by the Court in Morgan, the seating or even one such juror would be highly unacceptable in the interests of justice and most assuredly violate this



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defendant's Constitutional rights to be tried by a fair and impartial jury.

Of these five jurors, there was a attempt to remove the one who believed Jalowiec should have been shot two days after the crime. However Judge Glavas wanted Mrs. Kulcsar and her kind to saturate this jury as is evidenced below:

> Mr. Cleary: May I approach, your Honor?
> The Court: Certainly.
> Mr. Cleary: Your Honor, I don't know if this is the time to request a dismissal for cause.
> The Court: I don't think you have cause.
> Mr. Cleary: We are here stating --
> The Court: I am going to deny it.
> (Tr. 176).

The questioning of Mrs. Kulcsar continued on and along other avenues of interest to the parties and at the end of it all, Mrs. Kulcsar was seated as a full fledge member of Jalowiec's panel, along with the other four members of the trial's jury who maintained their strong preference for imposing death upon Jalowiec should he be found guilty. This is unconstitutional by any standards or measures which the Courts wish to impose.

All parties clearly colluded in the seating of most if not all of these quite biased jurors. It is quite impossible to suppose these was any type of justice here.

The Supreme Court in Morgan v. Illinois, 504 U.S. 719 (1992), also discussed its previous decisions in Witherspoon Wainwright the Court found that the defense has the same rights as the prosecution. This ruling allows the defendant to challenge



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for cause those persons who would always impose death following conviction in a capital case. Thus, Morgan v. Illinois, provides the defendant with a reverse Witherspoon inquiry as to the attitude of potential jurors.

Despite the specific statue of O.R.C. 2945.25(c), Ohio has adopted the standard of Wainwright specifically. The standard for determining whether a prospective juror may be excluded for cause is whether his views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." State v. Rogers, 17 Ohio St.3d 174 (1985). That standard adopted by the Ohio Supreme Court applies to the reverse Witherspoon challenges as well.

Of very significance within the U.S. Supreme Court's decision in Morgan v. Illinois is the recognition that jurors who have already stated a strong preference for imposition of death should a defendant be found guilty "cannot perform their duties in accordance with law." Morgan v. Illinois supra. The Supreme Court also recognized that such jurors could truthfully respond that they could follow the law unaware that their dogmatic views are not fair or impartial. Morgan v. Illinois recognized that "more importantly, however, the belief that death should be imposed ipso facto upon conviction of a capital offense reflects directly on that individual's ability to follow the law." at Id.

In Ross v. Oklahoma, 478 U.S. 81 (1988), the Supreme Court, in determining that there was no harm to the defendant because that juror who clearly indicated he would automatically impose



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death, had been removed by premptory challenge, clearly stated that the trial court's failure to remove that juror for cause was constitutional error. Further the Court stated that had that particular juror sat on the jury, that ultimately sentenced defendant to death, and had the petitioner properly preserved his right to challenge the trial court's failure to remove the juror, the sentence would have been overturned.

In like manner, the evidence of biased jurors is quite clearly cited here and therefore, this Supreme Court of Ohio has the duty in the interest of justice, to reverse this defendant's conviction and remand Jalowiec to the County of Cuyahoga for a new trial.



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PROPOSITION OF LAW NO. XIV

DEFENDANT WAS DENIED DUE PROCESS BY TRIAL COURT WHEN COURT VIOLATED CRIMINAL RULES 24 (A) AND 24 (B) AND OTHER INSTANCES DURING SELECTION OF JURORS THUS VIOLATING DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER 5, 6, AND 14 AMENDMENTS.

A

The trial court exhibited bias when it interfered with the defendant's rights to a fair trial and due process in deciding to strike potential jurors for reasons not governed by Criminal Rule 24 (B). These strikes by the trial court do in fact constitute illegal dismissals for cause. The court asked the prospective jurors generally if any one had plans at the time to be abroad or on a planned trip. (Tr. 14).

By the Court:
Q. Your name please?
A. Taylor.
Q. Mr. Taylor, can you tell us something about that?
A. Yes, I am leaving Sunday. I won't be back until the following Sunday.
Q. Business trip, vacation?
A. Vacation.
Q. Tickets already bought?
A. Yes.
Q. Mr. Taylor, there is not way -- there is always a way that you can cancel, but conveniently, cancel the trip?
A. No, sir.
Q. Very well. Are you just talking about one week, the next week?
A. Right.
Q. Mr. Taylor, at this point I am going to excuse you sir. (Tr. 14-15).

By the Court:
A. I have a business trip next Thursday.
Q. Business trip?
A. Yes, i am in charge of giving a retreat for a large group.
Q. Business trips are not necessarily a substantial excuse at this point, okay? What happens if you get sick?
A. They would have to cancel it. There are 20 people coming



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in for something I am heading.
Q. I understand what you are saying. Your name please?
A. Nancy Roth.
(Tr. 16-17).

By the Court:
Q. Anybody else at this point?
A. I am not leaving out of the country, but I am going out west.
Q. Vacation?
A. Yes.
Q. Tickets bought?
A. Plain tickets are bought, lodging is paid for, even have lift tickets to go skiing.
Q. The Court understands the problem that you have and rather then create additional problems, the Court will excuse you also because of vacation.
(Tr. 17-18).

By the Court:
Q. Anybody else?
A. I paid to go to a woman's retreat starting Friday and I paid for it before I ever got notice of this.
Q. I am sure the minute you got notice you rushed out and got the tickets.
A. The ticket is nonrefundable. The fee is.
Q. And the retreat if Friday?
A. Yes, I am due to leave at 9:00 Friday morning.
Q. And your name again?
A. Linda Little.
Q. The Court is going to excuse you also at this point.
(Tr. 18-19).

By the Court: Mr. Neilson.
A. I am a commission salesman and to lose a week would take a pretty good chunk out of my income. Where I work there is only two of us there. This would create a hardship for the other man too.
Q. Let me say a this point -- it will create a hardship with you?
A. Yes.
Q. Let me say at this point that I will not excuse you here. You will be asked again if you are selected for the panel -- I need to have people to work with at this point.
A. Yes.
(Tr. 20).

By the Court:
A. I am an officer manager at the place I work at and I am the only one that does payroll and everything ends up with me and it would definitely be a hardship.
Q. What happens if you get sick, who does it?
A. Nobody. They have to wait until I get back. So far I



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have been lucky. I have not been sick.
Q. You are pretty lucky now. I am going to say no. bring it back up again when I ask the magic question again later on, if you would, please.
A. Thank you.
Q. Anybody else? Your name?
A. Alice Martin.
(Tr. 20-21).

By the Court:
Q. Your name, please?
A. Layport. I have an appointment with the doctor on thursday.
Q. Can you cancel that?
A. I have some problems with my stomach and I have to see the doctor.
Q. When is your appointment?
A. I have tests taken Thursday at three o'clock. I will be facing surgery pretty soon.
Q. Again, at this point I am not going to excuse on that. Again, when I ask the question later on, please speak up at that point, would you please?
A. Okay.
(Tr. 21-22).

By the Court:
A. My wife gave birth four months ago and she is scheduled for a laparoscopy. She has a tumors on the abdomen. She is scheduled for Friday.
Q. What time?
A. She has to be there at 6:30 in the morning.
Q. And obviously you would like to be present?
A. Correct. We have three kids at home.
Q. I understand that. Your name again?
A. Dean Asp, A-S-P.
Q. I will excuse you and I do understand and I will excuse you at this point. Thank you for coming.
(Tr. 22-23).

By the Court: Mrs. Kulcsar.
A. Can I ask you something? My husband and I are both retired. We have one car and it is hard for me to get to the trial here. It is hard for me to get back and forth and he is still working.
Q. He is employed?
A. He is semi-retired. He is a sailsman, so he goes to Sandusky, New York, different places, all depends when the customers want him and the first of the month is imperative for him to go to work.
Q. Okay. You know, again, at this point this lady does have a hardship. This is not within the reasons for me to excuse you from jury duty at this point.
(Tr. 178).



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The trial court is clearly in the wrong here, as all of the aforementioned instances show. The court is not only abusing its discretion in its selective dismissals of some prospective jurors but inadvertently or perhaps intentionally, is prejudicing the defendant in the minds of those prospective jurors who will ultimately sit on Jalowiec's jury. In open court, Judge Glavas is sending a strong message to the entire jury pool. If one wishes to go on vacation or a retreat, the court will readily dismiss that individual from jury duty. (Tr. 15, 18, 19). So too is a prospective juror excused from jury duty when he wishes to spend time with his wife. (Tr. 23). However, to the prospective jurors that expressed any real hardship reasons for their inability to serve, the court simply puts them off by claiming there reasons are not considered a substantial excuse by this trial court. (Tr. 16-17, 20, 21-22, 178).

Criminal Rule 24 (B) is very clear and quite specific as to the actual challenges for cause to which a trial court can legally excuse potential jurors from jury duty

> Crim. R. 24 (B) Challenge for cause
>
> A person called as a juror may be challenged for the following causes:
>
> (1) That he has been convicted of a crime which by law renders him disqualified to serve on a jury.
>
> (2) That he is a alcoholic, or drug dependent person.
>
> (3) That he was a member of the grand jury which found the indictment in the case.



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(4) That he served on a petit jury drawn in the same cause against the same defendant, and such jury was discharged after hearing the evidence or rendering a verdict thereon which was set aside.

(5) That he served on a juror in a civil case brought against the defendant for the same act.

(6) That he has an action pending between him and the State of Ohio or the defendant.

(7) 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.

(8) That he has been subpoenaed in good faith as a witness in the case.

(9) 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 the examination of the juror of from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

(10) 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, of to the defendant.

(11) That he is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant.

(12) That he is the employer or employee, or the spouse, parent, son



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> or daughter of the employer or employee, or the counsellor, agent or attorney, of any person included in subsection (B)(11).
>
> (13) That English is not his native language, and his knowledge of English is insufficient to permit him to understand the facts and the law in the case.
>
> (14) That he is otherwise unsuitable for any other cause to serve as a juror.
>
> The validity of each challenge listed in this subdivision shall be determined by the court.

As is clearly shown by Crim. R. 24(B), there are fourteen very specific categories under which any and/or all prospective jurors are to be excluded for cause by the trial court. Going on vacations are not among them. This abuse of the trial court's discretion was both frivolous and illegal.

As the court noted in Thompson v. Kayslip, 600 N.E.2d 756, 74 Ohio App.3d 829 Ohio (4th App. Dist. 1991), "Abuse of discretion" when applied to entry by the trial court, refers to arbitrary, unreasonable or unconscionable attitude by the court in making its ruling.

See also Turowski v. Johnson, 590 N.E.2d 434, 70 Ohio App.3d 118 Ohio (9th App. Dist. 1991). And also Lacare v. Dearing, 596 N.E.2d 1097, 73 Ohio App.3d 238 Ohio (11th App. Dist. 1991).

These prospective jurors being excused by the trial court's abuse of discretion was a clear violation of Crim. R. 24(B). And creating animosity against the defendant in the minds of the jury pool by these selectively illegal dismissals clearly biased the jurors who were finally sworn in. Thus Jalowiec must



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be granted a new trial.

B.

Defendant Jalowiec was further denied his rights to a fair trial by an unbiased jury of his peers when the trial court limited defense counsel's questions during the first phase of voir dire. This was a Constitutional Right under the 6th and 14th Amendments and to deny the defense the means by which to protect the defendant is a clear violation of due process. The court also set its own limit as to the number of prospective jurors to question.

By the Court:
Ladies and gentlemen, at this point there are people the Court feels that need to voir dire or further inquire of, specifically as to their particular views and we will do so at this point.
The rest of you at this point please relax. It will be awhile before we get to you further. Hopefully the coffee will hold out. You can roam about. You don't have to stay in this room totally, roam about the halls and what have you, but you are not going to see a heck of a lot. (Tr. 33).

The court in this instant case was completely in the wrong. The enactment of Crim. R. 24 did not abrogate the Ohio practice which permits counsel reasonable opportunity to personally examine prospective jurors. The court nevertheless retains discretion to reasonably limit counsel's voir dire. State v. Swanson, 476 N.E.2d 672 (1984).

While there is no denying that the trial court does retain discretion to set reasonable limitations on defense counsel's voir dire of all prospective jurors, this is not the argument here nor the case at bar. The trial court has abused its



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discretionary powers in the Jalowiec trial by its selective decision that only some perspective jurors are to be voir dired. A trial court has the duty as well as the moral obligation to have all prospective jurors voir dired not just some of them. This duty and moral obligation is tenfold in a capital trial such as this one certainly was. (Emphasis added).

C.

Trial court further violated Jalowiec's Constitutional Rights of due process and fair trial by its interference with defense counsel's attempts to voir dire the selected group of prospective jurors mere completely together on their individual views. The following cites clearly demonstrate said interference by the court:

By Mr. Grunda:
Your Honor, could we switch doing the voir dire? Is that a problem with the court?
By the Court:
Yes, it is. Somebody do it period. One person will do the voir dire, like you are not going to cross and direct exam and recross. You start the voir dire, you do it.
By Cleary:
We mean alternate per person.
By the Court:
You start the voir dire, you do the voir dire at this point, okay? The Court will reconsider that, Mr. Cleary. If you want to do that, you can do that.
(Tr. 43).

In this instance, the trial court reconsidered defense counsel Cleary's request that he and Grunda be permitted to alternate their voir dire role with the changing of individual prospective juror. While this decision by the court may fall



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within the discretionary powers of the trial court, it also cut the capability of defense counsels' expertise in posing all of the questions to the prospective juror by 50%.

The trial court then abused its discretion further when Judge Glavas abmonished defense counsel and placed the additional limitations on counsel's effectiveness by allowing only one defense attorney to raise timely objections to questionable practices of the prosecutor.

By the Court:
Whoever is doing the questioning is the only one that is going to be able to object.
By Mr. Grunda:
Okay.
By the Court:
If you want to alternate, that is okay, but you do everything.
By Mr. Grunda:
Okay.
(Tr. 57).

State v. Swanson, held that the court nevertheless retains discretion to reasonably limit counsel's voir dire, not to limit the individual defense counsels from participation in said voir dire.

In 1982, the Ohio Supreme Court ruled that, both Crim. R. 24 and O.R.C. 2945.27 require that the trial court "permit" counsel to supplement the court's examination by further inquiry, but only where that opportunity is sought by counsel. State v. Jones, 441 N.E.2d 1121 (1982). Defense Counsel Grunda clearly requested the court's permission to be able to have both defense counsel to participate in each individual voir dire. (Tr. 43). However, this method of voir dire, while being the most logical



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method to utilize both the knowledge and the ability to uncover preconceived biases on the part of each of the prospective jurors, was in fact, considered a problem for the court. (Tr. 43). "The entire voir dire should be directed to determine whether, for any reason, a juror has a bias of mind in favor or against either party such that his impartiality as to guilt would be impaired." State v. Ellis, 98 Ohio St. 21 (1981). In limiting the participation of defense counsel to singularly being able to pose the questions to those prospective jurors deemed worthy to even be voir dired, trial court was not in keeping with the Supreme Court decisions in the above cited cases, and was certainly not in the best interest of the defendant.

D.

The trial court also abused its discretion in the form of bias shown towards the defendant when it refused to allow defense counsel to be given the same opportunities as the prosecutors during the first segment of the voir dire process.

By Defense Counsel to Juror:
Q. I have another question that gets into that then because you also indicated in your questionnaire that a defendant must testify or should testify?
Court: All right. You will have an opportunity to get into that particular question at a later time, Mr. Grunda. The only issue that we are discussing here today is the feelings pro or con regarding the death penalty.
Grunda: Okay. I was going to ask if that would affect her opinion then in the death penalty.
Court: All right, you may ask her that question.
(Tr. 64-65).

Defense Counsel to some juror:
Q. .... He has a right not to testify.
A. I understand that.



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Q. Would that affect you if he didn't testify?
A. No, I don't think so.
Court: And you may inquire further on this point later.
Q. It wouldn't affect you as a to whether or not imposing a death sentence of the other two possibilities?
A. No.
Court: Again, Mr. Grunda, I will give you an opportunity later to inquire further of this juror. At this point this court will accept this juror and, Ma'am, what you do is, pick up your wraps and go back and join the other people across the street.
(Tr. 65-66).

But in the first phase of voir dire of another prospective juror, the prosecutor was given all the leeway he wished by the trial court, which certainly demonstrates bias toward the defense counsel and also by implication, the defendant.

By Prosecutor Rosenbaum:
Q. You don't want to go into anything else?
Court: No, as long as we have him here, let's go into that aspect of it too.
Q. Mr. Balog, you indicated on a couple of the questions that you thought they were too complicated to explain in the space provided, whether you or a close friend have ever been affiliated with any of the following, law enforcement, probation and parole, district attorney, public defender, law school, investigative work. Would you like to explain now?
Court: Because I think you did express that. Do you know some law enforcement people?
A. Yes.
Q. Who do you know?
A. Several policemen in North Ridgville that I grew up with.
Q. Their names?
A. Les Gowner -- I grew up with him. I know Al Dent, Ron Bauer.
Q. Do you know people that work for probation or parole?
A. Not there. I had a cousin who used to be here in probation.
Q. Who do you know that is a district attorney or a U.S. Attorney?
A. No one in this jurisdiction.
Q. Any public defenders?
A. Not in this jurisdiction.
Q. Who would that be that you know?
A. Chuck Tingley.



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Q. Where does he work?
A. In St. Augustine, Florida.
Q. How is it that you know him?
A. I built his house.
Q. And who do you know in Law School?
A. Well, I had a cousin that is a lawyer.
Q. And investigative work?
A. No one other then the police in Ridgville that I mentioned.
Q. Now, you also indicate that you had two times been a victim of a theft offense?
A. Yes.
Q. And the first time somebody was caught and convicted. The second time no results?
A. That is correct.
Q. Do you feel -- are you satisfied with the services that law enforcement provided you?
A. Yeah, actually given the combination of finding somebody -- I was not surprised they could not find the people the second time and I was really kind of amazed that they caught the first person.
Q. And you also indicated that way back in '71 you had a little brush with the law?
A. Yes.
Q. How do you feel you were treated then?
A. Very fairly, actually.
Q. I have no other questions, your Honor.
(Tr. 90-93).

Only upon the prosecutor's desire to further question this prospective juror was the court under obligation to allow the defense to also ask additional questions of this specific prospective juror during this first phase of voir dire. (Tr. 98-95). This outward bias exhibited by the trial court toward counsel for the defendant and the defendant himself clearly does violate the impartiality doctrine which must be adhered to by a trial court at all times.

As the following set of cites show, trial court again returned to its prejudicial stance against the defendant when it once more, would not allow the defense counsel to deviate from the rigid theme previously ordered by the court. The



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following cites would not even exist had prosecutor Rosenbaum expressed any desire to ask additional questions of his own violation.

By Defense Counsel Cleary to juror:
A. Put it more simple.
Q. Do you believe that a death sentence is imposed on the defendant in this case would never be carried out, do you believe that --
Court: Well, Mr. Cleary, I am not going to permit that question because I don't think it is proper. Whether it is carried out is not within the juror's province.
Q. It may influence the decision, your Honor.
Court: I am not going to permit that question. Is her opinion so strong that it would substantially impair her from imposing it, carry it at this point. That is the issue to be presented at this point.
(Tr. 116).

By Mr. Cleary:
Q. Your Honor, I would reserve an objection for later. I can go over it then.
Court: But the question here, Mr. Cleary, is, are your views so strong that it would substantially impair your ability to impose the death penalty or the two life sentences.
Q. In regards to that, if she believes it is not going to be imposed --
Court: No more questions on that issue. Next question to ask this juror because that ability is not questioned at this point, nothing we can do to control it.
Q. I am only speaking in terms of the death imposed.
Court: No sir.
Q. No further questions.
(Tr. 117).

The court again abused its discretion in denying the defense the opportunity to question this juror prospect more thoroughly concerning her true views in order to establish that she was bias and would assuredly vote for death without the slightest consideration as to the other two possible sentence upon a finding of quilt. In her juror questionnaire, when asked about her views concerning the death penalty, her answer was, "I think



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if a person kills someone he or she no longer has the right to live and enjoy all of the comforts better than the average person can afford in jail, if they go to jail." (Tr. 109).

With such a bias demonstrated on her questionnaire, the court had a moral and legal obligation to fully explore this and to deny counsel's requests to do so was clear abuse of discretion. When applied to a decision it rendered, in order to conclude that the trial court abused its discretion, said decision must be without a reasonable basis and clearly wrong. United Parcel Service Inc. v. Ohio Civil Rights Commission, 593, N.E.2d 87, 71 Ohio App.3d 146 Ohio (1st. Dist. App. Ct. 1991).

The trial court is afforded grate latitude and discretion in structuring the method in which voir dire will be conducted. Rosales-Lopez v. United States, 451 U.S. 182 (1981); State v. Mapes, 19 Ohio St.3d (1985); O.R.C. 2945.27; Crim. R. 24.

However, without adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be able to follow the Court's instructions and evaluate the evidence can not fulfilled. Rosales-Lopez, supra. The Ohio Supreme Court has also emphasized that trial courts "shall permit reasonable examination of such jurors by defendant or his counsel." State v. Anderson, 30 Ohio St.2d 66, 72 (1972). In the above cited instances this duty of the trial court was not met and so defendant's conviction and sentence should be overturned.

Trial court also denied defendant the opportunity to be tried by an impartial jury by its ongoing violation of Crim.



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R. 24(A) which in so doing, violated the Constitutional Rights of Due process of the defendant, as are guaranteed by the 14th Amendment to the U.S. Constitution.

Criminal Rule 24(A) states:

> (A) Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. The court may permit the attorney for the defendant, or the defendant if appearing pro se, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the later event, the court shall permit the state and defense to supplement the examination by further inquiry.

As Crim. R. 24(A) clearly states, any person called as a juror shall be examined. This is not an optional Ohio Rule of Criminal Procedure, nor is this to be construed as an optional clause of an Ohio Rule of Criminal Procedure.

The following excerpts are taken directly from the record of this defendant's trial proceedings:

By the Court:
Q. Now, Mr. Rosenbaum gave me names of five people that he would like to call in and question.
Grunda: So far there is only two out of the next like twenty eight that I wasn't going to ask questions.
Q. Even though you have the opportunity to ask them the questions when they are seated in the panel, you are going to have another shot at what kind of questions?
Grunda: They are on the death penalty, your Honor, because there are only two that I looked at so far that they didn't voice any opinion, very strong opinions in favor of it. Right now we kind of went through all the people that are like the other way, totally against it.



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Q. No, no, we went through people that were both ways. that was the question that was asked, both ways, but what happened, we have excluded a lot more for not being in favor of it or couldn't fairly consider it.

Grunda: What I am saying is, now the whole next group of what I am looking at, they are like at the other end of the pendulum, so strongly in favor of it.

(Tr. 158-159).

By the Court:

Q. Thank you. Gentlemen, the kind of questions that you are asking can be asked of the entire panel. They don't have to be done individually and I think on the mitigation phase, the question you asked, Mr. Cleary, could be asked of the entire panel when it is done. I think you should ask about the mitigation, but I don't think on an individual basis. It is not the proper place to do it unless you have a specific question. What you are asking is a general question that you can ask each juror. (Emphasis added).

Cleary: Actually, your Honor, the reason I wanted to get into that is to see if they would follow the mitigation. I think it is specifically tied into the death penalty qualification because --

Q. You can ask that question at the time she is selected as a member of the jury panel. You know you still have more questions to ask later on of all the jurors and any of these questions that can be asked, that are going to be asked the same thing to every juror, you ought to wait and do it and see if they are a member of the panel and get your answers at that time. Let's save time and get this thing going. (Emphasis added).

Cleary: Okay, your Honor.

(Tr. 179-180).

By the Court:

Q. Okay. Thank you. Some of the questions that you were questioning this witness about, you would have had the opportunity to question her when and if she becomes a regular member of the panel. Now, if she becomes a member of the panel, you have passed yourself on those. You have already had a chance. If you wanted to hold it till then, you could have. Once you have asked these people questions, you are not going to go over and over it again. (Emphasis added).

Cleary: All right. Thank you.

Q. I think a lot of these questions could have been asked of the panel and not on an individual basis.

(Tr. 303).

Clearly in these above cited trial transcript quotations, trial court is, by inference, limiting the jurors to be



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questioned by defense counsel. In repeatedly stating that certain lines of questioning must wait until said juror is seated with the rest of the perspectives, trial court is well aware, as are all other involved parties, that no such future questioning will ever take place. It is evident from the set pattern that said questions are either of a very personal nature to the jurors or are in some ways, embarrassing to be talked about in the presence of a entire room full of strangers. And then, to do such questioning of jurors in front of the entire pool of prospective jurors would most certainly alienate the juror at best or instill a deep bias or even hatred for the defendant at worst. All reasonable minds can easily draw this conclusion. As this Honorable Supreme Court is aware, it is always better from an ethical standpoint to err on the side of the accused in such matters and in the interests of justice as well. As stated by this Honorable Court's predecessors, "When a court itself conducts the voir dire examination in a criminal case pursuant to Crim. R. 24(A), it is error to refuse counsel the opportunity to supplement the examination by personal inquiry of the prospective jurors." State v. Procter, 367 N.E.2d 908 (1977).

Without adequate voir dire, the trial Judge's responsibility to remove prospective jurors who will not be able to follow the Court's instructions and evaluate the evidence can not be fulfilled. Rosales-Lopes, Supra. Both Crim. R. 24 and the Ohio Statue 2945.27 of the Revised Code require that the trial court "permit" counsel to supplement the court's examination by further



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inquiry, but only where that opportunity is sought by counsel. State v. Jones, 441 N.E.2d 1121 (1982). These instances are yet another part of a continuous list of substantiated errors and claims cited by Jalowiec throughout this brief which call for this conviction to be overturned and remanded.



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PROPOSITION OF LAW NO. XV

THERE IS INSUFICIENT EVIDENCE TO CONSTITUTIONALLY SUSTAIN OR SUBSTANTIATE DEFENDANT'S CAPITAL MURDER CONVICTION IN VIOLATION OF THE UNITED STATES CONSTITUTION AMENDMENTS 5, 6, 8, AND 14 AND ARTICLE I, SECTION 10 AND 16 OF THE OHIO CONSTITUTION.

This Honorable Court must reverse defendant's conviction as the evidence produced at trial is legally insufficient. The United States Supreme Court held In Re Winship (1970), 397 U.S. 398, that due process prohibits the criminal conviction of a person except proof beyond a reasonable doubt. The tests of sufficiency of the evidence are: the Court is to view all the evidence and all reasonable inferences of fact in the light most favorable to the prevailing party; must assume that such facts and inferences are true; and then determine whether a rational finder of fact could return the verdict based upon that evidence. This standard is Constitutionally required in all criminal cases, both at trial and appellate levels. Jackson v. Virginia, (1979), 443 U.S. 305.

There is insufficient evidence to sustain Mr. Jalowiec's conviction for aggravated murder of Ronald J. Lally. Count one of the indictment charged defendant with the aggravated murder of Ronald J. Lally in violation of R.C. §2903.01 (A)(1).

This section provides in pertinent part, as follows:

> (A) No person shall purposely, and with prior calculation and design, cause the death of another.
>
> * * *
>
> (C) who ever violates this section



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> 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.... (Emphasis added).

After viewing all the evidence and all reasonable inferences of fact in light most favorable to the prevailing party, the defendant confidently believes this Court will agree that the evidence is illegally insufficient to sustain this conviction. As stated in §2903.01 (A) No person shall purposely, and with prior calculation and design, cause the death of another. If believed that the defendant was involved with the murder, the evidence shows only that the murder occurred after the defendant's co-defendant Raymond Smith panicked upon seeing some police and fire trucks in Cleveland. (Tr. 783-84, 816-17, 818, 819, 820, Depo. 12, 24). (Emphasis added.)

Michael Smith, the States main witness, testified that there was not plan to harm anyone the night the murder occurred and the murder was a total surprise and shock, and came unexpectedly out of the blue. (Tr. 819).

In State v. Jenkins, 48 Ohio App.2d at 102, 2 O.O.3d at 75, 355 N.E.2d at 828, the Court of Appeals found three factors in determining whether prior calculation and design exists: (1) Did the accused and victim know each other, and if so, was the relationship strained? (2) Did the accused give thought or preparation to choosing the murder weapon or murder site? and (3) Was the act drawn out or "an almost instantaneous



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eruption of events"?

Turning now to each factor in Jenkins supra, and applying them to this case clearly establishes, if the defendant was involved, that the events were not done with prior calculation and design, but instead without thought or preparation. Addressing factor #(1) found in Jenkins supra, "(1) Did the accused and the victim know each other, and if so, was the relationship strained?" Brian Howington, states witness, testified that the defendant and victim were friends. (Tr. 718). He also testified that there was no indication that there was any problem with the victim or the defendant, leaving no strain in their relationship. (Tr. 733, 734, 735, 736, 738).

Now, turning to the second factor found in Jenkins; "(2) Did the accused give thought or preparation to choosing the murder weapon or murder site?" The answer is, no, if the state witnesses are to be believed. The defendant did not have a gun or any weapon in his possession on the night of the murder. (Tr. 735, 736, 738, 834, 843, Depo. 49, 51, 66, 70). As for choosing the murder site: According to Michael Smith, the defendant was present the night of the murder. But, pulling into the cemetery was out of the blue, a total shock and surprise. (Tr. 819).

Now turning to the third and last factor found in Jenkins supra, "(3) was the act drawn out or "an almost instantaneous eruption of events"?" According to Michael Smith, there was no plan to harm the victim, but to only put him on a bus and get him out of town. (Tr. 782, 783, 815, 816, Depo. 11, 23-24,



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53, 54, 55, 86-87).

Clearly, according to the state witnesses, if this Court wants to believe the defendant was involved, this murder occurred without any prior calculation and certainly there was no design applied. The state showed no involvement in a plan on part of Mr. Jalowiec. Raymond Smith, according to Michael Smith, intended to put Ronald Lally on a bus to get him out of town. (Tr. 782, 783, 813-14, 815, 816, Depo. 11, 12, 24, 87). But while looking for drugs for Lally to take with him on the bus trip, police and fire trucks spooked Raymond Smith. (Tr. 783, 816, 817, Depo. 12, 24, 57). This clearly demonstrates no prior calculation and design was used. If the defendant was at the cemetery he was so under the assumption that the victim was being taken to the bus station and did not plan with Raymond Smith to cause any harm to the victim. Michael Smith could not and did not present any evidence whatsoever that the defendant got out of the car to help Ronald Lally or Raymond Smith. In fact, Michael stated he did not see anything after Mr. Lally got out of the car. (Tr. 820, 824-25, 826, 827, 833-2x, 834, Depo. 65, 66, 67, 68, 69, 70, 71). This conviction must be remanded back to the trial court and a new trial must be ordered because the evidence is not legally sufficient to sustain this conviction.



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PROPOSITION OF LAW NO. XVI

THE DEFENDANT WAS DENIED DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE 5, 6, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10, OF THE OHIO CONSTITUTION WHEN THE PROSECUTOR WAS ALLOWED TO DELIBERATELY LIE AND MISSTATE EVIDENCE TO THE JURY DURING CLOSING ARGUMENTS.

Mr. Jalowiec denied due process and a fair trial in violation of the 5, 6, and 14th Amendments to the U.S. Constitution and Article I, Section 10, of the Ohio Constitution when prosecutor Rosenbaum was allowed to deliberately lie and misstate evidence to the jury during his closing arguments.

Through the course of this trial, the trial court permitted the prosecutor to introduce testimony alleging to a false implication of a conspiracy. Throughout the course of the trial, defendant's counsel did raise objections to such errors. (Tr. 512-13, 514, 523, 525, 526, 527, 528, 529, 530, 537-38, 542, 569, 570, 574, 576, 577, 578).

The prosecutor in both his initial closing and final closing arguments continued to lie and mislead the jury by claiming the case before them was a conspiracy trial. Rosenbaum started with his own quote and then commenced to mislead the jurors as follows:

By Rosenbaum:

> **In a conspiracy trial like this** I like to start out with a quote, and I am not sure where I got it, but it goes like this: **"The birth of a conspiracy** conceived in hell is seldom witnesses by angels." or **if someone goes about trying to carry out a conspiracy to commit a crime,** especially the heinous crime like aggravated murder, who are you going to select to help you? (Tr. 920). (Emphasis added.)



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By Rosenbaum:
> **If the State is going to illustrate a conspiracy** and bring you proof of what happen and people that have knowledge, that you must understand that the State is stuck with those. (Tr. 921). (Emphasis added.)

By Rosenbaum:
> They were chosen by the defendant and his co-conspirators to participate.
> (Tr. 921).

Mr. Rosenbaum then continued to deliberately mislead the jurors by making further misstatements of the evidence and outright falsehoods:

By Rosenbaum:
> The only thing that keeps you going is fear and retaliation and that motivation may be consistent to why Stanley Jalowiec wanted to help **his source**, his friend **and his supplier** by participating in keeping **this drug empire going** by killing a witness.
> (Tr. 974). (Emphasis added.)

This claim by the prosecutor was an outright lie. There was never any testimony or evidence given to show any link between defendant Jalowiec and drug dealers. Furthermore, there was never any evidence or testimony to show that Jalowiec is, was, or had ever been a drug customer of the Smith Family. Unfortunately the jury was further placed under a false perception of guilt as the objections made were also overruled.

By Grunda:
> Your Honor, I would object to that there was no testimony about source, it is not in evidence.
> (Tr. 974).

By Court:
> Ladies and gentleman, you will use your collective recollection as to what the testimony may have been in that matter and the objection is overruled.



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(Tr. 974).

The lies and bias against Mr. Jalowiec continued with Rosenbaum's further false statements implying this defendant had done various acts which no one testified to as having been witnessed to:

By Rosenbaum:
These pictures tell you what this man did alone is enough right here in this incident to kill him.

By Rosenbaum:
These photographs demonstrated his handiwork and they are gruesome.
(Tr. 982).

By Rosenbaum:
Shows there was planning for a period of months and that this was kicked around actually until they finalized it.
(Tr. 976).

State's witness Michael Smith testified there was nothing planned ever. (Tr. 884; Depo. 53, 80). In fact, Michael Smith testified that they were only taking Ronald Lally to the bus station so he could leave town. (Tr. 782, 813, 815, 816; Depo. 23, 24).

By Rosenbaum:
No, they shot him in the mouth, they cut his throat, they stomped his head and ran the car into him three times.
(Tr. 977).

Any and all testimony related to these details of the killing have only one individual performing any given act. (Tr. 784, 820-21, 822, 823, 824, 825, 826, 827, 828, 833, 834; Depo. 12, 25, 66, 67, 68, 69). That person is Raymond Smith. (Tr.



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822, 823, 824, 826, 827; Depo. 12, 25, 66, 67, 68). There is no they, and never was.

By Rosenbaum:
> There was testimony on the first day of the trial linking him to the crime. Patrolman Homoki testified, Carl Hartman testified, Sharon Hopkins testified, and Terry, all on the first day, and they all mentioned the defendant by name as having some part in this crime.
> (Tr. 977-78).

None of these persons linked Jalowiec to any crime whatsoever. Half of these state's witnesses stated just the opposite of Rosenbaum's deliberate misstatements to the jurors.

By Rosenbaum:
> When we all know that he called Stanley from Mom's Open Kitchen.
> (Tr. 978).

This lie can not stand up in the light of the real facts and evidence. State witness Brian Howington clearly testified that Jalowiec received a page on his beeper about 1:00am. (Tr. 720-721). Everyone claims they went to Moms Open Kitchen at 2:30-3:00am..(Tr. 572, 594-95, 682, 777-78, 791; Depo. 8, 20, 45-46).

Each and every example of Mr. Rosenbaum's claims cited here has been proven by the state's own witnesses to either be a lie or a misstatement deliberately made by the prosecutor in his closing argument. This is clearly a violation of Mr. Jalowiec's rights to due process and a fair trial, both under the United States and Ohio's Constitutions. It is clear by the degree of error that, of it own volition, the court should have



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822, 823, 824, 826, 827; Depo. 12, 25, 66, 67, 68). There is no they, and never was.

By Rosenbaum:
> There was testimony on the first day of the trial linking him to the crime. Patrolman Homoki testified, Carl Hartman testified, Sharon Hopkins testified, and Terry, all on the first day, and they all mentioned the defendant by name as having some part in this crime.
> (Tr. 977-78).

None of these persons linked Jalowiec to any crime whatsoever. Half of these state's witnesses stated just the opposite of Rosenbaum's deliberate misstatements to the jurors.

By Rosenbaum:
> When we all know that he called Stanley from Mom's Open Kitchen.
> (Tr. 973).

This lie can not stand up in the light of the real facts and evidence. State witness Brian Howington clearly testified that Jalowiec received a page on his beeper about 1:00am. (Tr. 720-721). Everyone claims they went to Moms Open Kitchen at 2:30-3:00am..(Tr. 572, 594-95, 682, 777-78, 791; Depo. 8, 20, 45-46).

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corrected the prosecutor.

One reviewing court held under the old standards that:

> Reviewing court would not consider alleged errors resulting from counsel's closing argument where no objection was made at trial. Stelma v. Juguilon, 597 N.E.2d 523, 73 Ohio App.3d 377, Jurisdictional motion overruled. 596 N.E.2d 474, 64 Ohio St.3d 1444 Ohio (App. 8 Dist. Ct. 1992).

Although none of these deliberate lies and misstatements made to the jury were objected to, a clear pattern of overruling had been established. (Tr. 920-2x, 921-2x, 975, 976, 977-78). When counsel did object to the misstatements the court overruled every one of them, both during the trial and the closing arguments. (Tr. 974).

None of the errors and deliberate misstatements of the evidence were really objected to. (Tr. 920-2x, 921-2x, 975, 976, 977-78). However, the trial court's bias was clearly and unquestionably evident well before closing arguments were given. In every instance where legitimate objections were timely raised, by defense, the trial court did not hesitate to overrule them. (Tr. 512-13, 514, 523, 525, 526, 527, 528, 529, 530, 537-38, 542, 569, 570, 574, 576, 577, 578).

Since the ruling in Stelma v. Juguilon by the 8th District Appellate Court of Ohio, several cases have come to light of similar conditions, as are demonstrated throughout the Jalowiec trial proceedings. In all of the more recent case law rulings to date, Federal Courts as well as Appellate Courts in other



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States have ruled on common ground in the interest of justice.

> "Although defense counsel Blum objected to some instances of prosecutoral misconduct, he did not do so in all cases. Moreover, some of the times Blum objected he either did not adequately state the grounds of his objections or failed to request the jury admonished. Nevertheless, we note Blum was subjected to a constant language of prosecutor Morton's unethical conduct, including MISSTATING THE EVIDENCE, SARCASTIC AND CRITICAL COMMENTS DEMEANING DEFENSE COUNSEL AND PROPOUNDING OUT RIGHT FALSEHOODS." (Emphasis added.) Page 9 of decision. People v. Avena, (1996) 13 Cal.4th 394, 420.

The court in People v. Avena further went on and ruled that, "Under these unusual circumstances, we conclude Blum must be excused from the legal obligation to continually object, state the grounds of his objection, and ask the jury be admonished. Page 10 of the decision.

As stated above defense counsel for Mr. Jalowiec continuously objected throughout this trial only to have the trial court overrule the objections thus allowing the prosecutor to create falsehoods. Therefore, Mr. Jalowiec's counsel should also be excused from his legal obligation to continually object, when to do so would have been futile and could have alienated the jury.

> "Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, Mischaracterizing the evidence is misconduct." (People v. Avena (1996) 13 Cal.4th 394, 420:



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Page 13 of the decision. (Emphasis added.)

In People v. Purvis, (1963) 60 Cal.2d 323, 343, the court held: "A prosecutor's "vigorous" presentation of facts favorable to his or her side "does not excuse either deliberate or mistaken misstatements of fact." Mr. Rosenbaum whether deliberately or mistakenly misstated the facts of Mr. Jalowiec's case. The court in People v. Purvis Further stated, "Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error."

As shown above, it is clear prosecutor Rosenbaum made the calculated decision not to refrain from misstating the facts and evidence of this case and in so doing he denied Mr. Jalowiec the rights to due process and a fair trial in violation of the 5, 6, and 14th Amendments to the United States Constitution, and Article I, Section 10 of the Ohio Constitution, which are afforded to any person charged with the simplest of crimes, much less to one charged with a capital offense such as the defendant.

See Also Groseclose v. Bell, 985 F.Supp. 935, 956 (M.D. Tenn. 1995) Aff'd 130 F.3d 116 (6th Cir. 1997); Gravely v. Mills, 87 F.3d 779, 785 (6th Cir. 1996); Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994); Cabello v. U.S., 884 F.Supp. 298, 302-03 (N.D. Ind. 1995) and C.F. Freeman v. Lane, 962 F.2d 1252, 1259 (7th Cir. 1992).

Although Counsel for Mr. Jalowiec failed to object to each



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lie or misstatement made by Mr. Rosenbaum, case law clearly holds that the deeds of the prosecutor in this capital case constitutes plain error. Mr. Jalowiec's conviction therefore should be required by law to be overturned and he should be granted a new trial and remanded to Cuyahoga County.



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PROPOSITION OF LAW NO. XVII

DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT OF DUE PROCESS AND FAIR TRIAL WHEN TRIAL COURT, PROSECUTOR ROSENBAUM AND DEFENSE COUNSEL GRUNDA VIOLATED CODES OF PROFESSIONAL RESPONSIBILITY WITH PRIOR CALCULATION AND DESIGN WHILE SWORN TO UPHOLD INTERESTS OF JUSTICE VIOLATING DEFENDANTS 5, 6, AND 14TH AMENDMENT RIGHT TO THE U.S. CONSTITUTION AND ARTICLE I SECTIONS 10 AND 16 TO THE OHIO CONSTITUTION.

Defendant Jalowiec was denied his fundamental Constitutional rights of due process and a fair trial as guaranteed by the 5, 6, and 14th Amendments to the United States Constitution. These rights are both fundamental and mandated by the basic principles of the Constitution, as well as the Code of Professional Responsibility which every attorney swears an oath to uphold and be governed by. Yet, the trial court, Rosenbaum Grunds placed their own interests above the interests of justice as well as the very life of this defendant.

A.

As already demonstrated through numerous cites of the trial record in Propositions of Law II, III, V, VIII, XI, XII, XIII, XIV, and XV, trial court abused its discretion in a great number of its rulings and/or decisions. However, in this instance trial court has left a paper trail which could in actuality be construed as having been a possible reason for the great number of instances of its abuse of discretion. In Stewart v. Bay Village, 591 N.E.2d 1305, 69 Ohio App.3d 817 Ohio (8th App. Dist. (1990), the court held that, Abuse of Discretion by a lower court is more than an error of law or of judgment; it connotes unreasonable, arbitrary or unconscionable attitude



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on the part of said lower court.

In this case defendant believes that the attitude of the trial court, Judge Glavas, was of an arbitrary nature and as such, deprived defendant of his expectation of a fair trial and justice throughout his death penalty trial.

This Court should be shocked, as was defendant, to learn that trial court was presiding over criminal proceedings against state witness Terry Hopkins all the while the capital trial against Jalowiec was in progress. (Appendix B-1, B-2, B-3, B-4). A further examination of the Lorain Common Pleas Court docket sheet will show this Honorable Court that Terry Michael Hopkins has been indicted for aggravated burglary, attempted felonious assault, domestic violence and criminal damaging on September 13, 1994. (Appendix B-1). On October 24, 1994, Terry Hopkins withdrew his former plea of not guilty and entered pleas of guilty to four felonies. (Appendix B-2). Then upon motion, Judge Kosma J. Glavas granted Hopkins probation on September 12, 1995, following a seven and a half month period of incarceration on a sentence of 5 - 15 years, 3 - 10 years, 6 months and 90 days. (Appendix B-3).

Judge Glavas, trial court for defendant Jalowiec's capital trial, continued to preside over state witness Hopkins in case No. 94CR045662 throughout 1996, well after the conviction and sentence of death had been meted out to Mr. Jalowiec.

At the very least, Judge Glavas should have had the foresight to reassign the Terry Hopkins proceedings to some other common pleas Justice in Lorain County. Or failing that,



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trial court had the ethical and legal obligation to recuse itself from presiding over the capital trial of defendant Jalowiec. Judge Glavas was assigned this capital case on March 14, 1995.

This certainly is well within the perimeters of trial court's awareness of a conflict on its part. One has to see the granting of probation after only seven months of incarceration in the case of Terry Hopkins by Judge Glavas as a very real inducement for Hopkins to testify as a state's witness in the capital trial of Stanley E. Jalowiec. In light of the fact that all of Hopkins' testimony was either proven false by other witnesses for the State, or completely contradictory to other sworn testimony, trial court committed plain error through this clear conflict of interest and has shown its bias towards Jalowiec by its capricious and unconscionable attitude in granting probation to Hopkins in lieu of testifying.

Judge Glavas is a lawyer as well as a sitting judge. As both, he violated DR 1 - 102 (A)(5) of the Code of Professional Responsibility which states, A lawyer shall not: Engage in conduct that is prejudicial to the administration of justice. This was probably the case here throughout this capital trial based upon the quantity of cites alleging judicial abuse of discretion, when taken as a whole. Abuse of discretion by the trial court which justifies reversal of judgment implies arbitrary, capricious or unconscionable attitude on the part of the court. Smith v. Smith, 600 N.E.2d 396, 75 Ohio App.3d 68 Ohio (4th App. Dist. 1991). This brief demonstrates this



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abuse of discretion and so, this case should be overturned and remanded.

B.

Prosecutor Rosenbaum clearly violated numerous canons and disciplinary rules of the Code of Professional Responsibility and in doing so, deprived defendant of his Constitutionally assured rights of due process and his expectations of a fair trial. Rosenbaum's actions were contrary to his oath of office and a clear denial of Jalowiec's rights to justice.

Rosenbaum is guilty of suborning perjury through the sworn testimony of at least three separate witnesses for the State. He, through his oath of office, has an on going obligation and duty to prohibit the use of fraudulent, false or perjured testimony or evidence.

Ethical Consideration 7-26 states, The law and Disciplinary Rules prohibit the use of fraudulent, false or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desired to have presented unless hi knows, such testimony or evidence is false, fraudulent, or perjured. (Emphasis added.)

In the capital murder trial of this defendant, Rosenbaum called Officer Homoki to the stand where Homoki testified in part, that Danny Smith was quoted as stating various, specific threats against the victim, Ronald Lally. (Tr. 529-531). These quoted threats included "That snitch will get his." (Tr. 531). However, upon taking the witness stand later on in the Danny



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Smith trial, Homoki testified that the previously attributed, threatening, direct quotes of Danny Smith to Homoki were in fact, Homoki's own words. (Appendix D-1, D-2).

Also in the capital trial of defendant Jalowiec, Rosenbaum called state witness, Sandra Williams to the stand where she testified that Danny Smith had come into her yard on Sept. 7, 1993 and threatened Ron Lally, the victim, and his immediate family. (Tr. 511, 512, 514). According to Williams' testimony, Danny Smith was quoted as saying to Williams, "He said that he knew where Ron's family lived and he knew where Ron was and it would be a shame if anything happened to his family or to myself." (Tr. 514). And also, "Yes, he said he knew that they lived in a trailer and it would be a shame if it got blowed up." (Tr. 514). Again however, when Williams took the stand and testified in the Danny Smith trial, she then recanted her previous testimony from defendant's trial and denied matter of factly that any threats were made against Ron Lally, his family or she herself. (Appendix E-1).

Further along in defendant's capital trial, Rosenbaum called state witness Lynne Altpater to the stand for the sole purpose of testifying that some poison was ordered by Danny Smith to be used upon some person or persons unknown to her. Altpater testified that, Danny Smith asked her for a poison. (Tr. 537). That Smith wanted said poison, "Because he said he needed it to take care of somebody." (Tr. 538). And, "He wanted to take care of a person." (Tr. 538). When asked why, Altpater replied, "Yeah, actually because this person was going to cause him to



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be in a lot more trouble then what he was." (Tr. 538).

And yet again, in the Danny Smith trial, Altpater recanted her testimony about the poison's intended use. On the stand she was asked and answered the following:

> Q. As you recall, to refresh your memory as to what you testified to on Friday, on 1-6-95 I think you gave a statement to Detective Leiby at your house; is that correct?
> A. Uh-huh.
> Q. All right. And in that statement you told him that this poison Danny asked you about, you understood it to be for cats; is that correct?
> A. Yes.
> Q. All right. Then at the police station, on 1-19-95, you gave another statement to Detective Leiby; is that correct?
> A. Yes.
> Q. And then you came to my office in October or '95 and gave a statement, right?
> A. Uh-huh.
> Q. Do you recall telling me that the poison was for cats at my office?
> A. Yes.
> Q. "Do you know of anybody that Danny asked to do any harm to Mr. Lally?" And you said, "No"; is that correct?
> A. Yeah. I said that.
> Q. All right. And your testimony is that you told -- well, you would agree you told me that he wanted to get this poison because there are cats crawling on his cars; is that right?
> A. yes.
> Q. Is that right?
> A. Yes.
> (Appendix F-1, F-2, F-4)

Defense counsel was never permitted to review any of the previously made statements by Williams or Altpater. (Tr. 514-515, 538-539). Clear evidence support's defendant's contention that prosecutor Rosenbaum did knowingly suborn perjury at least upon three seperate occasions. To say that Rosenbaum was unaware is ludicrous. In the case of Altpater, we have 2 police



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statements having been made previous to the Jalowiec trial (Appendix F-1). And in the case of Williams, there too existed her prior police statement of January 3, 1995. (Tr. 515). And for someone such as Rosenbaum to honestly believe that Officer Homoki was able to recall direct quotes made by a suspect to him two and a half years earlier, without having taken any notes whatsoever at the time, would have to bring into question Rosenbaum's credibility and stability as a prosecuting attorney. (Tr. 527-531).

Rosenbaum is guilty of misconduct under DR 1-102 (A)(5) which states, "A lawyer shall not engage in conduct that is prejudicial to the administration of justice."

Rosenbaum is also guilty of violating Disciplinary Rule 7-102 (A)(3), "In his representation of a client, a lawyer shall not: Conceal or knowingly fail to disclose that which he is required by law to reveal."

Rosenbaum is further guilty of violating Disciplinary Rule 7-102 (A)(4), "In his representation of a client, a lawyer shall not: Knowingly use perjured testimony or false evidence."

Furthermore, Rosenbaum violated Disciplinary Rule 7-106, TRIAL CONDUCT under section (c)(1) which states, "In appearing in his professional capacity before a tribunal, a lawyer shall not: State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence."

In defendant's capital trial, Rosenbaum had to elevate the charge or aggravated murder to one with death penalty



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qualifications. In order to do so, it was crucial for Rosenbaum to falsely imply to the jury that this was a crime involving the elimination of a government witness through the perjured testimony of Homoki, Williams, and Altpater. This suborned perjury was used in order to substantiated the false conspiracy claims made by prosecutor Rosenbaum, during the course of the trial and in closing summation. (Tr. 475, 512, 513, 530, 920-2x, 921-2x).

In State v. Smith, 589 N.E.2d 454, 68 Ohio App.3d 692 (9th Dist. Ct. 1990), the court held that the State must prove sufficient proof necessary to convince the trier of fact beyond a reasonable doubt of the existence of every element of the offense. In defendant's trial, Rosenbaum could only succeed in this by calling these witnesses to give testimony which Rosenbaum knew to be false and therefore he did in fact suborn perjury in order to assure a conviction. The Prosecution is required to disclose relevant, recorded statements. Rule of Crim. Proc., Rule 16 (B)(1)(a)(i). State v. Manning, 598 N.E.2d 25, 74 Ohio App.3d 19 (9th Dist. Ct. 1991).

C.

Lead defense counsel Joseph C. Grunda also violated his inherent obligations to defendant-appellant Jalowiec in representing Jalowiec throughout these capital proceedings. Recently discovered by the defendant are the Lorain County Common Pleas Court Docket sheet in case no. 94CR045662, Ohio v. Hopkins. This is the same Terry Hopkins who was a state's witness against the defendant in his capital murder trial. As the Honorable



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Supreme Court will note, defendant's lead counsel was in fact, legal counsel for Terry Hopkins throughout this same time frame. (Appendix B-1). Grunda is on record as having represented Terry Hopkins prior to Jalowiec's trial, during Jalowiec's trial, and after Jalowiec's trial. (B-1, B-2, B-3, B-4, B-5).

This is both unconscionable and outrageous to be so deliberately flaunted in a capital murder trial. To represent this defendant on trial for his life and to be representing a state witness in the prosecution of this defendant at one and the same time calls for the prosecution of this defendant at one and the same time calls for this Supreme Court to immediately overturn this conviction.

A closer look at Hopkins' docket sheets shows that defendant Jalowiec's lead counsel was very instrumental in formulating the release of Terry Hopkins from prison just seven months into his 5-15 prison term for an agreement to testify against his other client, defendant Jalowiec, in his capital murder trial. (Appendix B-3).

What we clearly show here is unmitigated collusion between trial court and defense counsel Grunda in preventing this illegal, duo representation from being made public to defendant Jalowiec. (Appendix B-1). On deciding whether a potential conflict of interest precluded attorney from continuing to represent both clients simutaneously, the trial court cannot knowingly participate in a breach of ethics or disciplinary violations. Code of Pro. Resp. DR5-101(B), (B-4), DR*5-102 (A,B); GOVERNMENT OF THE BAR RULE V (16) - Id.. Mentor Lagoons Inc.



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v. Teague, 595 N.E.2d 392, 71 Ohio App.3d 719 (11th Dist. 1991).

Also in Mentor Lagoons Inc. v. Teague, the Eleventh District Court of Appeals for Ohio held that, If an attorney becomes aware of possible conflict of interest before accepting employment, party moving to disqualify does not have burden of showing that proposed testimony my be prejudicial to other client; if attorney becomes aware of possible conflict before accepting employment, rule specifically states that attorney shall not accept employment unless exception applies. Code of Prof. Resp., DR5-101 (B), DR5-102 (A,B). Dual representation in not invalid pre se; however, before a lawyer may represent multiple clients, he should explain fully to each client the implications of common representation and should accept or continue employment only if the clients consent. Code of Prof. Resp., EC 5-15, EC 5-16. Rowland v. Rowland, 599 N.E.2d 315, 74 Ohio App.3d Dist. 415 Ohio (4th Dist. 1991).

For the Courts in Ohio, including this Supreme Court, to hold a higher degree of legality and a higher standard in cases involving civil matters then in a capital case such as this one before this Court, would most assuredly be quite unconscionable, unreasonable and arbitrarily against this defendant and the interests of justice. For this Court to declare as nonprejudicial the conduct of trial court, prosecutor Rosenbaum and lead counsel Grunda, in this case would be to announce a new standard for the prosecution of death penalty cases - a standard that falls dramatically short of that which is guaranteed to any person accused of a capital crime by both



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the Ohio and United States Constitutions.



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PROPOSITION OF LAW NO. XVIII

DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL AS GUARANTEED BY THE 5TH, 6TH, 8TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 AND 16 OF THE OHIO CONSTITUTION WHEN COUNSELS' PERFORMANCE WAS SO DEFICIENT TO BE INEFFECTIVE ASSISTANCE.

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, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972); Kirby v. Illinois, 406 U.S. 682 (1972); United States v. Wade, 388 U.S. 218 (1967); Gideon v. Wainright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932). 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, 466 U.S. 648, 654 (1984), quoting Schaefer, Federalism and State Criminal Procedure, (1956), 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 trial counsel is a fundamental Constitutional error which undermines the entire adversarial process. Strickland v. Washington, 466 U.S. 668, 688 (1984). In Strickland, the Supreme Court of the United States



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decided that ineffectiveness should be determined through a two-pronged test, 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 the counsel's unprofessional errors, the result of the proceeding would have been different. As such, a reasonable probability is a probability sufficient to undermine confidence in the outcome. Id at 694. (Emphasis added.)

The State of Ohio, through rulings by the Supreme Court of Ohio has adopted the Strickland test in order to determine if in fact ineffective assistance of counsel did occur and the deficient performance did prejudice the defendant. State v. Post, 32 Ohio St.3d 380 (1987); State v. Thompson, 33 Ohio St.3d 1 (1987).



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## A. PRETRIAL PHASE

Defendant Jalowiec's trial counsel began providing ineffective assistance to this defendant with the acceptance of the trial court's appointment as defense counsel for this capital murder defendant. The following list of instances are clear and convincing proof of motive on the part of defense counsel and their deficient performance and total disregard for protecting the Constitutional rights of defendant. Reference is also made to the Proposition of Law where the particular issue has been fully briefed and argued, rather than discuss each claim individually.

1.) Failure to refuse trial court's appointment of Joseph C. Grunda as lead defense counsel when said appointment was a clear conflict of interest. (See Proposition of Law No. XVII; Appendix B-1).

2.) For continuing to represent state witness Terry Hopkins throughout the proceedings against the defendant in this capital murder trial. (See Proposition of Law No. XVII; Appendix B-1, B-2, B-3, B-4, B-5).

3.) Failure to disclose to defendant that counsel was instrumental in formulating state witness Hopkins' prison release in exchange for testimony against defendant in these capital proceedings. (See Proposition of Law No. XVII; Appendix B-3).

4.) Failure to disclose to defendant that trial court granted shock probation to state witness Hopkins in exchange for his cooperation in these criminal proceedings against the defendant. See Proposition of Law No. XVII; Appendix B-1, B-3).

## B. JURISDICTIONAL VENUE

Defendant Jalowiec was provided with ineffective assistance of counsel when counsel attempted half heartedly to discuss the question of jurisdiction and venue with trial court. The



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following instances from the record of the trial demonstrate the point more clearly. Defendant refers when necessary to the Proposition of Law where the particular issue has been fully briefed and argued.

1.) Failure to object or argue for a change of venue prior to the jury selection process in voir dire. (See Proposition of Law No. II).

2.) Failure to file a motion for dismissal pursuant to O.R.C. §2941.29 Time for objecting to defect in indictment. (See Proposition of Law No. II).

3.) Failure to request change of venue pursuant to O.R.C. §2901.12 (A) prior to commencement to trial. (See Proposition of Law No. II).

4.) The arguing with trial court on a lacking of venue to proceed with trial in Lorain County after trial has begun. (Tr. 891).

5.) The attempt to use a motion for acquittal under Crim. R. 29 as the instrument for change of venue after the state rests its case. (Tr. 891-92, 898-99).

Although venue is not a material element of the offense charged, venue is a fact which must be proved in criminal prosecutions unless it is waived by the defendant. State v. Draggo, 65 Ohio St.2d 88, 90, 418 N.E.2d 1343 (1981). As the record clearly shows, defendant executed no such waiver at any time, nor was Jalowiec requested to do so. Defendant did in fact, file a pro se motion for change of venue on the grounds that the murder occurred in Cuyahoga County. This motion was filed on January 31, 1996 1995 and denied by the trial court on February 7, 1996.



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## C. VOIR DIRE PHASE

Trial counsel provided grossly ineffective assistance to defendant during the initial death penalty qualification phase of voir dire when counsel failed to object to numerous instances of prosecutor misconduct. Prosecutor Rosenbaum was able to misinform jurors as to Ohio sentencing laws. Rather than discuss each cite individually, reference is made to the Proposition of Law where that particular issue has been fully briefed. Defense counsel failed to object to:

1.) Q. And I also take it, if you would look at him, if the law and the evidence required it, you could sign your name to a piece of paper condemning this young man to death?
A. Yes. (Tr. 109).

2.) Q. Could you sign your name to a piece of paper condemning him to death if you thought the law and the evidence required it?
A. Yes. (Tr. 132).

3.) Q. Sir, would you look at the defendant? If you thought the law and the evidence required it, could you sign your name to a piece of paper condemning him to death?
A. Yes. (Tr. 163-64).

4.) Q. If the law and the evidence required it, could you sign your name to a piece of paper that says he is suppose to die?
A. Yes. (Tr. 188).

5.) Q. If you felt the law and evidence required it, could you sign your name to a piece of paper condemning him to die?
A. Yes. (Tr. 195).

6.) Q. If the law and evidence required it, could you sign your name to a piece of paper condemning him to death?
A. Yes. (Tr. 200).

7.) Q. If you thought the law and the evidence required it, could you sign your name to a piece of paper



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that condemns him to die?
A. Yes.
Q. Are you sure if the law and evidence required it, you could sign a piece of paper?
A. If the law and the evidence require it, yes. (Tr. 205).

8.) Q. If the law and the evidence require, could you sign your name to a piece of paper that calls for him to die?
A. I don't know that right now. (Tr. 216).

9.) Q. I am asking you to go one step further. I am asking if you personally could enforce the death penalty in this case if this case if the law and evidence required it?
A. No, I don't think so. (Tr. 218).

10.) Q. If the law and evidence required it, could you sign your name to a piece of paper that calls for his death?
A. Yes, sir. (Tr. 236).

11.) Q. If the law and the evidence required it, could you sign you name to a piece of paper which calls for his death?
A. If the law and the evidence requires it?
Q. Right.
A. Yes. (Tr. 239-40).

12.) Q. If you get selected as a juror, I want you to promise that if the law and the evidence requires a verdict of guilt and the death penalty, could you sign your name to a piece of paper that might kill him?
A. I am not sure I would. (Tr. 243-44).

13.) Q. Sir, would you look at the defendant, please. If you thought the law and the evidence required it, could you sign your name to a piece of paper that condemns him to death?
A. I could. (Tr. 249).

14.) Q. If the law and the evidence require it, could you sign your name to a piece of paper which calls for him to die?
A. If the law calls for the, yes. (Tr. 255).

15.) Q. Do you feel the law and the evidence required it you could sign your name to a piece of paper condemning a man that young to death?
A. I really don't understand the question, sir. (Tr. 265).



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16.) Q. If the law and the evidence required you to do that, could you sign your name to a piece of paper condemning someone as young as him to death?
A. Yes, I could. (Tr. 275).

17.) Q. Do you feel that if the law and the evidence required it that you could sign your name to a piece of paper that condemns him to die?
A. Yes, I could. (Tr. 282).

18.) Q. If you felt the law and the evidence required it, could you sign your name to a piece of paper that condemns this young man to death?
A. I'm not sure. I don't know, depends on the -- (Tr. 291).

19.) Q. If you felt the law and the evidence required it, could you sign your name to a piece of paper that condemns this young man to death?
A. Yes. (Tr. 302).

20.) Q. If you thought the state proved its case and the law and the evidence required it, could you sign your name to a piece of paper condemning someone that young to death?
A. Yes. (Tr. 308).

21.) Q. If the law and the evidence required it in this case, could you sign your name to a piece of paper that called for this young man's death?
A. If there was the evidence to prove it, yes. (Tr. 313-14).

22.) Q. If you are picked as a juror, you have to assume the law and the evidence requires -- you feel the law and the evidence requires the death penalty verdict, could you, as a person, sign your name to a piece of paper that condemns him to death?
A. No, I can look at him. Yes, I would be fair. (Tr. 336-37).

23.) Q. If you felt the law and the evidence require it, could you return a verdict that condemns him to death?
A. Yes. (Tr. 347).

24.) Q. If you felt the law and the evidence required it, could you return a verdict that condemned him to death?
A. If the circumstances warrant it, yes. (Tr. 362).

25.) Q. If you felt the law and the evidence in this case required it, could you return a verdict that called for this young man's death?



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A. Yes. (Tr. 366).

26.) Q. If you felt the law and the evidence required it, could you return a verdict of guilty that condemns him to death even though he is that young?
A. Yes, I could. (Tr. 370).

27.) Q. If you felt the law and the evidence in this case required a verdict of death, could you sign your name to a piece of paper which called for him to die?
A. If the evidence was overwhelming, yes. (Tr. 377).

28.) Q. If you thought the law as it exists today and the evidence require it, could you sign your name to a piece of paper which called him to die?
A. I don't think so. (Tr. 381-82).

29.) Q. If you were picked as a juror and you felt the law and the evidence required it, could you sign your name to a piece of paper that condemns as young a man as him to death?
A. If I felt the evidence and law require it, yes. (Tr. 387).

30.) Q. The law and the evidence require it.
A. Yes. (Tr. 387).

31.) Q. The situation I have given you is, the State proves its case, the law requires the death penalty, but you take one look at him and say, "I can't do it no matter what you have said out here, I am not going to follow the law." Have you violated your oath of office?
A. Yes, definitely. (Tr. 432).

32.) Q. Could you impose the death penalty on him if the law and evidence require it?
A. Yes, I could. (Tr. 434).

33.) Q. You will be able to carry out a death sentence if the law and evidence require it?
A. Yes, I would. (Tr. 436).

(For all the above, see Proposition of Law No. IV).

Each one of these thirty three misstatements of the law went unchallenged by defense counsel when no objections were raised. No corrective instruction was ever asked for by the defense counsel, not did trial court take it upon itself to



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give corrective instructions in any instance aforementioned.

Further ineffective assistance of counsel was provided to defendant Jalowiec by defense counsel when various jurors were not dismissed for cause by the trial court. These jurors were unobjected to by counsel even though they clearly violates Ohio Rules of Criminal Procedure Rule 24 (B) (11) and (B) (12). Rather then discuss each claim individually, reference is made to the Proposition of Law where the particular issue has been fully briefed.

1.) Failure to object to the court's improper seating of Ms. Smarr as a juror following her stating that her spouse is a corrections officer with the Lorain Police Department. (Tr. 124, 128, 129). (See Proposition of Law No. V).

2.) Failure to object to the court's improper seating of Susan (last name unknown) as a juror after she stated she is to begin police officer training. (Tr. 341, 342). (See Proposition of Law No. V).

3.) Failure to object to the court's improper seating of another unnamed juror who admitted to being the employer of numerous Elyria Police officers. (Tr. 349, 350, 351). (See Proposition of Law No. V).

Trial counsel provided defendant Jalowiec ineffective assistance also during the initial voir dire when they allowed the trial court to dismiss for cause various potential jurors who expressed desires to take vacations. This abuse of discretion went unchallenged and/or even sanctioned in some instances by defense counsel. The ineffectiveness was in direct violation of Ohio Rules of Criminal Procedure Rule 24 (B) in its entirety. Rather than discuss each claim individually, reference is made



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to the Proposition of Law where the particular issue has been fully briefed.

1.) Failure to object when trial court dismissed Mr. Taylor for cause so as to be able to go on vacation. (Tr. 14-15).

2.) Failure to object when trial court dismissed Nancy Roth for cause so as to be able to attend a retreat. (Tr. 16-17).

3.) Failure to object when trial court dismissed unnamed juror for cause so as to be able to go on vacation. (Tr. 17-18).

4.) Failure to object when trial court dismissed Linda Little for cause so as to be able to attend a retreat. (Tr. 18-19).

5.) Failure to object when trial court refused to dismiss Mr. Nielson for cause for financial hardship if loses work days as commission salesman. (Tr. 20).

6.) Failure to object when trial court refused to dismiss Alice Martin for cause for hardship created for employer if she did not go to work. (Tr. 20-21).

7.) Failure to object when trial court refused to dismiss Layport for cause for prior scheduled pre-surgery tests. (Tr. 21-22).

8.) Failure to object when trial court dismissed Dean Asp for cause so as to be able to sit in a hospital waiting room while his wife undergoes routine surgery. (Tr. 22-23).

9.) Failure to object when trial court refused to dismiss Mrs. Kulcsar for cause even though court stated on record that she does have a hardship. (Tr. 178).

(For all of the above, see Proposition of Law No. XIV).

Defense counsel further provided ineffective assistance to defendant when they refused to object to trial court's abuse of discretion in limiting the voir dire questioning to only one of Jalowiec's two defense attorneys. The counsel for defense



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in effect, allowed the court to place a fifty percent limit upon the performance level to be given to defendant Jalowiec at this initial and very crucial stage of the criminal proceedings against him. (Tr. 43). Rather than discuss this claim fully for a second time, reference is made to Proposition of Law No. XIV, where this particular issue has already been fully briefed.

Defense counsel also provided ineffective assistance to defendant Jalowiec when they allowed the trial court to limit the topics to be covered by them during the initial voir dire questioning while the prosecutor was given wide latitude in the same stage of voir dire by the court. Rather than discuss each claim individually, reference is made to the Proposition of Law where the particular issue has been fully briefed.

1.) Failure to object to trial courts ruling when the court's stated that questioning was to be limited to discussing the juror's feelings pro or con regarding the death penalty. (Tr. 64-65). (See Proposition of Law No. XIV).

2.) Failure to object to trial court's ruling when the court again limited counsel's questioning during the initial voir dire of a juror. (Tr. 65-66). (See Proposition of Law No. XIV).

3.) Failure to object to trial court's permitting prosecutor Rosenbaum to expand the prior limited scope of the initial voir dire questioning of a juror when the court was exhibiting clear bias towards defendant Jalowiec, having forbidden defense counsel the same leeway in broadening the scope of initial voir dire (Tr. 90-93). (See Proposition of Law No. XIV).

4.) Failure to object to trial court's double standard when the court again limited the scope of initial voir dire questioning when the defense attempted to inquire further of a juror. (Tr. 116). (See Proposition of Law No. XIV).



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5.) Failure to object vehemently to trial court's refusal to grant the same privileges to the defense as to the prosecutor with regard to expanding on the questioning of pro or con feelings regarding the death penalty. (Tr. 117). (See Proposition of Law No. XIV).

Ineffective assistance again was provided to defendant Jalowiec by defense counsel when counsel chose to accept the trial court's decision to limit even the number of actual jurors that would be questioned. Rather than discuss each claim individually, reference is made to the Proposition of Law where the particular issue has been fully briefed.

1.) Failure to object to trial court's decision to place limits on the number of jurors who would be questioned during the initial, individual voir dire proceedings. (Tr. 158-159). (See Proposition of Law No. XIV).

2.) Failure to object to the trial court's decision to ignore and violated Criminal Rules of Procedure Rule 24 (A). (See Proposition of Law No. XIV).

3.) Failure to object to the trial court's stated option that, "I think you should ask about the mitigation, but I don't think on an individual basis." when this was clearly the point of individual voir dire. (Tr. 179). (See Proposition of Law No. XIV).

4.) Failure to protect the Constitutional right of the defendant to be tried by an impartial jury of his peers when counsel acquiesced to trial court's violations of said Right by its decision to save time and get this thing going. (Tr. 180). (See Proposition of Law No. XIV).

5.) Failure to object to trial court's blatant abuse of its discretionary powers when the court took it upon itself to forbid defense counsel any opportunity to question a juror on any topic whatsoever in front of the entire panel of jurors. (Tr. 303). (See Proposition of Law No. XIV).

6.) Failure to object when trial court again expressed its views on limiting the defense's questioning of jurors on an individual basis during the initial voir dire of jurors. (Tr. 303). (See Proposition of Law



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No. XIV).

Defense counsel was able to provide defendant Jalowiec with even more ineffective assistance during the selection of unbiased jurors from the jury pool and the elimination of all prospective jurors who exhibit clear bias towards the defendant. Rather than discuss each claim individually, reference is made to the Proposition of Law where the particular issue has been fully briefed.

1.) Failure to object to trial court's refusal to dismiss Mrs. Repko for cause when very strong predilection to vote for death under any circumstances is evidenced through replies given during voir dire. (Tr. 58, 59, 60). (See Proposition of Law No. XIII).

2.) Failure to object to trial court's refusal to dismiss Mr. Balog for cause when very strong predilection to vote for death under any circumstances is evidenced through replies given during individual voir dire. (Tr. 81, 82, 83, 84, 85, 86, 87). (See Proposition Law No. XIII).

3.) Failure to object to trial court's refusal to dismiss unnamed juror for cause when very strong prediction to vote for death under any circumstances is evidenced through replies given during individual voir dire. (Tr. 107, 108, 109, 110, 113, 114). (See Proposition of Law No. XIII).

4.) Failure to object to trial court's refusal to dismiss Mrs. Hoover for cause when very strong predilection to vote for death under any circumstances is evidenced through replies given during individual voir dire. (Tr. 140, 142, 143). (See Proposition of Law No. XIII).

5.) Failure to object to trial court's refusal to dismiss Mrs. Kulcsar for cause when very strong predilection to vote for death under any circumstances is evidenced through replies given during individual voir dire. (Tr. 165, 166, 167). (See Proposition of Law No. XIII).

Additional ineffective assistance was provided to this



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defendant by defense counsel when counsel acquieseced trial court's non verbal decision to prevent any review of various voir dire proceedings by not recording them. This was a contemptuous disregard for and violation of Ohio Rules of Criminal Procedure Rule 22 as well as a criminal act pursuant to O.R.C. §2929.05 and the Fourteenth Amendment to the United States Constitution. Rather then discuss each claim individually, reference is made to the Proposition of Law where the particular issue has been fully briefed.

1.) Failure to object to court's decision not to record side bar proceedings. (Tr. 13). (See Proposition of Law No. XII).

2.) Failure to object to court's decision not to record side bar proceeding. (Tr. 164). (See Proposition of Law No. XII).

3.) Failure to object to court's decision to not record any portion of the preemptory challenge proceedings in this trial, after all the examples of Criminal Rule 24 (B) violations witnessed throughout voir dire. (Tr. 460-61). (See Proposition of Law No. XII).

D. OPENING ARGUMENT PHASE

Defense counsel again provided defendant with damaging and ineffective assistance during the prosecutor's opening arguments by failing to object to any of the numerous instances where Rosenbaum testified personally to the jurors. The prosecutor's opening arguments, when stated as facts not in evidence, can only be construed as being serious Constitutional violations of the confrontational clause of the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. Rather than discuss each claim



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individually, reference is made to the Proposition of Law where the particular issue has been fully briefed.

1.) Failure to object to Rosenbaum testifying the defendant was part of a conspiracy to kidnap and kill Ron Lally. (Tr. 475).

2.) Failure to object to Rosenbaum testifying that the defendant goes to Howington's house. (Tr. 475).

3.) Failure to object to Rosenbaum testifying that the defendant stole Corrine Fike's car. (Tr. 475-76).

4.) Failure to object to Rosenbaum testifying that the defendant went to victim's apartment and smoked crack with Lally and Howington there. (475).

5.) Failure to object to Rosenbaum testifying as to what various other individuals were doing that night. (Tr. 476).

6.) Failure to object to Rosenbaum testifying that Danny Smith drives a group or persons out of town. (Tr. 467).

7.) Failure to object to Rosenbaum testifying as to the emotional state of Michael Smith and what the defendant and Michael Smith's father supposedly did to the victim. (Tr. 478).

8.) Failure to object to Rosenbaum testifying that the defendant and the two Smiths exchanged crack cocaine for use of Fike's car. (Tr. 475).

9.) Failure to object to Rosenbaum testifying that Raymond Smith pages the defendant about 3:00 a.m.. (Tr. 476).

10.) Failure to object to Rosenbaum testifying that defendant was aware of the time and so he drove the victim and himself to a prearranged meeting site. (Tr. 476).

11.) Failure to object to Rosenbaum testifying that defendant and Raymond Smith attempted to place victim inside a trunk and that body of victim contained dog hairs from being in the car of Joann Fike. (Tr. 482).

(For all of the above, see Proposition of Law No. VI).



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## E. TRIAL PHASE

Defendant Jalowiec was again provided with highly ineffective assistance of counsel during the cross examinations of various state witnesses. Defense counsel neither requested nor insisted upon having prior written statements made to the police by witnesses during their cross examination of said witnesses. Rather then discuss each claim individually, reference is made to the Proposition of Law where the particular issue has been fully briefed.

1.) Failure to even inquire of the court or prosecutor into the existence of prior written police statements made by state's witness Sandra Williams in spite of being aware of their existence through her own testimony on cross examination. (Tr. 517, 518, 519). (See Proposition of Law No. III).

2.) Failure to obtain or inquire even into the obvious existence of prior written statements made by state's witness, Lynne Altpater. (Tr. 535-540). (See Proposition of Law No. III).

3.) Failure to use the prior, written statements made by state's witness, Carl Hartman, in spite of knowing there were considerable inconsistencies found during in camera. (Tr. 546-551). (See Proposition of Law No. III).

4.) Failure to object to court's stating it did not bother to make an in camera inspection of Terry Hopkins' several prior statements even though this state's witness attempted to link the defendant to the crime charged. (Tr. 580-581). (See Proposition of Law No. III).

5.) Failure to object to court's refusal to allow defense counsel the use of the state's witness Brian Howington's prior statement. (Tr. 724). (See Proposition of Law No. III).

6.) Failure to object to court's on record ruling that the trial court found no ultimate inconsistencies in the two previously made statements of state's witness, Joann Fike, even though she testified as to changing



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all the relevant facts. (Tr. 757, 758). See Proposition of Law No. III).

During the testimony of Dr. Heather Neilson-Raaf, deputy coroner for Cuyahoga County, defendant was yet again afforded highly ineffective assistance by his trial counsel through their failure to object to her possibility theories. Rather than discuss each claim individually, reference is made to the Proposition of Law where the particular issue has been fully briefed.

1.) Failure to object to testimony given in reference to State Exhibit 2-K when Dr. Raaf testified, "I think...", "There might...", "...and possibly ..." (Tr. 647-48). (See Proposition of Law No. IX).

2.) Failure to object to testimony given by Dr. Raaf in reference to State Exhibit 2-U when Dr. Raaf testified, "...But the best I could do was, it mostly looked like a cut." (Tr. 651). (See Proposition of Law No. IX).

3.) Failure to object to testimony given by Dr. Raaf in reference to injuries being consistent with being stomped and/or struck by a vehicle several times. (Tr. 655). (See Proposition of Law No IX). (Emphasis added.)

## F. EXHIBITS OFFERED INTO EVIDENCE PHASE

Defendant was further denied effective assistance of counsel during the state's offering of exhibits into evidence. Defense counsel chose to object to state's exhibit 2-A through 2-CC but did not make exceptions to various autopsy photographs which do clearly emphasize the alterations made to the victim by the Coroner's staff. These altered depictions of the victim were introduced by the prosecutor solely to inflame and outrage the jury during their deliberations in order to assure the conviction



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of this defendant because the evidence is insufficient to sustain a conviction of Jalowiec. Rather than discuss each claim individually, reference is made to the Proposition of Law where the particular issue has been fully briefed.

1.) Failure to make exceptions to State Exhibit 2-I, depicting the inside of Lally's lower face after having had the larynx, trachea and neck structure pulled out yet attached, so the jurors would be able to look at the victim's spinal column simply by looking into the mouth. (Tr. 647). (See Proposition of Law No. VIII).

2.) Failure to make exceptions to State 2-K, which shows Mr. Lally's scalp peeled back from his skull and affixed to the rear of his head. (Tr. 647). (See Proposition of Law No. VIII).

3.) Failure to make exceptions to State Exhibit 2-L, depicting the peeled back scalp by the coroner from a different angle. (Tr. 648). (See Proposition of Law No. VIII).

4.) Failure to make exceptions to State Exhibit 2-M, which also shows the victims scalp peeled back and held by clamps. (Tr. 649). (See Proposition of Law No. VIII).

## G. CLOSING ARGUMENTS PHASE

Finally, defendant Jalowiec was provided ineffective assistance during the closing arguments given by Rosenbaum when counsel failed to object to numerous instances of witnesses vouching by Rosenbaum. Rather than discuss each claim individually, reference is made to the Proposition of Law where the particular issue has been fully briefed.

1.) Failure to Object to Rosenbaum vouching for the credibility of Michael Smith (Tr. 924).

2. Failure to Object to Rosenbaum vouching for the credibility of Michael Smith. (Tr. 925).



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3.) Failure to Object to Rosenbaum vouching for the credibility of Michael Smith. (Tr. 927).

4.) Failure to Object to Rosenbaum vouching for the credibility of Michael Smith (Tr. 927-28).

5.) Failure to Object to Rosenbaum vouching for the credibility of Michael Smith (Tr. 928-2x).

6.) Failure to Object to Rosenbaum vouching for the credibility of Michael Smith (Tr. 929).

7.) Failure to Object to Rosenbaum vouching for the credibility of Michael Smith (Tr. 932).

8.) Failure to Object to Rosenbaum vouching for the credibility of Sharon Hopkins. (Tr. 932).

9.) Failure to Object to Rosenbaum vouching for the credibility of Michael Smith (Tr. 973-2x).

(For All of the above, See Proposition of Law No. X).

Also during closing arguments, defendant Jalowiec was provided additional ineffective assistance of counsel when Rosenbaum was able to falsely implicate the defendant in some imagined conspiracy without any objections raised on the part of defense counsel. Rather than discuss each claim individually, reference is made to the Proposition of Law where the particular issue has been fully briefed.

1.) Failure to object to Rosenbaum's false claim that this was a conspiracy trial. (Tr. 920). (See Proposition Law No. XVI).

2.) Failure to object to Rosenbaum's false implication that the defendant was trying to carry out a conspiracy. (Tr. 920). (See Proposition of Law No. XVI).

3.) Failure to object to Rosenbaum's false claim that defendant had participated in a conspiracy with the co-defendants, one of whom was found to be not guilty of all charges related to this conviction. (Tr. 921). (See Proposition of Law No. XVI).



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4.) Failure to object to Rosenbaum's false claim that the State had illustrated a conspiracy to this jury when in fact, no such proof had been demonstrated implicating the defendant, nor was such evidence in existence. (Tr. 921). (See Proposition of Law No. XVI).

And too, throughout the closing summations of the prosecutor, defense counsel demonstrated further ineffective assistance in their representation of defendant Jalowiec when they permitted Rosenbaum to blatantly lie to the jurors with out raising so much as a single objection to deliberate fabrications and falsehoods not in evidence. Rather then discuss each claim individually, reference is made to the Proposition of Law where that particular issue is fully briefed.

1.) Failure to object to Rosenbaum's false claim that the coroner's photographs proved defendant committed murder. (Tr. 975). (See Proposition of Law No. XVI).

2.) Failure to object to Rosenbaum's false claim that the coroner's photographs proved to be defendant's handiwork. (Tr. 982). (See Proposition of Law No. XVI).

3.) Failure to object to Rosenbaum's false claim that the evidence showed that the defendant planned for months to murder victim. (Tr. 976). (See Proposition of Law No. XVI).

4.) Failure to object to Rosenbaum's false claim that "They" shot him; "they" cut his throat; "They stomped his head; and "they" ran the car into the victim three times when even common sense shows one individual doing these things. (Tr. 977). (See Proposition of Law No. XVI).

5.) Failure to object to Rosenbaum's false claim that the testimony of patrolman Homoki had linked defendant to the crime. (Tr. 977). (See Proposition of Law No. XVI).

6.) Failure to object to Rosenbaum's false claim that the testimony of Carl Hartman linked defendant to the crime. (Tr. 977). (See Proposition of Law No. XVI).



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7.) Failure to object to Rosenbaum's false claim that the testimony of Sharon Hopkins linked defendant to the crime. (Tr. 977-78). (See Proposition of Law No. XVI).

8.) Failure to object to Rosenbaum's false claim that defense counsel's other and preferred client, Terry Hopkins, linked defendant to the crime. (Tr. 978). (See Proposition of Law No. XVI).

9.) Failure to object to Rosenbaum's false claim that Ray Smith called the defendant from Mom's Open Kitchen at approximately 2:45 - 3:00 a.m.. (Tr. 978) (See Proposition of Law No. XVI).

The United States Supreme Court has enunciated the standard for determining whether prejudice has resulted from trial counsel's deficiencies:

> The 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.

The trial court has a duty sua sponte to take action to protect a capital defendant's right to effective assistance of counsel, not to actively or passively partake in denying the defendant's Constitutional right to effective assistance of counsel.

"Upon the trial judge resets the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." Glasser v. United States, 315 U.S. 60, 71



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(1942). The right to effective representation "implies a duty of the trial judge to assure, to the extent possible under the circumstances, that defendant receives such diligent advocacy. People v. McKenzie, 34 Cal.3d 616, 626, 668 P.2d 769, 775 (1983). "The trial judge is vested with both the statutory and the inherent power to exercise reasonable control over all proceedings connected with the litigation before him." McKenzie, 34 Cal.3d at 626, 668 P.2d at 775.

The Sixth Amendment of the United States Constitution guarantees that the accused shall enjoy the right to assistance of counsel for his defense. In McMann v. Richardson, 397 U.S. 759 (1970), the United States Supreme Court recognized the right to counsel is the right to effective assistance counsel.

Reversal of conviction or sentence based on ineffective assistance of counsel required: deficient performance, or error was so serious that counsel was not functioning as the "counsel" guaranteed defendant by the Sixth Amendment; and prejudice, meaning that counsel's errors were so serious as to deprive defendant of a fair trial. State v. Carter, 594 N.E.2d 595, 64 Ohio St.3d 218 (1992). And in United States v. Hayes, the court declared that the Sixth Amendment guarantees that the accused in every criminal prosecution shall be effectively assisted by competent, legal counsel. United States v. Hayes, 800 F.Supp. 1575 (Southern District Ohio 1992). Right to counsel is in fact the right to effective assistance of counsel and the right to effective assistance of counsel ensures that, under all circumstances, accused had a fair trial and substantial



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justice was done. Ohio Constitution, Articles 1 and 10; State v. Cleary, 596 N.E.2d 554, 73 Ohio App.3d 42 (10th Dist. Ct. 1991).

The performance of court-appointed trial counsel fell far below any objective standard of reasonableness as this brief demonstrates and the record substantiates. Defendant Jalowiec has illustrated throughout the brief that counsel violated their essential duties to their client substantially. Through numerous examples cited from the trial record defendant has clearly overcome any presumptions that counsel's actions were some sort of sound and/or twisted trial strategy. The deficient performance of trial counsel and the serious errors acquiesced to were such that counsel could not be and was not functioning as the "counsel" guaranteed defendant by the Sixth Amendment; that prejudice by counsel's errors were so serious as to deprive defendant of a fair trial. Const. Amend. VI. The two-prong Strickland standard for determining whether defendant has received ineffective assistance of counsel supports the claims raised in defendant's brief. Strickland v. Washington, 466 U.S. 668, 687 (1984). Defendant clearly shows this Honorable Court that trial counsel's performance was deficient and the deficient performance prejudiced his defense. There is a showing "That there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland 466 U.S. at 694.



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In paragraph 3 of the syllabus in State v. Kinney, 35 Ohio App.3d 84, 519 N.E.2d 1386 (1987), the following was declared:

> Where trial counsel fails to raise errors that result in substantial prejudice to defendant's right to a fair trial defendant is denied the effective assistance of counsel.

Similarly, in State v. Martin, 37 Ohio App.3d 213, 525 N.E.2d 521 (1987), the failure to object to improper evidence was sufficient to award a new trial to a defendant.

In this case, defendant was not presented with effective assistance of counsel at any stage of the criminal proceedings against him. It is no wonder then that Jalowiec was wrongfully convicted, having had the outcome of these proceedings predetermined against him. Therefore in the interest of justice, this false conviction must be overturned.



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PROPOSITION OF LAW NO. XIX

DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN HIS FIRST DEATH PENALTY DIRECT APPEAL AS OF RIGHT IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION AND O.R.C. §2929.05 BY COUNSELS FAILURE TO RAISE AND/OR ADEQUATELY ADDRESS SUBSTANTIAL AND WELL-ESTABLISHED CRIMINAL LAW ISSUES ON APPEAL.

Defendant Jalowiec was denied his Constitutional Rights to effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Section 10 and 16, Article I of the Ohio Constitution and Ohio Revised Code Statue §2929.05. This is and was a direct appeal as of right in a death penalty case yet former appellate counsel, Patricia J. Smith #0059621, failed to raise and/or adequately address numerous and substantial errors for review by the Ninth District Court of Appeals. That failure assuredly deprived defendant Jalowiec of any chance of obtaining a meaningful review in his capital case at that level. Defendant was provided with extremely ineffective assistance of appellate counsel in the form of Patricia J. Smith as evidenced by the merit brief submitted to that court on Mr. Jalowiec's behalf.

This Honorable Supreme Court has placed great importance on the meaningful appellate review of capital cases and in so doing, upholds the requirements set forth in O.R.C. §2929.05. In State v. Maurer, 15 Ohio St.3d 239, 246-247 (1984), this Honorable Court noted that the meaningfulness of the review



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is directly dependent on the effectiveness of appellate counsel. Once a capital defendant is convicted and sentenced to death, his appeals as of right become critical. Assignments that counsel present on the first appeal can make the difference between life and death.

While numerous and substantial errors that took place during the trial proceedings were not mentioned or briefed by Patricia Smith in defendant's appeal as of right to the Ninth District Court of Appeals, defendant is still entitled by right to a meaningful review of all the assignments or error which can be presented to this Supreme Court. The omission of the numerous errors and transcript citings documenting them by Smith in counsel's merit brief to the lower court is in no way to be construed as being some archaic form of waiver on the part of this defendant. At the time of these criminal proceedings conducted against Mr. Jalowiec, Ohio's procedures with regard to death penalty direct appeals of capital convictions mandated two direct appeals as of right. This Supreme Court has held the legal position that any error can be addressed when it is briefed in any appeal as of right. In State v. Keenan, this Court reversed the conviction in this death penalty direct appeal as of right to this Supreme Court. This Court stated, "Thus, although we have 'express[ed] out mounting alarm over the increasing incidence of misconduct... in capital cases,' we have not treated prosecutorial misconduct as reversible error 'except in rare instances.' State v. Depew, (1988), 38 Ohio St.3d 275, 288, 528 N.E.2d 542, 556. This case presents and



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aggravated example of such misconduct. Here, we find that the prosecutor's pattern of misconduct throughout much of the trial and during closing arguments did deprive the defendant of a fair trial." State v. Keenan, 66 Ohio St.3d 405 (1993).

This Court went on to find Keenan's second proposition of law and his fifth proposition of law had merit thus, reversing the judgment of the court of appeals upholding his conviction and remanding the cause to the Cuyahoga County Court of Common Pleas for further proceedings consistent with this decision. State v. Keenan, 66 Ohio St.3d 405, 411, 412-13 (1993). Defendant Jalowiec humbly prays that this Honorable Court will note that the overwhelming majority of errors claimed and cited throughout section A thru I of Keenan's Proposition of Law No. II were not raised by Keenan's ineffective appellate counsel at the district court level. Yet, this Honorable Court had no reservations or compunctions in overturning that appellant's conviction because said errors were contained in appellant's merit brief to the Supreme Court of Ohio. Both direct appeals are appeals as of right and as such, defendant is entitled to raise any and all meritorious claims in order to secure a meaningful appellate review by this Supreme Court.

The Due Process Clause of the Fourteenth Amendment guarantees the effective assistance of counsel on a criminal appeal as of right. Evitts v. Lucey, 469 U.S. 387 (1985). While appellate counsel had no constitutional duty to raise every single non-frivolous issue requested by a criminal defendant, counsel must still exercise reasonable professional judgment



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in presenting an appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). As Justice Blackmum wrote, concurring in Jones, appellate counsel may choose which issues to appeal as long as his performance is "'within the range of competence demanded of attorneys in criminal cases' [citation omitted] and 'assures the indigent defendant an adequate opportunity to present his claims fairly in the context of the state's appellate process [citations omitted]." Jones, supra, at 755 (Blackmun, J., concurring).

Various claims of ineffective assistance of appellate counsel have been raised in other jurisdictions and the courts have found that the appellants had been provided ineffective assistance of counsel on the appellate level. The failure of appellate counsel to present meritorious issues for review is considered to be ineffective assistance of appellate counsel. People v. Bowen, 791 F.2d 861 (11th Cir. 1986). See also Matire v. Wainwright, 811 F.2d 430 (11th Cir. 1989), and Ragan v. Dugger, 455 So.2d 1052 (Fla. Dist. 1 ct. Ap. 1989). The Supreme Court, of Ohio, in State v. Rojas, 592 N.E.2d 1376, 64 Ohio St.3d 131 (1992), found that defendant was entitled to effective assistance of counsel on first criminal appeal as of right.

The United States Supreme Court stated that failure to provide effective assistance of counsel is a fundamental Constitutional error which undermines the entire adversarial process. Strickland v. Washington, 466 U.S. 668, 688 (1984). This Court in Rojas noted that the two-pronged Strickland standard for determining whether defendant has received



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ineffective assistance of counsel also applies with respect to appellate counsel. Ohio has already adopted the Strickland test. State v. Thompson, 33 Ohio St.3d 1 (1987); State v. Post, 32 Ohio St.3d 380 (1987). In Strickland, the Supreme Court of the United States 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.

"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. In this present case before this Honorable Court, the proceeding referred to would be defendant's first death penalty direct appeal as of right to the Ninth District Court of Appeals.

An examination should be made as to the totality of the representation. House v. Balcom, 725 F.2d 608, 615 (C.A. 11, 1984). In this instance, the degree or level of ineffective assistance of appellate counsel provided by Patricia Smith to



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defendant Jalowiec. A claim of 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. It is also interesting to note that Patricia Smith, former counsel for defendant's appeal as of right to the district court of appeals, just so happens to be the law partner of David L. Daughten, the same attorney provided Keenan with the ineffective assistance of appellate counsel during Keenan's first direct appeal as of right to the district court of appeals.

The following list of issues and cites that should have been raised by this defendant's former appellate counsel in the interests of justice and to present the lower review court with a factual accounting of the errors occurring at the defendant's capital trial. Only then could the meaningfulness of that review have been in keeping with the right of due process guaranteeing defendant Jalowiec of effective assistance of counsel on a criminal appeal as of right which is assured through the Fourteenth Amendment to the United States Constitution. Rather than discuss each issue individually which Smith refused to raise, reference is made to the Proposition of Law where the particular issue has been fully briefed:

1.) Failure to address counsel Grunda's clear conflict of interest by his representation of state witness T. Hopkins at the time of counsel's appointment as defense counsel for defendant Jalowiec. (See Proposition of Law No. XVII).

2.) Failure to address trial court's Appointment of Joseph C. Grunda as lead defense counsel for defendant in



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his capital trial. (See Proposition of Law No. XVII); Appendix B-1).

3.) Failure to address Grunda's continued representation of both T. Hopkins and defendant throughout the criminal proceedings against this defendant. (See Proposition of Law No. XVII; Appendices B-1 through B-5).

4.) Failure to address the fact that defendant's trial counsel was instrumental in formulating Hopkins' release from prison in exchange for testimony as state witness against defendant. (See Proposition of Law No. XVII; Appendix B-3).

5.) Failure to address trial court's granting of shock probation to T. Hopkins in exchange for his cooperation in testifying against defendant. (See Proposition Law No. XVII; Appendix B-1, B-3).

6.) Failure to address trial counsel's refusal to argue for change of venue prior to jury selection. (See Proposition of Law No. II).

7) Failure to address trial counsel's refusal to file a motion for dismissal pursuant to O.R.C. 2941.29 Time for objecting to defect in indictment. (See Proposition of Law No. II).

8.) Failure to address trial counsel's refusal to file for change of venue pursuant to O.R.C. 2901.12 (A) prior to trial. (See Proposition of Law No. II).

9.) Failure to address trial counsel's argument with trial court on lacking of venue. (Tr. 891). (See Proposition of Law No. II).

10.) Failure to address trial counsel's attempts to use a Crim. R. 29 motion for acquittal as counsel's instrument for change of venue after the state's case in chief. (Tr. 891-92, 898-99). (See Proposition of Law No. XVII).

11.) Appellate counsel Smith's deliberate failure in Second Assignment of Error to quote actual conversation held between trial court and trial counsel about the defendant being seen handcuffed so as to deprive district court a meaningful review, thus ruling claim as having no merit. (See Proposition of Law No. III).

12.) Failure to address the plain error committed by trial court when it limited trial counsel to 50% effectiveness during voir dire by its ruling that only one attorney would participate per juror. (Tr.



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43, 57). (See Proposition of Law No. III).

13.) Failure to address state Witness Williams' prior witness statements being excluded from in camera. (Tr. 517-19). (See Proposition of Law No. III).

14.) Failure to address trial counsel's inability to use written witness statements of state witnesses during cross-examination:

a.) Failure to address trial counsel not using the previously made witness statements of Sandra Williams during cross-examination.

b.) Failure to address trial counsel not using the previously made witness statement of Lynne Altpater during cross-examination.

c.) Failure to address trial counsel not using the previously made statements of Carl Hartman during cross-examination.

d.) Failure to address trial counsel not using the previously made statements of Terry Hopkins during cross-examination.

e.) Failure to address trial counsel not using the previously made statement of Brian Howington during cross-examination.

f.) Failure to address trial counsel not using the previously made witness statements of Joann Fike during cross-examination.

(For all the above, see Proposition of Law No. III).

15.) Failure to address states witness Altpater's previously made witness statements being excluded from in camera inspection. (See Proposition of Law No. III).

16.) Failure to address trial court's ruling that the two previously made, contradictory written statements of Joann Fike had no ultimate inconsistencies. (See Proposition of Law No. III).

17.) Failure to address the fact that most if not all of witness statements are exculpatory to the defendant and should have been turned over to the defense under Crim. R. 16. (See Proposition of Law No. III).

18). Failure to address trial court's refusal to object to trial court's stating it did not make an in-camera of Terry Hopkins' prior witness statements. (See Proposition of Law No. III).



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19.) Failure to address trial court's refusal to perform an in-camera Terry Hopkins' prior witness statements. (See Proposition of Law No. III).

20.) Appellate counsel Smith's calculated failure in her First Assignment of Error to only cite jurors Porter and Eubanks as examples of have been illegally dismissed for cause so that the district court would be able to dismiss this claim as harmless error. (See Proposition of Law No. XIII).

21.) Appellate counsel Smith's deliberate failure to address trial court's illegal dismissal for cause of potential jurors expressing a desire to go on vacations and retreats.

a.) Deliberate failure to address trial court's dismissal for cause of Mr. Taylor to go on vacation.

b.) Deliberate failure to address trial court's dismissal for cause of Nancy Roth to go on retreat.

c.) Deliberate failure to address trial court's dismissal for cause of an unnamed juror to also go on vacation.

d.) Deliberate failure to address trial court's dismissal for cause of Linda Little to attend a retreat.

e.) Deliberate failure to address trial court's dismissal for cause of Dean Asp in order to be able to sit in a hospital waiting room for a few hours.

(For all the above, see Proposition of Law No. XIV).

22.) Failure to address trial court's not dismissing jurors for cause who demonstrated undue hardships if seated on panel.

a.) Failure to address trial court's decision not to dismiss Mr. Neilson for financial hardship.

b.) Failure to address trial court's decision not to dismiss Alice Martin for work related hardship.

c.) Failure to address trial court's decision not to dismiss Layport for medical tests scheduled previously.

(For all the above, see Proposition of Law No. XIV).

23.) Appellate counsel Smith's deliberate failure in her



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First Assignment of Error to only cite juror Kulcsar as the sole example of trial court's not dismissing for cause those jurors exhibiting a clear predisposition of automatically vote for the death penalty in every case so the district court would be able to dismiss this claim as being only harmless error. (See Proposition of Law No. XIII).

24.) Appellate counsel Smith's deliberate failure to address trial court's not dismissing for cause various jurors showing clear predispositions to automatically vote for death penalty in every case.

a.) Deliberate failure to address trial court's decision not to dismiss Mrs. Repko for cause showing clear predisposition.

b.) Deliberate failure to address trial court's decision not to dismiss Mr. Balog for cause showing a clear predisposition.

c.) Deliberate failure to address trial court's decision not to dismiss an unnamed juror for cause showing a clear predisposition.

d.) Deliberate failure to address trial court's decision not to dismiss Mrs. Hoover for cause showing a clear predisposition.

(For all the above, see Proposition of Law No. XIII).

25.) Failure to address trial court's clearly exhibited bias towards the defendant in voir dire when court ruled to limit scope of defense counsel's questioning of jurors several times but allowed prosecutor to expand into other areas of subject matter during the same phase of voir dire. (See Proposition of Law No. XIV).

26.) Failure to address trial court's exhibited bias towards defendant in disallowing defense to question each and every potential juror during voir dire. (See Proposition of Law No. XIV).

27.) Failure to address trial court's decision not to dismiss for cause those jurors who admitted connections directly related to the complaining party, violating Ohio Rules of Criminal Procedure Rule 24 (B)(11) and 24 (B)(12).

a.) Failure to address trial court's decision not to dismiss for cause Mrs. Smurr, wife of a Lorain Police officer.



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b.) Failure to address trial court's decision not to dismiss for cause an unnamed juror who was the employer/supervisor of the police officers involved in the case.

(For all the above, see Proposition of Law No. V).

28.) Failure to address prosecutorial misconduct in the form of misstating the law to prospective jurors in order to assure a commitment to the voting for defendant's death without fair consideration of the lesser penalties when found guilty.

a.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 56-57).

b). Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 109).

c.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 132).

d.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 137).

e.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 163-64).

f.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 188).

g.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 195).

h.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 200).

i.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 205).

j.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 216).

k.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 218).

l.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 236).

m.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 239-40).

n.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 243-44).



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o.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 249).

p.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 255).

q.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 265).

r.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 275).

s.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 282).

t.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 291).

u.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 302).

v.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 303).

w.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 313-14).

x.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 336-37).

y.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 347).

z.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 362).

aa.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 366).

bb.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 370).

cc.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 377).

dd.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 381-82).

ee.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 387).

ff.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 432).



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gg.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 434).

hh.) Failure to address Rosenbaum's misstating law to juror as to penalty. (Tr. 436).

(For all the above, see Proposition of Law No. IV).

29.) Failure to address trial court's ruling that defense was forbidden to question a particular juror further; stated in front of entire panel. (Tr. 303). (See Proposition of Law No. XIV).

30.) Failure to address trial court's violations of O.R.C. 2929.05, mandatory record of all criminal proceedings in a capital trial. (For all the above, see Proposition of Law No. XII).

31.) Failure to address trial court's violations of Ohio Criminal Rules of Procedure 25, which requires all criminal proceedings be recorded. (See Proposition of Law No. XII).

32.) Failure to address trial court's decision not to record side bar discussions during individual voir dire. (Tr. 13). (See Proposition of Law No. XII).

33.) Failure to address trial court's decision not to record side bar discussions in the middle of voir dire proceedings. (Tr. 164). (See Proposition of Law No. XII).

34.) Failure to address trial court's abuse of discretion in its decision not to record any portion of the alleged preemptory challenges made, nor the lack of concern on the part of all parties involved. (Tr. 460-61). (See Proposition of Law No. XII).

35.) Failure to address trial court's abuse of discretion in the decision not to record the polling of the individual jurors even though the record does reflect the request to do so by defendant. (Tr. 1013). (See Proposition of Law No. XII).

36.) Failure to address the prosecutor's being allowed by the trial court to testify throughout the state's opening statements in clear violations of the Sixth Amendment's confrontational clause.

a.) Failure to address Rosenbaum's testimony that, "their conspiracy generates a plan... ." (Tr. 475).

b.) Failure to address Rosenbaum's testimony that, defendant went to Howington's house. (Tr. 475).



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c.) Failure to address Rosenbaum's testimony that, the defendant stole Corrine Fike's car. (Tr. 475-76).

d.) Failure to address Rosenbaum's testimony that, defendant went to victim's apartment, smoked crack, returned to Fike's apartment and played pool. (Tr. 476).

e.) Failure to address Rosenbaum's testimony that, the Smiths, Hopkins and girlfriends were in and out of an eatery during the same time period. (Tr. 476).

f.) Failure to address Rosenbaum's testimony that, Danny Smith is driving specific people around at specific times. (Tr. 476).

g.) Failure to address Rosenbaum's testimony as to the emotional state of one of his witnesses back when the crime occurred. (Tr. 473).

h.) Failure to address Rosenbaum's testimony that, defendant and Ray Smith did things to Ron Lally. (Tr. 478).

i.) Failure to address Rosenbaum's testimony that, attempts were made to put decedent's body into a cartrunk. (Tr. 482).

j.) Failure to address Rosenbaum's testimony that, the body contained dog hairs belonging to Joann Fike's dog and that dog was in the car at one time or another too. (Tr. 482).

k.) Failure to address Rosenbaum's testimony that, defendant exchanged crack cocaine for the use of Fike's car on a regular basis. (Tr. 475).

l.) Failure to address Rosenbaum's testimony that, Danny and Raymond Smith exchanged crack cocaine for the use Fike's car on a regular basis also. (Tr. 475).

m.) Failure to address Rosenbaum's testimony that Ray Smith paged defendant on a beeper. (Tr. 476).

n.) Failure to address Rosenbaum's testimony that defendant took Ron Lally for a drive at a particular time on the night of the murder. (Tr. 476).

(For all the above, see Proposition of Law No. VI).

37.) Appellate counsel Smith's calculated failure in her



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Fourth Assignment of Error to only cite one of the various hearsay statements made over objections by police officer Homoki in order to give the district court the legal grounds to find no merit to this claim.

(See Proposition of Law No. VII).

38.) Appellate counsel Smith's deliberate failure to address the various other instances of hearsay committed over objection by police officer Homoki.

a.) Failure to address Homoki's hearsay statement as to the mental state of Ron Lally two and a half years previously without so much as having taking a single note at the time. (Tr. 525, 526).

b.) Failure to address Homoki's hearsay statement that Danny Smith was after Ron Lally. (Tr. 526-27).

c.) Failure to address Homoki's hearsay statement that Ron Lally said he was an informant for the police. (Tr. 527, 528).

d.) Failure to address Homoki's hearsay claim that Ron Lally told him Danny Smith was after him for wearing a wire. (Tr. 528).

e.) Failure to address Homoki's hearsay claim that when questioned, Dan Smith told him that nothing was going on. (Tr. 529-30).

(For all the above, see Proposition of Law No. VII).

39.) Appellant counsel Smith's calculated failure not to address the fact that Homoki had taken no notes of the "incident" back on Sept. 15, 1993. (See Proposition of Law No. VII).

40.) Failure to address the fact that Homoki only bothered to write out a report of this "incident" at the end of 1994, and only at the request of Detective Leiby. (See Proposition of Law No. VII).

41.) Appellants counsel Smith's calculated failure in her Fourth Assignment of Error to cite only one of the hearsay statements attributed to state witness, Sandra Williams. (See Proposition of Law No. VII).

42.) Appellate counsel Smith's deliberate failure to address the various other instances of hearsay committed over objection by Sandra Williams. (Tr. 514).

a.) Failure to address Williiams' hearsay statement that Danny Smith stated he knew where Ronald Lally's



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parents lived. (Tr. 514).

b.) Failure to address Williiams' hearsay statement that Danny Smith stated that it would be a shame if anything would happen to them (the parents). (Tr. 514).

c.) Failure to address Williiams' hearsay statement that Danny Smith stated that the Lally trailer might get blown up. (Tr. 514).

43.) Appellate counsel Smith's calculated failure in her Fourth Assignment of Error to cite only two of the hearsay statements made over objection by Terry Hopkins in order to give the district court legal grounds to find no merit to this claim. (See Proposition of Law No. VII).

44.) Appellate counsel Smith's deliberate failure to address the various other instances of hearsay attributed to Terry Hopkins.

a.) Failure to address Hopkins' hearsay statement that Danny Smith asked him if he knew any killers. (Tr. 570).

b.) Failure to address Hopkins' hearsay statement that Danny Smith stated that, he would purchase a BMW for Carl Hartman to commit murder. (Tr. 570, 571).

c.) Failure to address Hopkins' hearsay statement that Danny Smith stated that, they had done it. (Tr. 574).

d.) Failure to address Hopkins' hearsay statement that Danny Smith stated that, they stomped him and run him over with a car. (Tr. 576).

e.) Failure to address Hopkins' hearsay statement that he said he stomped him and run him over with a car. (Tr. 576).

f.) Failure to address Hopkins' hearsay statement that they said, they shot him and cut him. (Tr. 577).

g.) Failure to address Hopkins' speculative hearsay stating, I think Raymond said something that he was like a little nervous. (Tr. 577).

h.) Failure to address Hopkins' hearsay statement that Michael Smith stated, that he had wore a wire on him on a sail charge. (Tr. 578).

45.) Appellate counsel Smith's calculated failure in her



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Fourth Assignment of Error to even cite the hearsay testified to by Michael Smith in order to hide the fact that there was a clear pattern of this prosecutor misconduct from the district court. (See Proposition of Law No. VII).

46.) Appellate counsel Smiths deliberate failure to address the various instances of hearsay attributed to Michael Smith. (See Proposition of Law No. VII).

47.) Failure to address Michael Smith's hearsay statements that Raymond Smith stated twice, he was waiting on a ride. (Tr. 780-2x). (See Proposition of Law No. VII).

48.) Failure to address Michael Smith's being allowed to speculate on who actually shot Ronald Lally. (Tr. 341). (See Proposition of Law No. VII).

49.) Failure to address Rosenbaum's attempts to fabricate a conspiracy between defendant and the Smiths through testimony of police officer Ashely. (Tr. 492-498). (See Proposition of Law No. VII).

50.) Failure to address Rosenbaum's attempts to fabricate a conspiracy between the defendant and the Smiths through testimony of Sandra Williams. (Tr. 508-515). (See Proposition of Law No. VII).

51.) Failure to address Rosenbaum's attempts to fabricate a conspiracy between defendant and the Smiths through testimony of Lynne Altpater. (Tr. 535-539). (See Proposition of Law No. VII).

52.) Failure to address Rosenbaum's attempts to fabricate a conspiracy between defendant and the Smiths through testimony of police officer Homoki. (Tr. 521-531). (See Proposition of Law No. VII).

53.) Failure to address trial court's erroneous trial phase instructions to the jury implying that one is guilty of the crime if one fails to act. The court stated this five times in the guilt phase instructions. (Tr. 994, 995). (See Proposition of Law No. XI).

54.) Failure to address trial court's instructions to the jury in the guilt phase under a vicarious liability theory in a death penalty case. (See Proposition of Law No. XI).

55.) Failure to address the deputy coroner's testimony in which she guessed as to the actual numbers of blows depicted in the autopsy performed. (Tr. 647-48). (See Proposition of Law No. IX).



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56.) Failure to address the deputy coroner's testimony as to possibilities rather then probabilities. (Tr. 647-48). (See Proposition of Law No. IX).

57.) Failure to address deputy coroner's testimony when she was permitted to guess as to whether or not there was a cut on the victim. (Tr. 651). (See Proposition of Law No. IX).

58.) Failure to address deputy coroner's testimony as to wounds being either from being stomped or run over by a vehicle several times. (Tr. 655). (See Proposition of Law No. IX).

59.) Failure to address deputy coroner's testimony as to her conclusion that death was either caused by one thing or another. (Tr. 655). (See Proposition of Law No. IX).

60.) Appellate Smith's calculated failure in her Tenth Assignment of Error to cite a single objection by the defense to the admission of gruesome photographs into evidence so that the district court would not be compelled to overturn defendant's conviction. (See Proposition of Law No. VIII).

61.) Appellate Smith's calculated failure in her Tenth Assignment of Error to cite more than one exhibit of gruesome photographs in order to downplay the harm and hide the cumulative effect of the jurors. (See Proposition of Law No. VIII).

62.) Appellate Smith's deliberate failure to address the various exhibits offered by the state to inflame the jurors.

a.) Failure to address St. Ex. 2B as face after modifications by coroner.

b). Failure to address St. Ex. 2C as left eye after modifications by coroner to force open.

c.) Failure to address St. Ex. 2F as lower lip being held open and down artificially.

d.) Failure to address St. Ex. 2G as upper lip being held open and up artificially.

e.) Failure to address St. Ex. 2I as view through mouth after coroner removes entire insides of throat and neck.

f.) Failure to address St. Ex. 2K as scalp peeled away from skull by coroner.



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g.) Failure to address St. Ex. 2L as another view of coroner's peeled back scalp.

h.) Failure to address St. Ex. 2M as another view of scalp peeled back by coroner.

(For all the above, see Proposition of Law No. VIII).

63.) Appellate Smith's calculated failure in her Seventh Assignment of Error to cite more than one example of witness vouching by the prosecutor in closing arguments so as to prevent the district court from seeing the pattern of misconduct. (See Proposition of Law No. X).

64.) Appellate Smith's calculated failure in her Seventh Assignment of Error to cite only one example of witness vouching by the prosecutor during closing arguments so the district court would be forced to rule on it as harmless error. (See Proposition of Law No. X).

65.) Appellate counsel Smith's calculated failure to address the various other instances of witness vouching during closing arguments by Rosenbaum.

a.) Failure to address Rosenbaum's stating, "They want you to discredit Michael Smith." (Tr. 924).

b.) Failure to address Rosenbaum's stating, "He was the only one actually there and knows exactly what Stanley did, so they are going to discredit him." (Tr. 924).

c.) Failure to address Rosenbaum's stating, "Well, he is right and Michael was a bystander." (Tr. 925).

d.) Failure to address Rosenbaum's stating, "What evidence would I give you that said Michael Smith deserves to suffer life of the death penalty for being there? I have none." (Tr. 925).

e.) Failure to address Rosenbaum's stating, "What evidence do you have that tells you that what Michael says about that is true? You have the gunshot wound photograph that demonstrates that." (Tr. 927-28).

f.) Failure to address Rosenbaum's stating, "Which all confirms what Michael has to tell you about the defendant driving the car." (Tr. 928).

g.) Failure to address Rosenbaum's stating, "Which all tell you what Michael is telling you is actually



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what happen." (Tr. 928).

h.) Failure to address Rosenbaum's stating, "You have the knife that supports what Michael has to tell you." (Tr. 929).

i.) Failure to address Rosenbaum's stating, "What you have here is a set of facts that so dovetail that we know what Michael is telling us is true." (Tr. 932).

j.) Failure to address Rosenbaum's stating, "If you look at what Michael told you happened, happened." (Tr. 973).

k.) Failure to address Rosenbaum's stating, "My Dad and Stanley, as Michael says did, will take care of it." (Tr. 973).

l.) Failure to address Rosenbaum's stating, "You know what Sharon is telling you is true." (Tr. 932).

(For all the above, see Proposition of Law No. X).

66.) Failure to address Rosenbaum's remarks to jurors not warranted by the evidence and designed to arose prejudice by attacking the defendant and defense counsel.

a.) Failure to address Rosenbaum's stating, "They are going to want to say that his testimony was purchased." (Tr. 924).

b.) Failure to address Rosenbaum's stating, "So it is unfair for Mr. Cleary or anyone else to suggest that Michael got a break to purchase his testimony..." (Tr. 925-26).

c.) Failure to address Rosenbaum's stating, "The only way for him to escape his misdeeds is for him to convince you that these people are crackheads, some of the state's witnesses are felons or their testimony was purchased." (Tr. 922).

(For all the above, see Proposition of Law No. X).

67.) Failure to address Rosenbaum's statements to jury during closing arguments that this was a conspiracy case.

a.) Failure to address Rosenbaum's stating, "In a conspiracy trial like this..." (Tr. 920).

b.) Failure to address Rosenbaum's stating, "The birth



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of a conspiracy..." (Tr. 920).

c.) Failure to address Rosenbaum's stating, "If someone goes about trying to carry out a conspiracy to commit a crime..." (Tr. 920).

d.) Failure to address Rosenbaum's stating, "If the state is going to illustrate a conspiracy..." (Tr. 921).

e.) Failure to address Rosenbaum's stating, "They were chosen by the defendant and his co-conspiraters to participate." (Tr. 921).

(For all the above, see Proposition of Law No. XVI).

68.) Failure to address the personal claims made by the prosecutor against the defendant, based upon allegations in the prosecutor's own mind.

a.) Failure to address Rosenbaum's claim that defendant wanted to help his source. (Tr. 974).

b.) Failure to address Rosenbaum's claim that Raymond Smith was defendant's drug supplier. (Tr. 974).

c.) Failure to address Rosenbaum's claim that defendant helped keep this drug empire going." (Tr. 974).

(For all the above, see Proposition of Law No. XVI).

69.) Failure to address acts attributed to the defendant by the prosecutor where no evidence or testimony was given to support such claims.

a.) Failure to address Rosenbaum's stating that "These pictures tell you what this man did alone is enough right here in this incident to kill him." (Tr. 975).

b.) Failure to address Rosenbaum's stating that, "These photographs demonstrated his handy work and they are gruesome." (Tr. 982).

c.) Failure to address Rosenbaum's stating that, "Shows there was planning for a period of months and that this was kicked around until they finalized it." (Tr. 976).

(For all the above, see Proposition of Law No. XVI).

70.) Failure to address Rosenbaum's false claims during closing arguments that a number of people committed acts which could only have been committed by a single



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individual. (See Proposition of Law No. XVI).

71.) Failure to address Rosenbaum's stating, "No, they shot him in the mouth, they cut his throat, they stomped his head and ran the car into him three times." (Tr. 977). (See Proposition of Law No. XVI).

72). Failure to address Rosenbaum's false statement that patrolman Homoki linked defendant to crime. (See Proposition of Law No. XVI). (Tr. 977-78).

73.) Failure to address Rosenbaum's false statement that Carl Hartman linked defendant to crime. (See Proposition of Law No. XVI). (Tr. 977-78).

74.) Failure to address Rosenbaum's false statement that Sharon Hopkins linked defendant to the crime. (See Proposition of Law No. XVI). (Tr. 977-78).

75.) Failure to address Rosenbaum's false statement that Terry Hopkins linked defendant to the crime. (See Proposition of Law No. XVI). (Tr. 977-78).

76.) Failure to address Rosenbaum's false statement that Raymond Smith called defendant from restaurant when no such evidence was introduced. (See Proposition of Law No. XVI).

77.) Failure to fully address the point of fact that the evidence adduced throughout trial was woefully insufficient to sustain a conviction against the defendant. (See Proposition of Law No. XV)

78.) Failure to address Rosenbaum's false statement that coroner's photographs proved defendant had committed the murder. (See Proposition of Law No. XVI).

79.) Failure to address Rosenbaum's false claims that the coroner's proved to be the defendant's handiwork. (See Proposition of Law No. XVI).

80.) Failure to present a meritorious brief to the district court for a meaningful review of the more serious errors which occurred in the guilt phase. (See Proposition of Law No. XIX).

81.) Appellate counsel Smith's calculated decision to not raise numerous claims with merit so as to prevent the district court from overturning this conviction. (See Proposition of Law No. XIX).

82.) Appellate counsel Smith's calculated decision to obstruct justice and deprive defendant of a meaningful review by the district court. (See Proposition of



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Law No. XIX).

Although the United States Supreme Court has not set forth a definitive standard for judging the effectiveness of appellate counsel, Evitts, supra, at 392, courts which have considered this issue are in accord on several points. Alford v. Wainwright, 725 F.2d 1282 (C.A. 11, 1984); Myler v. Alabama, 671 F.2d 1299, 1300 (C.A. 11 1982).

The level of assistance rendered to appellant must be evaluate from the perspective of counsel, taking into account all circumstances of the case, but only as these circumstances were known to counsel. Sullivan v. Wainwright, 695 F.2d 1306, 1309 (C.A. 11 1983). Counsel is not obligated to raise issues that have no merit. Anders v. California, 386 U.S. 738 (1967). All ineffectiveness claims of appellate counsel must be decided upon the facts of each case and the individual merits of each claim not raised. Alford, supra, at 1291; Cunningham v. Henderson, 725 F.2d 32, 36 (C.A. 2, 1984); Mendiola v. Estelle, 635 F.2d 467 (C.A. 5, 1981).

In this case the numerous claims of ineffective assistance of appellate counsel provided to defendant Jalowiec by Patricia Smith are clearly substantiated through the claims presented in this Proposition of Law. There can be no denying the fact that a greater majority of claims cited by the defendant do have substantial merit. Yet Smith refused to raise them or did so in such a haphazardly manner as to make them harmless error in the eyes of the district court which reviewed that merit brief.



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This being a direct appeal as of right of a death penalty conviction and sentence, there can be no hindsighted claims by Smith that she had not read the transcript of these proceedings against this defendant. And so, one must conclude that Smith's assistance to the defendant was lacking any degree of effectiveness and as such, was and is to be looked upon as having been deliberately ineffective.

Appellate counsel Smith is guilty of violating the Constitutional rights of due process with regard to defendant Jalowiec and his first direct appeal as of right in this death penalty appeal. Former counsel's deliberate and calculated failure to bring the district appellate court's attention to the foregoing well established criminal law issues fell well below the tolerable range of competence demanded in appeals of capital convictions and guaranteed to any lesser appeals.

Each of the numerous errors cited throughout this Proposition of Law was not raised by former appellate counsel, Patricia Smith. Each of the errors which former counsel failed to raise on defendant's first appeal as of right did in fact prejudice Mr. Jalowiec. The failure by Smith to raise these very numerous meritorious claims has also undermined the confidence placed upon meaningful reviews by appellate courts.

When such a large quantity of trial errors have been overlooked and not placed before the review court within a merit brief, there certainly cannot be any reliability placed upon the defendant's conviction of a capital crime nor upon his death sentence. Mr. Jalowiec has been denied his rights to a meaningful



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review of his conviction by the Ninth District Court of Appeals, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Section 2, 9 and 16 of the Ohio Constitution. There was absolutely no reasonable or professional judgment exercised by former appellate counsel in presenting Mr. Jalowiec's appeal to the court of appeals. Jones, supra at 751, 755.

When prejudicial errors such as these are not raised on appeal due to counsel's deliberate and calculated ineffectiveness, the defendant is most assuredly denied a meaningful review of his capital trial and conviction. It is for this reason that Mr. Jalowiec's convictions and sentence of death should be reversed and remanded to the County of Cuyahoga.



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PROPOSITION OF LAW NO. XX

**DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN HIS APPEAL AS OF RIGHT TO THE OHIO SUPREME COURT AS GUARANTEED BY THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SECTION 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION AND O.R.C. 2929.05.**

Defendant Jalowiec was denied his Constitutional Rights to have effective assistance of appellant counsel in his appeal as of right to this Supreme Court of Ohio in his direct appeal of a death penalty conviction. This is an outrageous and deliberately mockery of justice and due process as guaranteed by the 6th and 14th Amendments to the United States Constitution as well as Sections 10 and 16, Article I of the Ohio Constitution and Ohio Revised Code Statue §2929.05.

The defendant in this direct appeal of right has been maliciously treated by the lower appellate district court in its appointment of two incompetent and wholly ineffective appellate counsel to represent him in his claims before this Honorable Supreme Court. Why defendant Jalowiec has been singled out for such a showing of contempt is certainly beyond the scope of reasonable minds and logic. This Supreme Court has placed a very great importance on the meaningful appellate review of capital cases required by O.R.C. §2929.05. The meaningfulness of the review is directly dependent on the effectiveness of appellate counsel. Once a capital defendant is convicted and sentenced to death, his appeals as of right becomes critical. State v. Maurer, 15 Ohio St.3d 239, 246-47 (1984).

All ineffectiveness claims against appellate counsel must



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be decided upon the facts of each case as well as the individual merits of each claim that was not raised. Alford v. Wainwright, 725 F.2d 1291 (C.A. 11, 1984); Cunningham v. Henderson, 725 F.2d 32, 36 (C.A. 2, 1984); Mendiola v. Estelle, 635 F.2d 487 (C.A. 5, 1981). One thing, however, is certain: if appellate counsel fail to raise meritorious issues, the default can cost the capitally sentenced client his life. Smith v. Murray, 477 U.S. 527 (1986). In the present death penalty direct appeal as of right to this Court, Jalowiec did not receive at any time, even the pretense of effective appellate representation as this Honorable Court is very much aware. The defendant prays this Court will indulge him in a very quick review of the highly deficient representation forced upon this defendant by the Ninth District Court of Appeals for Lorain County.

Attorney Patricia A. Millhoff #0013835 and Nathan Ray #0041570 were appointed as appellate counsel on April 24, 1998 by the Ninth District Court of Appeals to represent defendant Jalowiec competently and legally in his death penalty appeal as of right to this Supreme Court of Ohio. Although court-appointed in April, these appellate counsel found no compelling reason to file the mandatory notice of appeal to this Honorable Court until June 1, 1998 as the Court's Docket records of case No. 98-1074 will verify. Then, on July 22, 1998, Millhoff and Ray filed for a time extension which this Honorable Court granted, moving the due date for defendant's merit brief back to August 6, 1998. (See S.Ct. Docket for case No. 98-1074).

As this Court is well aware, nothing further was heard



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from either Millhoff or Ray and the due date for the filing of Jalowiec's merit brief came and went. As the middle of August approached, these incompetent attorneys finally decided they had bilked the State's coffers sufficiently on this defendant's behalf and so they filed a very untimely motion to withdraw as appellate counsel for defendant. (See S.Ct. Docket for Case No. 98-1074).

Leaving defendant Jalowiec in moral danger of forfeiting his life and totally losing his appeal as of right, Millhoff and Ray decided to group together a quantity of paragraphs and refer to the sum total as some sort of belated merit brief, representative of defendant Jalowiec. Perhaps Millhoff and Ray are foolish enough to believe that this grouping of issues and fraudulent claims can in come way offer to them a degree of legal protection from all levels of recrimination in the future.

This defendant has been sent a copy of this so called merit brief and finds it very disturbing as well as a total misrepresentation of the documented claims and issues to be presented in the true and accurate merit brief, which this defendant has prepared pro se from the trial court's record of the criminal proceedings, which are now being appealed to this Honorable Court.

As this Court is aware, appellants through their effective or even ineffective counsel, present their various meritorious issues in the order of most importance. That is to say, generally, those claims and/or issues which are deemed to be the strongest and most easily proved are placed in front of



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the weaker ones in a merit brief. In taking this point for granted, Millhoff and Ray are attempting to destroy the very foundations of the legal system in Ohio and make certain fools out of the Justices on this Honorable Supreme Court with their attempts to have this Court accept their highly insulting paperwork as the true merit brief in defendant Jalowiec's direct appeal of right to this Court in this death penalty appeal.

The so called brief, recently and hurriedly put together, can better be described by breaking it down into the groupings Millhoff and Ray are referring to as actual chapters. They show a listing of 13 chapters in their Table of Contents.

To begin with, defendant believes that Both Millhoff and Ray must have skipped all their law classes having to do with the preparation and composing of briefs in general. They have grouped together a grand total of nine paragraphs which they have entitled the statement of facts. However, a quick, cursory scanning of this section clearly shows that the last four paragraphs are actually summarizing a statement of the case itself. The first paragraph has absolutely nothing to do with the Jalowiec case and is in fact, a shortened version of a alleged drug purchase by the victim from the Smith family at least six months prior to the victim being found dead in Cleveland, Ohio. This was an unsubstantiated allegation simply because no one was ever tried for this alleged drug purchase and a police officer related this incident as pure, speculative hearsay at this defendant's trial. Paragraph two, three and four are merely summation of testimony given by several of the



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state's witnesses who were completely contradicted by the rest of the state's witnesses. The fifth and final paragraph is composed of two sentences, short and to the point: defendant Jalowiec was not linked to the murder.

Chapter 1 is an affront and an insult to decent and ethical lawyers everywhere. It is also a mockery of justice. Millhoff and Ray are blatantly lying and there is no polite manner in which to describe this. They are falsely claiming that the state entered into evidence two taped confessions of a co-defendant and that the jury then listened to them and used them in their guilt phase deliberations. This is simply untrue. Millhoff, in attempting to force her brief upon this Honorable Court, was trying to have this Court believe that existing in evidence were State's Exhibits 11-A and 11-B. She then goes on about the confrontational clause of the U.S.U Constitutional Sixth Amendment. Unfortunately for her, one only has to look at page iii of the trial transcript in this case and one will note that the words, "This exhibit was not used in this trial" appear under the description heading Exhibits.

Chapter 2, while listing various cites of hearsay testimony, has missed the point by then erroneously arguing on the grounds that they were statements made to various witnesses by a co-defendant, rather then using the inadmissible hearsay argument itself.

Chapter 4 is quite meaningless. Millhoff claims that actual jurors who were seated on the Jalowiec jury had in fact, viewed the defendant in shackles. Not only was the defendant not wearing



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shackles and the voir dire of individuals had just commenced, but there is nothing in the record which even suggests that members of the jury pool for this trial were on the scene - as Millhoff would have realized, had she read through the rest of the trial record.

Chapter 5 is nothing less than an insult to the intelligence of this Honorable Court. The claim is ineffective assistance of trial counsel, it is four and a half pages in length, cites all of the governing case law for the claim but Millhoff and Ray decided erroneously not to cite even one, single example of the more than one hundred and fifteen instances documented throughout the trial transcript.

In Chapter 6, again Millhoff and Ray skirt around the issue when they make their claims regarding the dismissal of jurors for cause being applied incorrectly. They not only do not brief a single word about the five prospective jurors who should have been dismissed for cause and were not, but instead they cite only five prospectives who were dismissed and even then, they misnamed one of the five, Buci for Buck on page 30.

Chapters 7, 8, 9, 10, 11, 11#3, 12, and 13 are all included to waste the valuable time of this very busy Honorable Court, as being all frivolous arguments on mitigation points.

Chapter 3 is decently written - as far as it goes. Yet once again, this chapter also falls woefully short of the claimed objective. In this case, it is a very poor imitation of defendant's Proposition of Law II and XV. Here again Millhoff and Ray have attempted to make it seem as thought they knew



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what they were doing. In this instance, counsel claimed this chapter was to be an argument on the insufficiency of the evidence, yet the contents in chief deal with venue. As usual, Millhoff and Ray erroneously choose to omit any actual cites which would have supported their positions: both under the topic of insufficiency of the evidence. (Tr. 718, 733, 734, 735, 736, 738, 834, 843; Depo. 49, 51, 66, 70; Tr. 732, 733, 815, 816; Depo. 11, 23-24, 53, 54, 55, 86-87). and under the topic of venue (Tr. 611, 612, 783-84, 810, 815, 817, 818; Depo. 12, 24, 54, 57, 59-60, 62, 87, 88).

Their second Chapter 11 is identical to Chapter 5 in that once more, Millhoff and Ray present various case law decisions to argue against the admitting into evidence of various State's Exhibits which had little or no probative value and, as in Chapter 5, they elect erroneously not to cite the transcript of give any actual examples for the Court to consider.

All in all this so called brief and these two attorneys have no meritorious qualities whatsoever. Aside from the ludicrous contents of this grouping of pages, it seems there are no less than three different chapter eleven's, one of which is an exact duplicate of chapter twelve, minus of course the number itself.

The Due Process Clause of the Fourteenth Amendment guarantees the effective assistance of counsel on a criminal appeal as of right. Evitts v. Lucey, 469 U.S. 387 (1985). This guaranteed right of effective assistance of appellate counsel is manifested a hundredfold in any appeal of right of a death



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penalty case. While appellant counsel has no constitutional duty to raise every single non-frivolous issue requested by a criminal defendant, counsel must still exercise reasonable professional judgment in the presenting of the appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). Concurring in Jones, Supreme Court Justice Blackmun wrote, appellate counsel may choose which issues to appeal as long as his performance is "'within the range of competence demanded of attorneys in criminal cases' and assures the indigent defendant an adequate opportunity to present his claims fairly in the context of the state's appellate process." Jones, supra, at 755 (Blakmun, J., concurring).

Canon 5 of the Code of Professional Responsibility has been violated by Millhoff and Ray in their grossly defective and highly ineffective representation of defendant Jalowiec in his death penalty appeal as of right to this Supreme Court. "A lawyer should exercise independent professional judgment on behalf of a client." (Code of Prof. Resp. Cannon 5). EC-5.1, Loyalty to Clients, states as follows:

> The professional judgment of a lawyer should be exercised, within the bounds of law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, not the desires of third persons should be permitted to dilute his loyalty to his client.

Clearly in this death penalty appeal as of right, the evidence supports defendant's charges that Millhoff and Ray colluded to provide ineffective assistance of counsel of the



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highest order to Jalowiec. Not to even bother to file a merit brief on behalf of the defendant was unconscionable. But then, to let it be known that their intentions were to submit a merit brief lacking any meritorious issues for review is criminal. (Emphasis added). There was absolutely no reasonable or professional judgment here on the part of either Millhoff or Ray.

The failure to present a meritorious issue for review is also ineffective assistance of appellate counsel. People v. Bowen, 791 F.2d 861 (11th Cir. 1986); Matire v. Wainwright, 811 F.2d 430 (11th Cir. 1939); Rogan v. Dugger, 544 So.2d 1052 (Fla. Dist. 1 ct. Ap. 1989). The level of assistance rendered must be evaluated from the perspective of counsel, taking into account all circumstances of the case, but only as those circumstances were known to counsel. Sullivan v. Wainwright, 695 F.2d 1306, 1309 (C.A. 11, 1983). Counsel is not obligated to raise issues that have no merit. Anders v. California, 386 U.S. 738 (1967). This brief contains issues of the highest levels of merit and these issues are not to be found fully briefed in any portion of the Millhoff/Ray "brief".

This Honorable Court may be loath to recall that a black mark had been found out with regards to the taking of the Ohio State Bar Examination and the discovery that answers were being sold to numerous examinees prior to the actual examiner's administering of the examinations. This defendant humbly prays this Court's gracious indulgence in order to make mention of this point. However, the defendant is now of the opinion that



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perhaps Millhoff and Ray are two of the culprits who managed to escape detection in connection of that aforementioned scandal, based upon and from the deficient performance these two appellate counsel provided to Defendant Jalowiec.

This falls well below the normal guidelines of ineffective assistance of counsel and should be construed as criminal acts in the eyes of this Honorable Supreme Court. Defendant requests that this Honorable Court seriously consider initiating disbarment proceedings against both Patricia A. Millhoff and Nathan Ray for their outrageously ineffective assistance to this defendant. At the very least, Millhoff and Ray should have their licenses to practice law in this state suspended; pending an order from this Court for both of them to retake the Ohio bar examinations. In any event, this Supreme Court should overturn the defendant's conviction and sentence in the interests of justice, based upon the meritorious claims contained throughout the first seventeen Proposition of Law to be found within defendant's pro se merit brief.



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## CONCLUSION

Defendant Jalowiec humbly asks this Court's forgiveness and understanding for the inability to afford this Court the opportunity to review the full record. It was not possible to include the gruesom picture exhibits and other relevant data due to appellate counsel's refusal to provide defendant his full and complete record of proceedings. The defendant prays this Honorable Court's indulgence in this matter. As this is defendant Jalowiec's appeal to a capital conviction, this pro se merit brief was the only manner to insure that all of the meritous issues would be addressed in this, his last, direct appeal.

As stated in each and every proposition of law in this brief, this defendant by far did not receive a fair trial. It was the court's duty to see that Mr. Jalowiec's constitutional rights were not violated, it was also trial counsel's duty to provide the defendant with effective assistance to defend and to uphold his innocence. But due to Grunda's ongoing, attorney/client relation with states Witness Terry Hopkins, at the time of this defendant's trial, defense counsel Grunda did not fufill his obligations to the defendant.

It is this Honorable Court's duty to overturn Mr. Jalowiec's conviction and provide him with a new trial. This pro se merit brief supports each error with cites to each instance of misconduct by the prosecutor, judge and trial counsel. Mr. Jalowiec was denied the rights afforded to him through the State and Federal Constitutions.



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Prosecutor Rosenbaum deliberately lied to this jury about the mandatory sentencing; Rosenbaum lied to this jury about this being a conspiracy; and Rosenbaum vouched for the perjured testimony of various state witnesses. See Proposition of Law IV, VII, X. The trial court refused to make legal rulings where required to do so by the Constitutions and the Rules of Evidence and Criminal Procedures. See Proposition of Law II, III, IV, V, VIII, XI, XII. And finally, defense counsel permitted many instances of the misconduct by the prosecutor to be entered into evidence in front of the jurors. See Proposition of Law IV, V, VI, IX, X, XI, XII.

These instances of plain error show a clear pattern of prejudicial and biased conduct on the parts of the court and prosecutor Rosenbaum permitting the entire trial. This requires a new trial be ordered for Jalowiec. The Judgment and sentence under review must be reversed in the interest of justice.

Stanley E. Jalowiec

STANLEY E. JALOWIEC
APPELLANT PRO SE
MAN.C.I. #321-712
POST OFFICE BOX 788
MANSFIELD, OHIO 44901



Case No. 08-3249
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APPENDIX

COURT OF APPEALS
FILED
LORAIN COUNTY
1999 AUG 18 P 12: 11
CLERK OF COURTS
DONALD J. ROTHGERY
9th APPELLATE DISTRICT

STATE OF OHIO )
)ss:
COUNTY OF LORAIN )

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO )
)
Appellee )
)
v. )
)
STANLEY E. JALOWIEC )
)
Appellant )

C.A. NO. 96CA006445

JOURNAL ENTRY

The appellant has moved, pursuant to App.R. 26(B), to reopen his appeal. This Court issued its decision on April 15, 1998. The appellant's application for reopening was filed on July 8, 1999. The appellee has responded to the motion.

App.R. 26(B)(1) states in relevant part: "An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from the journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." The appellant's application reopening should have been filed on or before July 14, 1998. The appellant states that he did not timely file the notice of appeal because (1) this Court did not appoint counsel to assist the appellant in preparing his application to reopen prior to issuing our decision in this matter, and (2) counsel representing the appellant before the Ohio Supreme Court did not assist him in preparing his application to reopen, instead favoring the presentation of such issues before the Ohio Supreme Court.

The motion is denied. The court finds that the appellant has failed to set forth sufficient reasons for having failed to file his application to reopen his appeal. The right to counsel does not attach in an application for reopening unless the application is granted. App.R. 26(B)(6)(a).

Appendix "A"

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Judge

Judge

Judge

cc: Gregory A. White, Prosecuting Attorney, 226 Middle Ave., Elyria, OH 44035.

Stanley E. Jalowiec, #321-712, P.O. Box 788, Mansfield, OH 44901.

8.12bt



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Jalowiec v. Bradshaw
Warden's Appendix Pg. 5058

RUN DATE: 06/09/98 C O M M O N P L E A S C O U R T RUN TIME: 2:08
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. HOPKINS CASE NO. 94CR045662
ACTION: CRIMINAL FILED: 7/12/94
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
TERRY MICHAEL HOPKINS
3061 ELYRIA AVE.
LORAIN OH
SSN: [redacted]
DOB:
RACE/SEX: W/MALE
BOND: $15,000 CASH
MUNI CT #: LORAIN MUNI 94 CRA 2393

ATTORNEY(S):

JOSEPH R GRUNDA
522 BROADWAY
LORAIN, OHIO 44052

JOSEPH C GRUNDA
522 BROADWAY
LORAIN, OHIO 44052

**********

| DATE | TYPE | DESCRIPTION |
|---|---|---|
| 7/12/94 | TRANSCRIPT | TRANSCRIPT FILED. FROM LORAIN MUNICIPAL COURT (2) 94 CRA 2393 - AGGRAVATED BURGLARY, ATTEMPTED FELONIOUS ASSAULT 94 CRB 2394 - DOMESTIC VIOLENCE BOND SET AT $15,000.00 CASH. NOT POSTED. COMMITTED. |
| 9/13/94 | INDICTMENT | INDICTMENT FILED. SUMMONS W/COPY OF INDICTMENT ISSUED TO LORAIN COUNTY SHERIFF. INDICTMENT FOR AGGRAVATED BURGLARY, 2911.11(A)93); ATTEMPTED FELONIOUS ASSAULT, 2923.02(A)/2903.11(A)(1); DOMESTIC VIOLENCE, 291925(A); CRIMINAL DAMAGING, 2909.06(A)(1) |
| 9/14/94 | ARRNMENT. | DEFENDANT ARRAIGNED. WAIVED STATUTORY 24 HOUR SERVICE REQUIREMENT OF INDICTMENT. WAIVED READING OF INDICTMENT. ENTERED PLEA OF NOT GUILTY. BOND CONT'D. CASE ASSIGNED TO JUDGE GLAVAS. PRE-TRIAL SET FOR 9/19/94 AT 8:30 A.M. (KJG) |

Appendix B
B1



Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 5059

STYLE: OHIO VS. HOPKINS CASE NO. 94CR045662
ACTION: CRIMINAL FILED: 7/12/94
JUDGE : KOSMA J. GLAVAS
**********

VOLUME # 683 PAGE # 332

| | | |
|---|---|---|
| 9/14/94 | ATTY APPT | IT APPEARING DEFENDANT IS INDIGENT, THE COURT HEREBY APPOINTS AS COUNSEL FOR DEFENDANT ATTORNEY JOSEPH C. GRUNDA. |
| 9/20/94 | (KJG) | FIRST PRE TRIAL HAD . DEFT DOES REQUEST DISCOVERY AND BILL OF PARTICULARS. PROSECUTOR TO PROVIDE DISCOVERY AND BILL OF PARTICULARS ON OR BEFORE 10/3/94. DEFT TO PROVIDE PROSECUTOR WITH DISCOVERY ON OR BEFORE 10/10/94. ALL MOTIONS SHALL BE FILED ON OR BEFORE 10/10/94. CASE IS SET FOR HEARING(S) ON MOTION(S) AND SECOND PRE-TRIAL ON 10/17/94 AT 8:30 AM. DEFT WAIVES STATUTORY TIME PURSUANT TO R.C. 2945.71 ET SEQ. VOL.684 PAGE.278 |
| 9/21/94 | RETURN | SHERIFF'S RETURN - I MADE PERSONAL SERVICE ON DEFENDANT ON SEPTEMBER 14, 1994, MARTIN J MAHONY SHERIFF |
| 10/04/94 | FILING | BILL OF PARTICULARS FILED BY STATE |
| 10/04/94 | FILING | DISCOVERY FILED BY STATE |
| /07/94 | (KJG) | UPON REQUEST OF DEFENSE COUNSEL, PRETRIAL SCHEDULED FOR 10/17/94 IS HEREBY RESCHEDULED TO 10/24/94 AT 8:30 A.M. VOL 687 PAGE 216 |
| 10/24/94 | PLEA/WAIVE | PLEA OF GUILTY, WAIVER OF RIGHTS FILED. |
| 10/24/94 | PLEA | DEFENDANT IN COURT WITH COUNSEL, WITHDRAWS FORMER PLEA OF NOT GUILTY AND ENTERS PLEA OF GUILTY TO ATTEMPTED AGG BURG, ATTEMPT FELONIOUS ASSAULT, DOMESTIC VIOLENCE, CRIMINAL DAMAGING, O.R.C. SECTION 2923.02(A); 2911.11(A)(3) AFF. F-2 2923.02(A)/2903.11(A)(1) AGG F-3, 2919.25 (A); 2909.06 (A)(1) IN THE DEGREE, WHICH PLEA IS ACCEPTED. DEFENDANT IS REFERRED TO THE LORAIN COUNTY ADULT PROBATION DEPARTMENT FOR A PRE-SENTENCE EVALUATION AND REPORT; BOND RESET TO $2,500.00 CASH. (KJG) VOL 689 PAGE 267 |
| 10/25/94 | BOND | BOND POSTED: $2,500.00 SURETY BOND POSTED BY BERG BAIL BONDING. |
| 10/25/94 | WRIT | WARRANT TO DISCHARGE ISSUED TO LORAIN COUNTY SHERIFF |
| 12/12/94 | (KJG) | AT REQUEST OF STATE, A BOND REVOCATION HEARING IS SET FOR 12-13-94 AT 8:30 A.M. VOL 696 PAGE 238 |

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STYLE: OHIO VS. HOPKINS CASE NO. 94CR045662
ACTION: CRIMINAL FILED: 7/12/94
JUDGE : KOSMA J. GLAVAS
**********

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|---|---|
| 12/13/94 (KJG) | AT THE REQUEST OF THE STATE, THE HEARING SET FOR TODAY ON BOND REVOCATION IS HEREBY CANCELLED. THE COURTS PRIOR NO CONTACT ORDER BETWEEN THE DEFENDANT AND TEMEKA FOGLYANO IS HEREBY TERMINATED. DEFENDANT SHALL BE ABLE TO HAVE CONTACT FOR PURPOSES OF VISITATION WITH THE PARTIES MINOR CHILD.<br>VOL 696 PAGE 289 |
| 1/06/95 REPORT | PRE-SENTENCE REPORT FILED. |
| 1/26/95 SENTENCING | DEFENDANT IN COURT WITH COUNSEL FOR SENTENCING. DEFENDANT SENTENCED TO<br>5-15 YEARS IN LCI ON COUNT 1. 3-10 YEARS IN LCI ON COUNT 2.<br>6 MONTHS IN LCI AND PAY FINE OF $500.00 ON COUNT 3.<br>90 DAYS IN LCI AND PAY FINE OF 250.00 ON COUNT 4.<br>SEE JOURNAL. (KJG)<br>VOLUME 702 PAGE 380 |
| 1/30/95 SENT/CONV | C/C OF INDICTMENT, JOURNAL ENTRY, AND SENTENCE ISSUED TO LORAIN COUNTY SHERIFF ALONG WITH WARRANT TO CONVEY TO: LORAIN CORRECTIONAL INSTITUTION. |
| 2/01/95 RETURN | SHERIFF'S RETURN - I CONVEYED THE DEFENDANT TO PLACE DESIGNATED ON<br>JANUARY 31, 1995, MARTIN J MAHONY SHERIFF |
| 8/04/95 MOTION | MOTION FILED<br>BY DEFT FOR SHOCK PROBATION |
| 8/11/95 FILING | STATE RESPONSE TO DEFT'S MOTION FOR SHOCK PROBATION FILED |
| 9/12/95 (KJG) | MOTION FOR PROBATION UNDER R.C., SECTION 2947.061 IS HEREBY GRANTED. DEFT., TERRY HOPKINS, #302-015, IS PLACED ON PROBATION FOR A PERIOD OF 5 YEARS FROM AND AFTER THE DATE OF THIS JUDGMENT ENTRY. DEFT. SHALL PAY COSTS OF THIS CASE TO THE CLERK OF THIS COURT WITHIN 60 DAYS. DEFT. SHALL ASSUME COURT-APPOINTED ATTORNEY FEES WITHIN 18 MONTHS. DEFT. TO PAY FINE IN THE AMT. OF $750.00 PAYABLE IN MONTHLY PAYMENTS OF $75.00 PER MONTH COMMENCING 11/1/95 UNTIL THE ENTIRE BALANCE IS PAID IN FULL. DEFT. TO BE PLACED IN A HALFWAY HOUSE FACILITY, AS DEEMED APPROPRIATE BY THE PROBATION DEPT. THE SUPERINTENDENT OF ALLEN CORRECTIONAL INSTITUTION/LIMA, OHIO, IS HEREBY DIRECTED TO RELEASE THE DEFT. TO THE SHERIFF OF LORAIN COUNTY, OHIO OR HIS AUTHORIZED DEPUTY, FOR TRANSPORTATION TO LORAIN COUNTY ON OR ABOUT MONDAY, 9/25/95.<br>DEFT. TO MAKE RESTITUTION WITHIN 12 MONTHS. SEE JOURNAL.<br>VOLUME 725 PAGE 854 |

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Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 5061

STYLE: OHIO VS. HOPKINS CASE NO. 94CR045662
ACTION: CRIMINAL FILED: 7/12/94
JUDGE : KOSMA J. GLAVAS
**********

| | |
|---|---|
| 9/12/95 WARRANT | WARRANT TO CONVEY TO LORAIN COUNTY |
| 9/26/95 RETURN | SHERIFF'S RETURN - I CONVEYED THE DEFENDANT TO PLACE DESIGNATED ON SEPTEMBER 21, 1995, MARITN J MAHONY SHERIFF |
| 10/19/95 ENTRY | DEFENDANT HAVING BEEN SENTENCED & HAVING BEEN ORDERED TO REIMBURSE COURT APPOINTED ATTORNEY FEES, THE CLERK SHALL TAX SAID SUM AS COSTS. DATE OF SENTENCING & AMOUNT DUE: SENTENCE ON OCTOBER 19,1995. ATTORNEY FEES ARE $300.00. (KJG) VOL 728 PAGE 463 |
| 5/15/96 (KJG) | AT THE REQUEST OF ADULT PROBATION DEPT, ANITA UPTON P.O. A PROBABLE CAUSE HEARING IS SET FOR 6/24/96 AT 8:30 AM. JOURNAL 741 PAGE 1727 |
| 6/25/96 (KJG) | DEFT IN COURT WITH COUNSEL FOR PROBABLE CAUSE HEARING ON PROBATION VIOLATION. DEFT WAIVES HEARING AND ADMITS PROBABLE CAUSE. MERTIS SET FOR 9/23/96 AT 8:30 AM. BOND SET AT $2,500. PERSONAL CONDITION OF BOND IS 100 HOURS OF COMMUNTIY SERVICE. JOURNAL 744 PAGE 846 |
| 9/24/96 ENTRY | BOND CONVERTED TO PERSONAL ON CONDITION THAT DEFENDANT COOPERATE WITH EFFORTS TO PLACE HIM IN A RESIDENTIAL DRUG TREATMENT FACILITY. MERITS HEARING CONTINUED TO 11-25-96 AT 8:30 A.M. JOURNAL 750, PAGE 1273 |
| 11/25/96 (KJG) | DEFT IN COURT WITH COUNSEL FOR MERITS HEARING. HEARING CONTINUED. MERITS HEARING RESET FOR 2/3/97 AT 8:30 AM. DEFT TO ENROLL IN NEXT ANGER/MANAGEMENT COUNSELING SESSION. VOL 754 PAGE 1097 |
| 1/10/97 (KJG) | AT THE REQUEST OF ADULT PROBATION AND AS THE DEFENDANT HAS FAILED TO REPORT TO HIS PROBATION OFFICER AND AS HIS WHEREABOUTS ARE PRESENTLY UNKNOWN, THE DEFENDANT IS FOUND TO BE IN VIOLATION OF HIS PROBATION. A CAPIAS IS HEREBY ORDERED FOR THE ARREST OF THE DEFENDANT AS A PROBATION VIOLATOR, AND THE RUNNING OF HIS PROBATIONARY TERM IS TOLLED. JOURNAL 757, PAGE 910 |
| 1/10/97 CAPIAS | CAPIAS ISSUED TO LORAIN COUNTY SHERIFF. |
| 2/03/97 RETURN | SHERIFF'S RETURN - I ARRESTED DEFENDANT ON FEBRUARY 1, 1997 MARTIN J. MAHONY, SHFF |



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Warden's Appendix Pg. 5062

STYLE: OHIO VS. HOPKINS CASE NO. 94CR045662
ACTION: CRIMINAL FILED: 7/12/94
JUDGE : KOSMA J. GLAVAS
**********

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|---|---|
| 2/03/97 (KJG) | DEFT IN COURT WITH COUNSEL FOR MERITS HEARING. HEARING HAD. DEFT FOUND IN VIOLATION OF PROBATION. ORIGINAL SENTENCE OF 5-15 YEARS ON COUNT 1; 3-10 YEARS ON COUNT 2; 6 MONTHS ON COUNT 3; 90 DAYS ON COUNT 4; ALL CONCURRENT IS REIMPOSED. CREDIT FOR TIME SERVED IS AWARDED. VOL. 759 PAGE 35 |
| 2/04/97 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 W/PRE-SENTENCE REPORT. |
| 2/06/97 RETURN | SHERIFF'S RETURN - I CONVEYED THE DEFENDANT TO PLACE DESIGNATED ON FEBRUARY 5, 1997. MARTIN J. MAHONY, SHERIFF |

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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

Appendix "C"



Case No. 08-3249
Jalowiec v. Bradshaw
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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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Jalowiec v. Bradshaw
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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:

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> [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.

---

[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:

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.



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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. | ) | |
| | ) | |
| STANLEY E. JALOWIEC | ) | |
| | ) | |
| Appellant | ) | JOURNAL ENTRY |

SEPARATE OPINION PURSUANT TO R.C. 2929.05(A)

Pursuant to R.C. 2929.05(A), this court certifies that it has independently reviewed the judgment in this case and the sentence of death recommended by the trial jury and imposed by the trial court, has reviewed and independently weighed all of the facts and other evidence disclosed in the record of this case, has considered the offense and the offender to determine whether the aggravating circumstance the offender was found guilty of committing outweighs the mitigating factors in this case, and has considered whether the sentence of death is inappropriate or disproportionate to the penalty imposed in similar cases.

Upon such a review, this court makes the following findings:

1) That the appellant's assignments of error, having been fully considered, are without merit and are each overruled.

2) That the evidence supports the findings by the jury that the appellant is guilty of each crime charged.

3) That the evidence supports the finding by the jury and the trial court of the existence of the aggravating circumstance of which the appellant was found guilty beyond a reasonable doubt.

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5) That upon independent review of the evidence, and upon independent weighing of the aggravated circumstance proven beyond a reasonable doubt, with the mitigating factors proven by a preponderance of the evidence, the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt.

6) That the sentence of death in this case is appropriate and is not disproportionate to the penalty imposed in similar cases within the jurisdiction of this court.

Accordingly, this court affirms the death penalty imposed on the appellant.

Lynn C. Slaby
Judge

John W. Reece
Judge

Clair E. Dickinson
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.

Jonathan E. Rosenbaum, Chief Counsel, Criminal Division, 226 Middle Avenue, 4th Floor, Elyria, Ohio 44035.

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COURT TRANSCRIPTS OF DANNY SMITH TRIAL

ST. WITNESS, OFFICER HOMOKI:
ADMITTING TO PERJURY IN JALOWIEC AND R. SMITH TRIALS
AS TO DIRECT QUOTES MADE BY DAN SMITH IN HIS PRESENCE



MR. ROSENBAUM: Objection.

A. Yes.

MR. ROSENBAUM: Objection. That's not what Ron Lally said.

Q. Let me ask the question. Is that what you testified to?

A. That Ron Lally said that.

Q. To you?

A. No.

Q. No. I'm sorry. Right, Mr. Prosecutor. I'm sorry. I'm a little confused. I got it straight. I meant to ask. Is that what Danny Smith allegedly said according to you today?

A. Yes, sir.

Q. That he said, and I want to quote it, "That punk son of a B is going to get his"?

A. Yes, sir.

Q. And that's his exact words?

A. I could not swear that that was his exact words. That was his reference.

Q. All right. What do you mean "reference"?

A. His reference was --

Q. No. What do you mean by the term "reference"?

A. Basically, that was what he was telling me.

Q. Are those his words or yours?



Appendix "D"

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A. I would not swear to you that that was his exact words.
Q. Have you previously testified in any of these cases as to his exact words, yes or no?
A. Yes. As I recall them, yes.
Q. All right. You have previously testified on two occasions, one occasion involving Raymond Smith and one versus Stanley Jaloweic, right?
A. Yes.
Q. Now, do you recall stating the following -- page 97, Mr. Prosecutor -- in a case of Raymond Smith that "What condition -- question by the prosecutor: "What condition was Danny Smith in at that time?" "Danny Smith was excited." It goes on, then there's an objection, then your answer was, "Direct statement to me was, 'That punk --' I'll say it.
THE COURT: Say it.
Q. All right. "That punk ass bitch," and he pointed at Ron Lally, "is going to get his." Is that what you testified to previously?
A. Yes, sir.
Q. All right. That you said he said "That punk ass bitch is going to get his"?
A. Yes, sir.
Q. All right. Now, that was a quote. That was a quote,



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sir?
A. Yes, sir, as I recall that was a quote.
Q. All right. And when was the trial involving Raymond Smith, when did you testify in that case?
A. It was the first trial. I couldn't tell you.
Q. All right. That was back in November of '95, right?
A. Yes, sir.
Q. And your memory of these events was better in November of '95 than it is now, right?
A. I don't think so.
Q. It's the same, huh? I'm sorry?
A. Yes, sir.
Q. You're not like most people, your memory doesn't get worse as time goes on of events that occurred a long time ago; are you like most people or not, Officer?
A. Yes, sir.
Q. So your memory will fade with time, will it not?
A. Yes, sir.
Q. That's what you testified to on November of '95, correct?
A. Yes, sir.
Q. And that was a quote, right?
A. Yes, sir.
Q. Now, do you recall testifying in a case of Stanley Jaloweic?



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ST. WITNESS, SANDRA WILLIAMS:
ADMITTING TO PERJURY IN JALOWIEC TRIAL BY ANSWERS GIVEN IN TESTIMONY AT DAN SMITH TRIAL.



it's funny or not.

BY MR. DUFF:

Q. Now, let's talk about this alleged incident in September of the '93, the 7th. You claimed there are a lot of people present during this thing, correct?

A. Yes.

Q. During this alleged threat; is that right?

A. There were four people.

Q. Four. Mike Tolvert was there, right?

A. Yes, sir.

Q. William Pierce was there, right?

A. Yes, sir.

Q. Duane Moore was there?

A. No, sir.

Q. Linda Dennis was there?

A. Yes, sir.

Q. And this was in broad daylight, right?

A. Yes, sir.

Q. And he didn't directly threaten you, did he, Danny, according to you?

A. No, he did not.

Q. He told you he was mad and upset with Ron over this thing, right?

A. Yes.

Q. Is William Pierce your son-in-law?



Appendix "E"

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A. Yes.
Q. Who is Duane Moore?
A. A friend of Rons.
Q. Okay. Linda Dennis is who?
A. My friend.
Q. How about William Pierce, he's your future son-in-law or is your son-in-law?
A. At the time he was my future son-in-law. Now --
Q. Who is he?
A. Now he's married to my daughter.
Q. What's her name?
A. Audra.
Q. Audra?
A. Yes.
Q. Was she present?
A. No.
Q. Who is Ralph Zinner?
A. It was a friend of Rons.
Q. Did you tell Detective Leiby --
MR. ROSENBAUM: Can we approach the bench?
THE COURT: Yes.
(Conference at the bench between the Court and counsel, as follows:)
MR. ROSENBAUM: This is clearly,



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COURT TRANSCRIPTS OF DANNY SMITH TRIAL

ST. WITNESS, LYNNE ALTPATER:

ADMITTING TO PERJURY IN JALOWIEC TRIAL BY ANSWERS GIVEN AT DANNY SMITH TRIAL IN SWORN TESTIMONY.



Q. I think you said it was okay to call you Lynne; is that right?
A. Yes.
Q. I think we left off -- as you recall, you had given -- can you see this, ma'am?
A. No. It doesn't matter. You would have to move it up here for me to see it, so you might as well leave it there.
Q. I can do that if you want.
A. That's fine.
Q. As you recall, to refresh your memory as to what you testified to on Friday, on 1-6-95 I think you gave a statement to Detective Leiby at your house; is that correct?
A. Uh-huh.
Q. All right. And in that statement you told him that this poison Danny asked you about, you understood it to be for cats; is that correct?
A. Yes.
Q. All right. Then at the police station, on 1-19-95, you gave another statement to Detective Leiby; is that correct?
A. Yes.
Q. And then you came to my office in October of '95 and gave a statement, right?
A. Uh-huh.



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Appendix "F"

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Q. Do you recall telling me that the poison was for cats at my office?
A. Yes.
Q. And you knew I was taping that conversation; is that correct?
A. Yes.
Q. And I told you just to tell me the truth; isn't that right?
A. Uh-huh.
Q. And do you recall me asking you, page 11, okay, "Do you know of anybody that Danny asked to do any harm to Mr. Lally?" And your answer was no at that time. Do you recall that question and answer at my office?
A. No.

MR. DUFF: All right. May I approach, Your Honor?

THE COURT: Yes.

Q. Do you see me ask you the question?

THE COURT: Would you point to the page.

MR. DUFF: I did.

THE COURT: Okay.

Q. "Do you know of anybody that Danny asked to do any harm to Mr. Lally?" And you said, "No"; is that correct?
A. Yeah, I said that.



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Q. All right. You further said that Danny was just a big clown, right?
A. Yes.
Q. And you still go along with that, that Danny's just a big clown?
A. Yes.
Q. In fact, he baby-sitted your kids, right?
A. Well, he was with them. He took them to the ice cream stand a few times.
Q. Did he watch your kids?
A. No, he never watched them.
Q. All right. Did you tell me he watched your kids?
A. I don't recall saying that.
Q. Page 18. Did you say, Mrs. Altpater, "He even watched my kids and stuff. We went to dinner together. I mean, he was just like a family member for Christ's sake." Is that what you said at my office?
A. Yeah, I said that.
Q. So he did watch your kids?
A. Well, I guess he did. He walked them to the ice cream stand.
Q. Did you tell me he watched your kids?
A. Yes.
Q. And in fact, I think you testified -- well, at the time you had this conversation with Danny about these cats,



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Jalowiec v. Bradshaw
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you weren't even, you weren't even working at the doctor's office, were you?
A. Yes.
Q. You were working at the doctor's office?
A. I believe so.
Q. All right. Do you recall telling me, page 18, "Oh, God. It was months before all that happened, months before all that happened. In fact, I didn't think I was working at the doctor's office when that happened anyway." Do you recall telling me that?
A. No, I don't recall me saying that.
Q. Do you want to read that?
A. (Reading.)
Q. Did you tell me that? That's what it indicates isn't it?
A. That's what it indicates.
Q. All right. And your testimony is that you told -- well, you would agree you told me that he wanted to get this poison because there are cats crawling on his cars; is that right?
A. Yes.
Q. Is that right?
A. Yes.
Q. If I could have a moment, Your Honor.
Now, did you tell me you didn't really know anything



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Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 5114

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| STATE OF OHIO, | : | 99-1753 |
| | : | ON APPEAL FROM THE COURT |
| Appellee, | : | OF APPEALS FOR LORAIN |
| -vs- | : | COUNTY, NINTH APPELLATE |
| | : | DISTRICT |
| STANLEY E. JALOWIEC | : | |
| | : | |
| Appellant. | : | COURT OF APPEALS |
| | : | CASE NO. 96CA006445 |

## NOTICE OF APPEAL OF APPELLANT STANLEY E. JALOWIEC

STANLEY E. JALOWIEC
MAN.C.I. #321-712
P.O. BOX 788
MANSFIELD, OHIO 44901

APPELLANT PRO SE

FILED
SEP 24 1999
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

GREGORY WHITE, ESQ.
Lorain County Prosecutor
226 Middle Avenue
Elyria, Ohio 44035

COUNSEL FOR APPELLEE,

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## NOTICE OF APPEAL OF APPELLANT STANLEY E. JALOWIEC

Appellant, Stanley E. Jalowiec, Pro Se, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment and final order of the Lorain County Court of Appeals, Ninth District, entered in the Court of Appeals Case No. 96CA006446 on the 18th day of August 1999.

This is an appeal as of right to the Ohio Supreme Court. This is an appeal as of right from affirmance of the death penalty by the Court of Appeals of Lorain County pursuant to the provisions of Article IV, Section 2 of the Ohio Constitution and the denial to allow Appellant leave to reopen his direct appeal to the Court of Appeals pursuant to App. R. 26(B)(2)(b) with "good cause" shown for going beyond the 90 days.

Stanley E. Jalowiec
Appellant Pro Se

## PROOF OF SERVICE

I hereby certify that a copy of this forgoing Notice of Appeal was sent to, Gregory White, Attorney at Law, and Jonathan E. Rosenbaum, Chief Counsel, Criminal Division, 226 Middle Avenue, 4th Floor, Elyria, Ohio 44035, on this 18th day of September 1999.

Stanley E. Jalowiec
Appellant Pro Se



Case No. 08-3249
Jalowiec v. Bradshaw
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## SERVICE

A true and accurate copy of the forgoing copy was forwarded by U.S. mail to Gregory A. White, Attorney for Plaintiff-Appellee, Lorain County Prosecutors Office, 226 Middle Avenue, Elyria, Ohio 44035, on this 7th day of November 1999.

Stanley E. Jalowiec

STANLEY E. JALOWIEC

APPELLANT PRO SE



Case No. 08-3249
Jalowiec v. Bradshaw
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IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| STATE OF OHIO, | ) | CASE NO: 99-1753 |
| Plaintiff-Appellee, | ) | |
| vs. | ) | |
| STANLEY E. JALOWIEC, | ) | |
| Defendant-Appellant. | ) | |

FILED
DEC 10 1999
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

# MERIT BRIEF OF APPELLEE

GREGORY A. WHITE
Prosecuting Attorney
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BY:
JONATHAN E. ROSENBAUM
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COUNSEL FOR APPELLEE

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APPELLANT PRO SE

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Case No. 08-3249
Jalowiec v. Bradshaw
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## STATEMENT OF THE CASE

The appellant is appealing the August 18, 1999 denial of his App.R. 26(B) Application to Reopen his Appeal. The appellant moved to reopen his appeal on July 8, 1999. The original decision overruling the issues he raised on appeal was filed by the Ninth District Court of Appeals on April 15, 1998. Therefore, the appellant waited nearly fifteen months to file his application for reopening.

Prior to filing the application for the reopening of his appeal, the appellant moved the Ninth District Court of Appeals for the appointment of counsel to represent him in the reopening of his appeal. That motion was denied.

The appellant belatedly moved the Ninth District Court of Appeals to reopen his appeal as a result of good cause premised upon the claim that his former counsel "did not raise all meritorious issues related to appellant's conviction and sentence and that former counsel did not obtain a full and complete record from the trial court; appellant further requested that counsel file a motion in the Ohio Supreme Court requesting that the proceedings be stayed, including an expedited ruling on said motion." Application at 3-4.

The Ninth District Court of Appeals denied the application for reopening (Appendix A, page 218 of Appellant's Merit Brief) because ". . . the appellant has failed to set forth sufficient reasons for having failed to file his application to reopen his appeal. The right to counsel does not attach in an application for reopening unless the application is granted. App.R. 26(B)(6)(a)." The Court of Appeals found that the appellant's reasons offered to explain why he could not have timely filed his application were insufficient.

The appellant now appeals the entry of the Ninth District Court of Appeals denying



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Jalowiec v. Bradshaw
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him his application to reopen his appeal claiming that the Ninth District abused its discretion and that basically because he is a capital litigant and a novice in the eyes of the law, the nearly fifteen month delay should be forgiven. Despite appellant's claims to the contrary, as set forth in his 209 page brief, the other issues are not properly before this court and are the subject of his direct appeal, which is pending before this court in Case No. 99-1074.



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Jalowiec v. Bradshaw
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## STATEMENT OF FACT

Appellant's Statement of the Fact is argumentative, untrue, and irrelevant since the sole issue in this case is whether or not the Court of Appeals abused its discretion in denying the appellant leave to reopen his appeal.



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Jalowiec v. Bradshaw
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## ARGUMENT AND LAW

### *RESPONSE TO PROPOSITION OF LAW NO. I*

A COURT OF APPEALS DOES NOT ABUSE ITS DISCRETION IN DENYING A LITIGANT LEAVE TO REOPEN HIS APPEAL PURSUANT TO APP.R. 26(B) WHEN THE APPLICATION TO REOPEN IS FILED NEARLY FIFTEEN MONTHS AFTER THE COURT OF APPEALS RENDERED ITS DECISION AND THE SOLE ARGUMENT ADVANCED AS TO WHY THE TIME LIMITATIONS OF APP.R. 26(B) HAVE NOT BEEN COMPLIED WITH IS BECAUSE THE APPELLANT IS NOT AN ATTORNEY AND COUNSEL WAS NOT APPOINTED TO REPRESENT HIM.

The sole contention of appellant's brief that is preserved at this time is whether the Court of Appeals has abused its discretion in denying him leave to reopen his appeal nearly fifteen months after it rendered its decision in the direct appeal. The appellant claims he could not timely comply with the ninety day limitation set forth in App.R. 26(B) because he is a novice at law, not an attorney, counsel was not appointed to represent him, and because he raised as soon as possible the issues which he claims were not raised on direct appeal by his appointed counsel.

Capital litigants are fast attempting to make all of the following constitutionally protected guarantees: a direct appeal, a reopening of that appeal, post conviction relief, an appeal from the denial of post conviction relief, and habeas corpus proceedings. Except for the direct appeal, all of these other proceedings are to be the exception rather than the rule and to be only embarked upon when the criminal litigant can demonstrate to the court that cause exists for him to avail himself of these extraordinary procedures. As a result, one is not entitled to counsel until a court is satisfied that cause exists to believe justice requires a



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reopening of the appeal, post conviction relief, and/or habeas corpus proceedings.

Therefore, the claim that counsel was denied or that the litigant himself is not an attorney nor skilled in the law is irrelevant. Indeed, perusal of the numerous assignment of errors that are attempted to be incorporated in this appeal demonstrate why this is so. Many of the issues are barred by the doctrine of *res judicata*, if not all of them, because they are or could have been raised upon direct appeal by competent counsel.

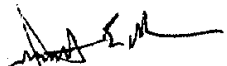
Appellant's novice status with the law has never been accepted as a reason why the limitations of App.R. 26(B) should be overlooked. **State v. Kitchen** (Cuyahoga County 1997), No. 69430, unreported, copy attached.

Despite appellant's claims to the contrary, "this court should [not] set an example for the Court of Appeals and remand the case back to the Court of Appeals for further briefing or to decide the case on the merits and remand the case back to the trial court for a new trial in order to prevent a miscarriage of justice." Appellant's brief at 34.

The remainder of appellant's issues are either not preserved for consideration at this time, raised in appellant's brief that is pending on direct appeal before this court and waiting oral argument, and/or barred by the doctrine of *res judicata*.

Respectfully submitted,

GREGORY A. WHITE
Prosecuting Attorney
Lorain County, Ohio

By: 
JONATHAN E. ROSENBAUM, #21698
Chief Counsel, Criminal Division
226 Middle Avenue, 4th Floor
Elyria, Ohio 44035
Phone: (440) 329-5393



Case No. 08-3249
Jalowiec v. Bradshaw
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PROOF OF SERVICE

A copy of the foregoing Memorandum in Opposition to Jurisdiction was sent by regular U.S. Mail to Stanley Jalowiec, #321-712, Appellant Pro Se, at PO Box 788, Mansfield, Ohio 44901, on this 1 day of December, 1999.

JONATHAN E. ROSENBAUM
Chief Counsel, Criminal Division



Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 5125

# *APPENDIX*



Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 5126

**STATE OF OHIO, Plaintiff-Appellee -vs- CHARLES KITCHEN, Defendant-Appellant**

NO. 69430
COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY
1997 Ohio App. LEXIS 2318
May 22, 1997, DATE OF ANNOUNCEMENT OF DECISION

CHARACTER OF PROCEEDING: Application for Reopening, Motion No. 79833, Lower Court No. CR 322957, Common Pleas Court.

**COUNSEL**

APPEARANCES:
For Plaintiff-Appellee: STEPHANIE TUBES JONES, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.
For Defendant-Appellant: CHARLES KITCHEN, PRO SE, P.O. Box 540, St. Clairsville, Ohio 43950.

**JUDGES**

JAMES M. PORTER, JUDGE. DAVID T. MATIA, P.J., and ANN DYKE, J., CONCUR.
**AUTHOR:** PORTER

**OPINION**

JOURNAL ENTRY AND OPINION

JAMES M. PORTER, J.,

In **State v. Kitchen,** Cuyahoga County Court of Common Pleas Case No. CR-322957, applicant was found guilty by a jury of attempted aggravated burglary. This court affirmed that judgment in **State v. Kitchen** (June 27, 1996), 1996 Ohio App. LEXIS 2713, Cuyahoga App. No. 69430, unreported. The Supreme Court of Ohio dismissed applicant's appeal for the reason that no substantial constitutional question existed and overruled applicant's motion for leave to appeal. **State v. Kitchen (1996),** 77 Ohio St. 3d 1486, 673 N.E.2d 145 [Case No. 96-1881].

On January 13, 1997, applicant filed a motion for leave to file delayed application for reopening (Motion No. 79833) pursuant to **State v. Murnahan** (1992), 63 Ohio St. 3d 60, 66, 584 N.E.2d 1204, and App. R. 26(B). The application is supported by applicant's affidavit. The state has not responded to the application.

Applicant asserts that he was denied the effective assistance of appellate counsel because his appellate counsel failed to assert various issues on appeal. We deny applicant's application for reopening. As required by App. R. 26(B) (6), the reasons for our denial follow.

Initially, we note that App. R. 26(B) (1) provides, in part: "An application for reopening shall be filed *** within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." App. R. 26(B) (2) (b) requires that an application for reopening include "a showing of good cause for untimely filing if the application is filed more

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than ninety days after journalization of the appellate judgment."

This court's decision affirming applicant's conviction was journalized on July 8, 1996. The application was filed on January 13, 1997, more than six months after journalization, after the Supreme Court dismissed applicant's appeal and clearly in excess of the ninety-day limit.

Applicant asserts in his brief (without corroboration in his affidavit):

> Access to legal materials and research utilities is extremely limited at the facility based upon it's **[sic]** new status and the fact that most materials had to be ordered and waited upon. The Defendant vigorously worked at the best of his abilities and at the fastest rate that he could articulate the **Murnahan** filing pursuant to **App. R. 26(B).** The Defendant is a layman at lay **[sic]** and without the skills of a trained attorney.

Motion for Leave to File Delayed Application for Reopening, Memorandum in Support, Preamble (capitalization and emphasis in original). In **State v. Cloud** (Oct. 10, 1995), 1995 Ohio App. LEXIS 4331, Cuyahoga App. No. 68439, unreported, reopening disallowed (Oct. 8, 1996), Motion No. 73557, the applicant averred, **inter alia,** in his affidavit that he was "unlearned in law" and that he had limited access to the prison library. This court held, however, that these circumstances did not establish good cause for the untimely filing of an application for reopening. **Id.** at 2-3 and cases cited therein.

Likewise, applicant in this case has not established good cause for the untimely filing of his application. Applicant's failure to demonstrate good cause is a sufficient basis for denying the application for reopening.

Having reviewed the arguments set forth in the application for reopening in light of the record, we hold that applicant has failed to meet his burden to demonstrate that "there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App. R. 26(B) (5).

> To establish such a claim, the [applicant] 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; **State v. Bradley** (1989), 42 Ohio St. 3d 136, 538 N.E.2d 373, cert. denied (1990), 497 U.S. 1011, 110 S. Ct. 3258, 111 L. Ed. 2d 768.

**State v. Munici** (Nov. 30, 1987), Cuyahoga App. No. 52579, unreported, reopening disallowed (Aug. 21, 1996), Motion No. 68671, at 7. Applicant cannot satisfy either prong of the **Strickland** test. We must, therefore, deny the application on the merits.

In his direct appeal, applicant's appellate counsel set forth as one of the assignments of error that applicant was denied his constitutional right to the effective assistance of counsel.

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Applicant's conviction arose out of an apparent attempt to break into a home. At trial, applicant's accomplice testified that he decided on the spur of the moment to break into the home. A police detective testified in rebuttal that applicant's accomplice had previously indicated that applicant knew of the planned break-in. Trial counsel did not request a limiting instruction regarding the testimony of the detective.

This court observed that the introduction of the prior inconsistent statement of the accomplice required a limiting instruction but applicant waived the error by failing to request the instruction. Furthermore, this court determined that failure to request the limiting instruction was not plain error because there was other evidence indicating applicant's intent. **Kitchen, supra,** at 7-9. As a consequence, this court overruled applicant's assignment of error asserting that trial counsel was ineffective.

Nevertheless, applicant contends that his appellate counsel was ineffective for restricting the basis of the ineffective assistance of trial counsel claim to the failure to request a limiting instruction.

> In regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld the appellate advocate's prerogative to decide strategy and tactics by selecting what he thinks are the most promising arguments out of all possible contentions. The court noted: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue If possible, or at most on a few key issues." **Jones v. Barnes** (1983), 463 U.S. 745, 103 S. Ct. 3308, 3313, 77 L. Ed. 2d 987. Indeed, including weaker arguments might lessen the impact of the stronger ones. Accordingly, the Court ruled that judges should not second-guess reasonable professional judgment and impose on appellate counsel the duty to raise every "colorable" issue. Such rules would disserve the goal of vigorous and effective advocacy.

**State v. Brewer** (July 3, 1995), 1995 Ohio App. LEXIS 2604, Cuyahoga App. No. 67782, unreported, reopening disallowed (Mar. 19, 1996), Motion No. 70080, at 4, discretionary appeal not allowed (1996), 76 Ohio St. 3d 1496 [Case No. 96-1011].

Applicant contends that his appellate counsel should have argued that trial counsel's "overall performance" was ineffective. In support of his position, applicant asserts that several specific aspects of trial counsel's representation were inadequate.

> Trial counsel failed to file discovery in this case, failed to investigate plausible lines of defense, failed to properly meet and question potential witnesses [including the co-defendant which alleged statements to a Detective ultimately were introduced against the Appellant at trial and effected **[sic]** the States' ability to meet one of the essential elements of the charged offense. Counsel further failed to exercise preemptory **[sic]** challenges to the potential jurrors **[sic]** when there clearly were potential jurrors **[sic]** that any competent counsel would have moved to exclude from service in a similar case. ***

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The error is particularly egregious when the transcript and record of this case are reviewed comprehensively to question trial counsel's purported trial strategy.

Memorandum in Support of Application for Reopening, at 6-7. Applicant does not, however, cite any portions of the record as supporting his claims of deficient performance by appellate counsel.

None of the grounds asserted by applicant provides a basis for concluding that his appellate counsel was ineffective. It is well-established that appellate counsel is not required to raise issues which do not arise from facts in the record. See, **e.g.: State v. Sherrills** (Apr. 5, 1990), 1990 Ohio App. LEXIS 1363, Cuyahoga App. No. 56777, unreported, reopening disallowed in part and granted in part (June 24, 1996), Motion No. 55362, at 6 (failure to pursue discovery not in the record); **State v. Townsend** (May 12, 1988), 1988 Ohio App. LEXIS 1801, Cuyahoga App. No. 53715, unreported, reopening disallowed (Apr. 19, 1994), Motion No. 50563, at 4 (failure to conduct a proper pretrial investigation).

Furthermore, the transcript reflects extensive questioning of the jurors during voir dire by the court, the assistant prosecuting attorney and applicant's trial counsel. TR. at 67-164. Neither the state nor the defense exercised peremptory challenges and none of the jurors was challenged for cause. Jurors whose backgrounds or experience suggested potential bias were questioned further. See, **e.g.,** TR. 78-79, 81-82, 83-84, 89-90, 91-94, 96-97, 99-101, 105-06, 138-39, 139-42, 150-55. We have previously determined that such an examination is a sufficient basis for denying an application for reopening in which the applicant challenged the propriety of the jury selection process. **State v. Hamblin** (Sept. 18, 1986), Cuyahoga App. No. 49975, unreported, reopening disallowed (July 6, 1994), Motion No. 40886, at 9, affirmed (1994), 71 Ohio St. 3d 291.

Accordingly, the application for reopening (Motion No. 79833) is denied.

**DAVID T. MATIA, P.J., and**

**ANN DYKE, J., CONCUR.**

JAMES M. PORTER

JUDGE

**DISPOSITION**

**JUDGMENT Application denied.**

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IN THE SUPREME COURT OF OHIO
CASE NO. 99-1753

| | | |
|---|---|---|
| **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, | : | |

# REPLY BRIEF OF APPELLANT


STANLEY E. JALOWIEC
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**COUNSEL FOR STATE OF OHIO.**



FILED
DEC 22 1999
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

**INTRODUCTION**

Appellant, Stanley E. Jalowiec, hereby submits his Reply Brief to this Honorable Court. Appellant has chosen to reply to the argument set forth by Appellee as to the statement of facts and Proposition of Law I, and rests upon his Brief, and upon oral argument as to the remaining Propositions of Law.

**STATEMENT OF THE FACTS**

For the appellee to claim that the statement of facts contained in Mr. Jalowiec's brief is "argumentative, untrue, and irrelevant." Appellee's brief at 3. Is a total misrepresentation of the facts, and an attempt to hoodwink this Honorable Court. Each and every assertion contained in Mr. Jalowiec's Statement of Facts is 100% supported by the trial court record and contains transcript cites. Mr. Rosenbaum is attempting, as he did with the trial court and the Court of Appeals, to mislead this Honorable Court as to the real facts of this case.

Mr. Jalowiec is innocent of the crime he is convicted of and is putting before this and all reviewing courts a claim of actual innocence. Mr. Jalowiec, believes that if this Honorable Court, considers the Statement of Facts and the Propositions of Law contained in his brief, the Justices of this court will be appalled by the actions of the trial court, Mr. Rosenbaum and trial counsel's actions. Furthermore, Mr. Jalowiec believes the Court will feel the same concerning appellant counsel.



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Jalowiec v. Bradshaw
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**PROPOSITION OF LAW NO. I**

In his brief, Appellant raised separate and distinct issues regarding the Court of Appeals denying him leave to reopen his direct appeal pursuant to App.R.26(B). The first was that appellant counsel, for the appellant, failed to raise before the Court of Appeals errors completely and fully as addressed in his Proposition of Law No. XIX. His second was that he has shown "good cause" as required pursuant to App.R.26(B).

In response to Proposition of Law No. I, appellee, states that "Appellant's novice status with the law has never been accepted as a reason why the limitations of App.R.26(B) should be overlooked." Appellee's brief at 5. The appellee also replied that "The remainder of appellant's issues are either not preserved for consideration at this time, raised in appellant's brief that is pending on direct appeal before this court and waiting oral argument, and/or barred by the doctrine of res judicata." Appellee's brief at 5.

In other words, appellee is stating that because counsel did not raise the issues in the lower court and the issues that are contained in the counsels brief in case no. 98-1074, before this court are raised then all appellant's Proposition of Law's are not preserved and/or barred from consideration. This is totally false, the issues that were raised in the Ninth District Court of Appeals and the issues that Mr. Jalowiec raised in his brief are either not fully raised or were never raised at all. Meeting one of the factors needed in order to reopen the appeal. App.R.26(B)(5).



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To establish a claim of ineffective assistance of counsel, Mr. Jalowiec 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. Through each and every Proposition of Law cited in Mr. Jalowiec's Pro Se Brief, he has met the criteria, both deficient performance and the prejudice it has caused.

App.R.26(B)(5) states:

> An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

Mr. Jalowiec has demonstrated that there is a genuine issue as to the ineffective assistance of counsel through the Propositions of Law contained in his brief. The appellee has failed to reply to the remaining Propositions of Law contained in the Brief, in an attempt to have this Court disregard the issues. This Honorable Court should not be swayed by such an attempt and should decide each Proposition of Law on their merits. Accordingly, it is respectfully submitted Appellant's conviction must be reversed and the cause remanded for a new trial, or remand to the Court of Appeals for further briefing and full review.

Respectfully Submitted,

Stanley E. Jalowiec



Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 5134

**CERTIFICATE OF SERVICE**

I certify that a copy of this **REPLY BRIEF OF APPELLANT** was sent by ordinary U.S. Mail to Jonathan E. Rosenbaum, Chief Counsel, Criminal Division, of the Prosecuting Attorney Office, Counsel for Appellee, 226 Middle Avenue, 4th Floor, Elyria, Ohio 44035.

Stanley E. Jalowiec 12-20-99

Stanley E. Jalowiec

Appellant Pro Se



Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 5135

IN THE SUPREME COURT OF OHIO

ORIGINAL
ON COMPUTER - RAN

| | | |
|---|---|---|
| STATE OF OHIO<br>Plaintiff-Appellee, | : | Case No. 99-1753 |
| -vs- | : | Defendant-Appellants<br>Supplemental Authority |
| STANLEY E. JALOWIEC<br>Defendant-Appellant. | : | White v. Schotten |

Now comes Defendant-Appellant, Stanley E. Jalowiec, pro se, and respectfully requests this Honorable Supreme Court to consider the recently decided Sixth Circuit case of White v. Schotten, (2000) 201 F.3d 743, as authority in the above captioned matter.

STATE OF OHIO
Plaintiff-Appellee
GREGORY A. WHITE
Prosecuting Attorney
Lorain County, Ohio
226 Middle Avenue, 4th Fl.
Elyria, Ohio 44035

Counsel for Appellee

DEFENDANT-APPELLANT
Stanley E. Jalowiec
STANLEY E. JALOWIEC
Nan.C.I. #321-712
Post Office Box 788
Mansfield, Ohio 44901

Counsel for Appellant

FILED
AUG 02 2000
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

PROOF OF SERVICE

A copy of the forgoing Motion was sent by regular mail to Gregory A. White, Prosecuting Attorney, Lorain Coutny, Ohio, 226 Middle Avenue, 4th Floor, Elyria, Ohio 44035 on the 1st day of August 2000.

Stanley E. Jalowiec

THE STATE OF OHIO, APPELLEE, v. JALOWIEC, APPELLANT.
No. 99-1753

SUPREME COURT OF OHIO

2001 Ohio 164; 92 Ohio St. 3d 421; 751 N.E.2d 467; 2001 OhioLEXIS 2107

May 15, 2001, Submitted
August 8, 2001, Decided

PRIOR HISTORY: [***1] APPEAL from the Court of Appeals for Lorain County, No. 96CA006445.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant was convicted of aggravated murder with death-penalty and firearm specifications and was sentenced to death. On appeal, the court of appeals and the state supreme court both affirmed the convictions and sentence. The Court of Appeals for Lorain County, Ohio, denied defendant's later Ohio R. App. P. 26(B) application for reopening in which defendant claimed ineffective assistance of appellate counsel. Defendant appealed.

OVERVIEW: In denying the application for reopening, the court of appeals essentially found that defendant failed to show good cause for filing his application more than 90 days after the judgment was journalized, as required by Ohio R. App. P. 26(B)(2)(b). The state supreme court agreed with the court of appeals' denial of the application for reopening, but for a different reason than the one that was relied upon by the court of appeals. The state supreme court found that defendant failed to prove that his appellate counsel were deficient for failing to raise the issues he presented in his application for reopening or that there was a reasonable probability of success had they presented those claims on direct appeal. In none of the 20 propositions of law stated in his arguments did defendant raise a genuine issue as to whether he was deprived of the effective assistance of counsel on appeal before the court of appeals, as was required under Ohio R. App. P. 26(B)(5). Accordingly, defendant's application for reopening based on ineffective assistance of appellate counsel in his direct appeal was properly denied.

OUTCOME: The state supreme court affirmed the judgment of the court of appeals.

CORE TERMS: genuine issue, reopening, court of appeals, propositions of law, direct appeal, sentence, effective assistance of counsel, ineffective assistance, deprived, albeit

LexisNexis (TM) HEADNOTES - Core Concepts:

Criminal Law & Procedure: Counsel: Effective Assistance: Appeals
[HN1] The two-pronged analysis found in Strickland is the appropriate standard to assess whether a defendant has raised a genuine issue as to the ineffectiveness of appellate counsel in his request to reopen an appeal under Ohio R. App. P. 26(B)(5). To show ineffective assistance, the defendant must prove that his counsel were deficient for failing to raise the issues he later presented in his application for reopening and that there was a reasonable probability of success had they presented those claims on appeal.

Criminal Law & Procedure: Counsel: Effective Assistance: Appeals
[HN2] To justify reopening an appeal under Ohio R. App. P. 26(B)(5), a defendant bears the burden of establishing that there was a genuine issue as to whether he has a colorable claim of ineffective assistance of counsel on appeal.

COUNSEL: Gregory A. White, Lorain County Prosecuting Attorney, and Jonathan E. Rosenbaum, Assistant Prosecuting Attorney, for appellee.

Stanley E. Jalowiec, Pro se.

JUDGES: MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

OPINION: [*421] [**467]

DECISION OF THE COURT

Per Curiam. Appellant, Stanley E. Jalowiec, was convicted of aggravated murder with death-penalty and firearm specifications. He was sentenced to death. Upon appeal, the court of appeals affirmed the convictions and sentence. *State v. Jalowiec , 1998 Ohio App. LEXIS 1548* (Apr. 15, 1998), Lorain App. No. 96CA006445, unreported, *1998 WL 178554*. On direct appeal as of right, we also affirmed his convictions and sentence on April 4, 2001. *State v. Jalowiec (2001), 91 Ohio St. 3d 220, 744 N.E.2d 163.*

On July 8, 1999, appellant filed an application for reopening with the court of appeals pursuant to App.R. 26(B) and *State v. Murnahan (1992), 63 Ohio St. 3d 60, 584 N.E.2d 1204,* alleging ineffective assistance of appellate counsel in his direct appeal.

In denying appellant's application[***2] for reopening, the court of appeals essentially found that Jalowiec had failed to show good cause for filing his application more than ninety days after that court's judgment was journalized, as required by App.R. 26(B)(2)(b). State v. Jalowiec (Aug. 18, 1999), Lorain App. No. [**468] 96CA006445, unreported. The cause is now before this court upon an appeal as of right.

We affirm the judgment of the court of appeals, albeit for different reasons. [HN1] The two-pronged analysis found in *Strickland v. Washington (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674,* is the appropriate standard to assess whether Jalowiec has raised a "genuine issue" as to the ineffectiveness of appellate counsel in his request to reopen under App.R. 26(B)(5). See *State v. Spivey (1998), 84 Ohio St. 3d 24, 25, 701 N.E.2d 696, 697.* To show ineffective assistance, Jalowiec must prove that his counsel were deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had they [*422] presented those claims on appeal. *State v. Bradley (1989), 42 Ohio St. 3d 136, 538 N.E.2d 373,* paragraph three of the syllabus.

Moreover, [HN2] to[***3] justify reopening his appeal, Jalowiec "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey, 84 Ohio St. 3d at 25, 701 N.E.2d at 697.*

We have reviewed appellant's twenty propositions of law alleging, inter alia, deficient performance by appellate counsel. Many of these same arguments were rejected by us on Jalowiec's appeal before this court. See *State v. Jalowiec , 91 Ohio St. 3d 220, 744 N.E.2d 163.* In any case, however, in none of the twenty propositions of law has Jalowiec raised "a genuine issue as to whether [he] was deprived of the effective assistance of counsel on appeal" (emphasis added) before the court of appeals, as required under App.R. 26(B)(5).

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

ON COMPUTER SCAN

# The Supreme Court of Ohio

FILED
AUG 03 2001
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

94-084

| | | |
|---|---|---|
| State of Ohio,<br>Appellee, | : | Case No. 99-1753 |
| v. | : | JUDGMENT ENTRY |
| Stanley E. Jalowiec,<br>Appellant. | : | APPEAL FROM THE<br>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.

It is further ordered that the appellee recover from the appellant 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.

COSTS:

Docket Fee, Affidavit of Indigency filed.

(Lorain County Court of Appeals; No. 96CA006445)

THOMAS J. MOYER
Chief Justice

0065r080801

# The Supreme Court of Ohio

FILED
AUG 08 2001
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

State of Ohio,
Appellee,

v.

Stanley E. Jalowiec,
Appellant.

Case No. 99-1753

MANDATE

COPY

To the Court of Appeals

Within and for the County of Lorain, Ohio.

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.

COSTS:

Docket Fee, Affidavit of Indigency filed.

(Lorain County Court of Appeals; No. 96CA006445)

THOMAS J. MOYER
Chief Justice

0065r080801

ORIGINAL

ON COMPUTER-II

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : CASE NO. 99-1753

Plaintiff-Appellee, :

-vs- :

STANLEY E. JALOWIEC, : MOTION FOR RECONSIDERATION

Defendant-Appellant. :

FILED
AUG 15 2001
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

.....

On August 8, 2001, this Honorable Court denied Mr. Jalowiec's case. Mr. Jalowiec would respectfully request that this Court reconsider its decision in the Seventeenth, Eighteenth and Ninteenth Proposition of Law's, wherein this Court found that these Propositions of Law's do not raise "a genuine issue as to whether he was deprived of the effective assistance of counsel on appeal."

Proposition of law Seventeen delt with the trial Court, prosecutor Rosenbaum and defense counsel violating Codes of Professional Responsibility with prior calculation and design in regards to a actual conflict of intrest in Mr. Jalowiec's case. Proposition of Law Eighteen delt with the lack of effective counsel at trial, as a result of the conflict of intrest and Proposition of Law Nineteen delt with the right to effective assistance of appellate counsel.

RECEIVED
AUG 15 2001
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO



Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 5142

Each proposed Proposition of Law Mr. Jalowiec seeks this Court to reconsider are intertwined, and are addressed together as one, pointing out that there was a major conflict of intrest with Mr. Jalowiec's trial counsel who represented a state's witness, the trial Court, prosecutor Rosenbaum and defense counsel hid the conflict in violation of the code of Professional Responsibility, the Fifth and Sixth Amendment's to the United States Constitution and in the intrest of fairness to Mr. Jalowiec.

This Court in State v. Gillard, (1992) 64 Ohio St.3d 304, held that Gillard raised an additional matter which was of "paramount importance." Specifically, Mr. Gillard, like Mr. Jalowiec, claimed that his trial counsel, Louis H. Martinez, may have labored under a conflict of intrest in his representation at trial.

Appellant Jalowiec did support this conflict of intrest and the proposed propositions of law with documentation, i.e. Lorain County Docket Sheet of Terry Hopkins, Case No. 94CR045662, supporting that Joseph C. Grunda was counsel for Mr. Hopkins before, during and after the trial of Mr. Jalowiec. This document supported a 'genuine issue' which should have been brought before the Ninth Judicial District Court of Appeals and that as a direct result of counsel's failure to raise such issue supports a 'colorable claim' of ineffective assistance of counsel on appeal.



Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 5143

This Court held that "Where, as here, a possible violation of due process and the right to counsel exists, we are not only empowered to consider the question, but it is our duty to do so as a court of last resort." State v. Gillard at 307.

To ingnore this fundamental constitutional right under the Fifth and Sixth Amendment's to the United States Constitution is to say that Mr. Jalowiec is not afforded these right's.

Because of the actual conflict of intrest involved here, this Honorable Court has a duty to ensure that Justice is served. Wherefore, Mr. Jalowiec respectfully requests this Honorable Court to reconsider its August 8, 2001 decision and remand this case back to the trial Court for a new trial.

## CONCLUSION

Based upon the forgoing Mr. Jalowiec respectfully requests that this Court reconside its position in the Seventeenth, Eighteenth, and Ninteenth proposition's of law dealing with the conflict of intrest, ineffective assistance of counsel and ineffective assistance of appellate counsel and remand the case back to the trial court, or back to the Ninth district Court of appeals.

Respectfully Submitted,

Stanley E. Jalowiec
Man.C.I. #321-712
Post Office Box 788
Mansfield, Ohio 44901

Defendant-Appellant Pro Se



Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 5144

PROOF OF SERVICE

I hereby certify that a copy of the forgoing has been mailed by regular U.S. Mail this 13th day of August, 2001, to Jonathan Rosenbaum, Assistant Prosecuting Attorney, Lorain County, 226 Middle Avenue, Elyria, Ohio 44035.

Stanley E. Jalowiec



Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 5145

# The Supreme Court of Ohio

FILED
AUG 03 2001
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

| | | |
|---|---|---|
| State of Ohio,<br>Appellee, | : | Case No. 99-1753 |
| v. | : | JUDGMENT ENTRY |
| Stanley E. Jalowiec,<br>Appellant. | : | APPEAL FROM THE<br>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.

It is further ordered that the appellee recover from the appellant 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.

COSTS:

Docket Fee, Affidavit of Indigency filed.

(Lorain County Court of Appeals; No. 96CA006445)

THOMAS J. MOYER
Chief Justice

0065r080801

# The Supreme Court of Ohio

FILED
OCT 10 2001
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

94-263

| | | |
|---|---|---|
| State of Ohio,<br>Appellee, | : | Case No. 99-1753 |
| v. | : | RECONSIDERATION ENTRY |
| Stanley E. Jalowiec,<br>Appellant. | : | (Lorain County) |

This cause came on for further consideration upon appellant's motions for reconsideration and for remand. Upon consideration thereof,

IT IS ORDERED by the Court that the motions be, and hereby are, denied.

(Court of Appeals No. 96CA006445)

THOMAS J. MOYER
Chief Justice

111r101001

# D O C K E T  S H E E T

Jul 28, 2003 3:32 pm — Page 1

Lorain County, Elyria Ohio USA
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. 5148

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. 5149

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. 5150

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. 5151

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. 5152

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. 5153

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. 5154

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



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Jalowiec v. Bradshaw
Warden's Appendix Pg. 5155

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. 5156

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. 5157

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
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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
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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. 5160

**COSTS TAXED TO APPELLANT.**
**VOL. 90 PG. 182**

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Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 5161

ENTERED

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JUL 19 2002
JUDGE KOSMA J. GLAVAS

FILED
LORAIN COUNTY
2002 JUL 17 A 10:47
CLERK OF COMMON PLEAS
RON NABAKOWSKI

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

| | | |
|---|---|---|
| STATE OF OHIO, | :: | |
| | :: | |
| Plaintiff-Respondent, | :: | JUDGE KOSMA J. GLAVAS |
| | :: | |
| -vs- | :: | Case No. 95CR046840 |
| | :: | |
| STANLEY E. JALOWIEC, | :: | |
| | :: | |
| Defendant-Petitioner. | :: | CAPITAL CASE |

ORIGINAL

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

Petitioner, Pro Se, respectfully requests that this Honorable Court grant him the funds to retain an expert in the field of clinical/forensic psychology and an expert in the field of trial counsel ineffectiveness for the purpose of his Second Petition for Post-Conviction Relief proceeding now pending before this Court. Petitioner raised the necessity for such expert's in his Second Post-Conviction Petition through his Grounds for Relief. The accompanying Memorandum in Support sets out the grounds for this request.

Respectfully Submitted,

Stanley E. Jalowiec

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MEMORANDUM IN SUPPORT

At trial, the State of Ohio marshaled different experts to bring its case against Petitioner. Conversely, Petitioner's trial counsel failed to reasonably investigate and obtain experts necessary for Petitioner's defense. As a result, Petitioner was convicted and sentenced to death.

Petitioner identified such expert in his Ground for Relief set forth in his Second Petition for Post-Conviction relief that is pending before this Court. In his Ground for Relief Petitioner alleged that his trial counsel failed to obtain the services of a psychologist who was skilled in determining, through review of records, whether Michael Smith's competency should have been challenged and whether medical records existed to challenge the testimony of Michael Smith at trial in Petitioner's case in order to adequately prepare the defense case at Petitioner's trial. See, Post-Conviction Exhibits B, C, & D.

As a result, counsel's performance "fell below an objective standard of reasonableness." Strickland v. Washington, Id.; Ake v. Oklahoma, 470 U.S. 68 (1985); Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995). The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Section 39, Article I of the Ohio Constitution, C.P. Sup. R. 20(IV)(D) and O.R.C. §2929.024 guarantee an accused in capital cases the assistance of experts.



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Equally so, a complete evaluation of Michael Smith's Mental Health Records is now needed. This is so because Petitioner has identified the need of the services of a Clinical/Forensic psychologist and attorney expert in ineffective assistance of counsel. Dr. David Fisher, Ph.D., LP is such an expert and Attorney S. Adele Shank is also fully qualified.

Dr. Fisher's letter to Petitioner is attaches to this motion. As to his fees, Dr. Fisher charges $175 per hour for review of the documents. He estimates it would only take him 2-3 hours to review the necessary material. Petitioner therefore moves this Honorable Court to grant him $525.00 with which to retain and pay for the services of Dr. Fisher. Moreover, Dr. Fisher will be available to conduct the review in a timely manner following this Court's approval of Petitioner's request for funding. (See Letter from Dr. Fisher attached hereto). Petitioner requests that this Court allow sixty days from the date of this Court's entry approving funds so that Dr. Fisher can conduct his review of the material.

Petitioner is waiting on the necessary information needed to provide this Court with Attorney Shank's hourly fees and total amount needed to evaluate his ineffective assistance of counsel claim and will supplement this motion promptly after receiving said information.



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Just as State's counsel relied upon and paid for forensic experts at trial, so too it is reasonably necessary for Petitioner to retain experts to assist him in presenting his Post-Conviction Petition in this case. Ake v. Oklahoma, 470 U.S. 68 (1985); State v. Mason, 82 Ohio St.3d 144, 694 N.E.2d 932 (1998), syllabus; State v. Jenkins, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984), Syl. para. 4; Ohio Rev. Code §2929.024; C.P. Sup. R. 20 §IV(D).

Given the nature of the State's case against Petitioner, denying Petitioner funds would result in an unfair proceeding and deny him an adequate corrective process in state post-conviction proceedings. An adequate corrective process should be "swift and simple and easily invoked," should eschew rigid and technical doctrins of res judicata of forfeiture, waiver or default," and should "provide for full fact hearings to disputed factual issues." Case v. Nebraska, 381 U.S. 336, 346-347, (1965)(Brennam H., concurring); Goldberg v. Kelly, 397 U.S. 254 (1970); Evitts v. Lucey, 469 U.S. 387 (1985).

Further, funding experts for Petitioner is necessary in order to protect his State and Federal Constitutional rights to due process of law, equal protection of the law, confrontation of the state's evidence against him, and freedom from cruel and unusual punishment. U.S. Const. amend. V, VI, VII, IX and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20. Ohio has established



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statutory, procedural, and case law precedents governing the provisions of experts to capital defendants in an attempt to effectuate these constitutional rights.

Assuming, arguendo, that Ohio's procedures do not emanate directly from clear constitutional provisions, nevertheless, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution - and, in particular, in accord with the Due Process Clause." Evitts v. Lucey, 469 U.S. 387, 401 (1985). This is all the more so when a petitioner's "life" interest (protected by the "life, liberty and property" language in the Due Process Clause) is at stake in the proceeding. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (five Justices recognized a distinct "life" interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests).

Death is different; for that reason more process is due, not less. See Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). To the extent that Ohio's jurisprudence governing the provision of experts to capital post-conviction petitioners intrudes on greater rights granted by the federal constitution, Petitioner must be afforded experts pursuant to his federal constitutional rights to due process and equal protection.



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Wherefore, Petitioner moves this Honorable Court to grant funding for a clinical/forensic psychologist and an Attorney expert in the field of ineffective assistance of Counsel as set out above and to allow sixty days from the date of the entry granting funding to accomplish the required review.

Respectfully Submitted,

Stanley E. Jalowiec
Man.C.I. #321-712
Post Office Box 788
Mansfield, Ohio 44901

Petitioner Pro Se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing 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 was forwarded by first class U.S. Mail to Gregory A. White, Lorain County Prosecutor, Lorain Ohio, 226 Middle Avenue, Elyria, Ohio 44035, this 16th day of July 2002.

Stanley E. Jalowiec

Petitioner Pro Se



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Jalowiec v. Bradshaw
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PsyBar
A Limited Liability Company

4500 Park Glen Road, Suite 345
Minneapolis, MN 55416
*Telephone: 952-285-9000*
*Facsimile: 952-848-1798*
*e-Mail: info@PsyBar.com*

5/30/02

Stanley E. Jalowiec
MAN.C.I. #321-712
PO Box 788
Mansfield, OH 44901

Dear Mr. Jalowiec:

I received your letter dated May 15th requesting information on finding an expert in the field of clinical/forensic psychology. PsyBar does have a number of experts in the Ohio area who would potentially meet your requirements. In order to help decide which of these experts might be best for your case, we would first want to have your documents reviewed at our office. Such document review is $175 per hour, and I do not anticipate that it would take us more than roughly two to three hours to review the necessary key documents and give you some preliminary information about the appropriate expert to help you.

I notice that you are representing yourself in this matter. I am willing to work with you rather than through an attorney on this case, however I feel it is my responsibility to tell you that there might be benefits to your consulting an attorney who is very experienced in working with psychological issues such as the ones with which you might present us. If you are interested in proceeding with this matter please notify me. Upon receipt of your notification I will mail you our standard letter/contract for services. With that I will request either a retainer or a letter from the court promising payment of our fees. You should also know that while the fee for reviewing records would be $175 an hour, the fee for the expert who would eventually help you in the Ohio case might be higher. I can't tell you exactly what that fee would be right now because I have not yet decided on the expert that I want to suggest you consider.

Sincerely,

David Fisher, Ph.D., LP
Diplomate in Clinical Psychology
American Board of Professional Psychology
President, PsyBar, LLC

RECEIVED
JUL 15 2002
JUDGE KOSMA J. GLAVAS

ENTERED

FILED
LORAIN COUNTY
02 JUL 17 A 8:48
CLERK OF COMMON PLEAS
RON KADAKOWSKI

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

| | | |
|---|---|---|
| STATE OF OHIO, | : | Case No. 95CR046840 |
| | : | |
| Plaintiff-Respondent, | : | JUDGE KOSMA J. GLAVAS |
| | : | |
| -vs- | : | HEARING REQUESTED |
| | : | |
| STANLEY E. JALOWIEC, | : | |
| | : | |
| Defendant-Petitioner. | : | |

ORIGINAL

pc

MOTION FOR DISCOVERY

Now comes Petitioner, Stanley E. Jalowiec, Pro Se, and hereby moves this Honorable Court for discovery pursuant to Ohio R. of Crim. P. 16 and Ohio Revised Code Section 2953.21 and/or §2953.23 in support of his Second Post-Conviction Petition. Mr. Jalowiec additionally requests that this Court order the Lorain County Prosecutor's Office to disclose for inspection and copying the materials that he is entitled to under Ohio R. Crim. P. 16(B) and Ohio R. Civ. P. 26(B), and Ohio Revised Code Section 149.43.

Further, Mr. Jalowiec requests permission to amend his Second Post-Conviction Petition to include any and all potential claims for which he may discover a sufficient basis. For the reasons set forth in the attached memorandum, and to ensure Mr. Jalowiec due process and a full and fair hearing on his meritorious claims, this Court should allow the necessary discovery.



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RESPECTFULLY Submitted,

Stanley E. Jalowiec

Stanley E. Jalowiec
Man.C.I. #321-712
Post Office Box 788
Mansfield, Ohio 44901

Counsel for Petitioner
Pro Se

## MEMORANDUM IN SUPPORT

### I. INTRODUCTION

Stanley E. Jalowiec, has filed a Second Post-Conviction Petition for Relief seeking relief from this Court. The Petition was filed under the authority of Ohio Revised Code Ann. §2553.23. In order to fully prepare for and present the claims that he raised in his Second Post-Conviction Petition, this Court must allow Mr. Jalowiec to pursue plenary discovery and grant him adequate time in which to complete his discovery.

Mr. Jalowiec is entitled to discovery because his Petition, in addition to the supporting materials already before this Court, demonstrate substantive grounds for relief. Furthermore, by granting this discovery motion, this Honorable Court ensures that Mr. Jalowiec is afforded due process, that he is not denied a full hearing on the meritorious claims, and that the interest of justice are served.



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II. DISCOVERY SOUGHT

Discovery is required at this time to uncover the following relevant and material evidence which further supports Mr. Jalowiec's already well supported claims and which is not available through other means:

a. Depositions of Joseph C. Grunda, Esq., and Edward Cleary, Esq., to determine issues surrounding Mr. Jalowie's ineffective assistance of counsel claim presented in his second claim for relief of failure to investigate Michael Smith's back ground and his competency;

b. The Production of any and all records of Brady material in the possession of the State of Ohio regarding Michael Smith's mental health, including but not limited to Records from CPI, Elyria Memorial Hospital; Metro General Hospital; Huron Road Hospital; St. Vincent Charity Hospital; Hanna Pavilion at University Hospital as they Relate to Petitioner's First Claim for Relief;

c. Suboena's issued to CPI, Elyria Memorial Hospital; Metro General Hospital; Huron Road Hospital; St. Vincent Charity Hospital; Hanna Pavilion at University Hospital, seeking the Production of all medical and psychological Records of Michael A. Smith in support of Petitioner's Second Claim for Relief;

d. All mental health records of Michael Smith;

e. Information about Michael Smith's condition possessed by Det. Leiby; and others;



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f. All Mental Health information kept by the Lorain County Probation Department;

g. Any and all Drug and alcohol abuse dependency information kept by the Probation Department;

h. Examples of any and all of Michael Smiths probation violations and other misconduct occasioned by Michael Smith while on probation;

i. Copies of any and all information which would assist Petitioner in his understanding of Michael Smith's mental condition before, during and after the murder of Ronald Lally, including any and all notes that he left when attempting to commit suicide.

Petitioner reserves the right to seek further discovery as is necessary to fully support his claims. Petitioner further requests that this Court establish a discovery schedule, setting forth the deadlines by which the above discovery is to be completed. Mr. Jalowiec suggests that copies of the discovery documents and/or all records be provided as requested within sixty (60) days of the filing of this motion, and that deposition discovery proceed thereafter for an additional sixty (60) days. Because the Petitioner is proceeding Pro Se, he requests that this Honorable Court allow his personal investigator and/or an attorney from the Ohio Public Defender Office access to the copies so that he/she may forward them to the Petitioner.

III. ARGUMENT

This Court Should Allow Petitioner Jalowiec



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**To Conduct The Discovery Sought.**

The Ohio post-conviction statute is silent on the issue of discovery. Instead, the focus of the Ohio Rev. Code Section 2953.21 is on the threshold burden the petitioner must satisfy in order to be entitled to an evidentiary hearing. Once a Petitioner has met "the burden of production of documents demonstrating substantive grounds for relief," State v. Sherrills, 1992 WL 6060 (Ohio App. 8 Dist. 1992), [Exhibit A], discovery should be granted.

In State v. Otstot, Case No. 2500, 1989 WL 20299 at *2 (Clark Ct. App. Mar. 7, 1989), [Exhibit B], the Court of appeals held that the trial court abused its discretion in not permitting a post-conviction petitioner to conduct discovery on his claim **prior** to determining whether he was entitled to a hearing. Petitioner Jalowiec has met his burden of production. Therefore, this Court should permit discovery in this case, for it is essential for a proper adjudication of the Grounds for Relief presented.

Moreover, the United States Supreme Court has said, "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Hickman v. Taylor (1947), 329 U.S. 495, 507, 68 S.Ct. 385, 392, 91 L.Ed. 451. The Ohio Supreme Court has stated that "[t]he purpose of the liberal discovery policy contemplated by the Ohio Rules of Civil



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Procedure is the narrowing and sharpening of the issue to be litigated." State ex rel. Daggett v. Gessaman, 34 Ohio St. 55, 56, (1973).[1]

It was in that spirit that Civ.R. 26(B) was promulgated. Civ.R. 26(B)(1) provides a liberal discovery policy:

> In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery of the claim of any defense of anyother party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

By permitting discovery, this Court would aid Mr. Jalowiec in fairly presenting and exhausting the constitutional challenges to his conviction and death sentence in the State Courts. Such a step is necessary before the claims are raised in Federal Court. Furthermore, the discovery sought is limited to information necessary, thus it will serve to conserve judicial resources by focusing the issues presented in his Petition for Post-Conviction Relief.

[1] Post-conviction actions are civil proceedings. State v. Malanovich, 42 Ohio St. 2d 46 (1975); see also State v. Harvey, 68 Ohio App. 2d 170, 171 (1980). As such, the Ohio Rules of Civil Procedure apply. Milanovich, supra. at 52. See also Ohio R. Civil P. 1(A); State v. Nicols, 11 Ohio St. 3d 40, 42-43 (1984).



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**Stanley Jalowiec Is Entitled to Conduct Discovery Because He Has Presented Evidence and Materials Establishing a Substantive Ground For Relief.**

The evidentiary materials and affidavits submitted by Mr. Jalowiec with his petition are sufficient to establish, prima facie, substantive grounds for relief on his claims. Relevant documents and affidavits in support of the Grounds for Relief were submitted with his Petition and are before this Court.

Having met this threshold burden under Section 2953.21, the statute affords Mr. Jalowiec the immediate right to an evidentiary hearing on these Grounds. Ohio Rev. Code Section 2953.21 ("the court shall proceed to a prompt hearing on the issues."); see also, State v. Milanovich, 42 Ohio St. 2d 46, 51 (1975) (if the petition "states a substantive ground for relief and ...is based upon matters outside the record, the Court should thus proceed to a prompt evidentiary hearing.").

In order for this statutorily mandated hearing to be meaningful, this Court should permit Mr. Jalowiec to conduct the discovery he seeks. The limited discovery sought will enable Mr. Jalowiec to develop the relevant issues for the hearing, and thus focus the proceedings and conserve judicial resources. It will also give Mr. Jalowiec the opportunity - denied to this point - to more completely develop the facts establishing his entitlement to relief. This is especially important for Mr. Jalowiec because he has a viable innocence claim before this Court. The due process and fundamental fairness guaranteed by



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the Fourteenth Amendment to the United States Constitution, and similar provisions in the Ohio Constitution, will thus be served, as will the purposes of the post-conviction statute.

**Even if the Court Is Not Prepared to Grant a Hearing, Due Process and Fundamental Fairness Require that The Court Permit the Discovery Sought, to Enable Stanley E. Jalowiec to Gather Additional Evidence to Meet the Threshold Burden.**

Mr. Jalowiec has presented sufficient documents and evidentiary materials entitling him to a full evidentiary hearing and the discovery necessary in preparation for the hearing. But, even if the Court is not prepared to grant a hearing at this time, it should permit Mr. Jalowiec to conduct the limited discovery sought herein, so that he can gather additional evidence to support his claims and fully demonstrate his entitlement to a hearing. Allowing discovery in these circumstances - that is before granting Mr. Jalowiec an evidentiary hearing - serves to conserve judicial resources, furthers the goals of the post-conviction statute, and ensures due process.

The post-conviction statute places the burden of presenting documents and other evidentiary materials "containing sufficient operative facts to demonstrate [his] claim" on the petitioner. State v. Smith, 30 Ohio App. 3d at 140. In order to meet this burden, Mr. Jalowiec must have access to evidentiary materials, **inter alia**, the state. Because of this fact, a refusal to permit Mr. Jalowiec to conduct limited discovery may effectively



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foreclose him from ever meeting the threshold burden placed upon him by the statute. This result deprives Mr. Jalowiec of his rights under the post-conviction statute and violates his due process rights under both Ohio and Federal Constitutions.

The need for liberal discovery in capital cases is especially acute, for it helps to ensure the reliability in the proceedings and outcome, an especially important concern where the death sentence is involved. The United States Supreme Court has repeatedly emphasized the need to ensure a heightened reliability of the outcome where an individual's life is at stake. See, e.g., Beck v. Alabama, 447 U.S. 625, (1980); Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, (1976). Echoing this statement, the Second Appellate District has recognized the importance of permitting a post-conviction petitioner to conduct discovery before a hearing is granted. State v. Ostot, Case No. 2500, 1989 WL 20299 (Clark Ct. App. Mar. 7, 1989) [Exhibit B].

Thus, Ohio courts are willing to recognize the vital role that discovery plays in fully litigating post-conviction claims. For, apart from the due process which discovery affords a petitioner, discovery also serves to conserve judicial resources by helping the parties to focus on meritorious issues.



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## CONCLUSION

Stanley E. Jalowiec has produced sufficient evidence de hors the record, in the form of Medical Records and other documents, to support his Grounds for Relief in His Petition for Post-Conviction Relief. The granting of this Motion will serve to supplement the discovery Mr. Jalowiec has requested in his Post-Conviction Petition. Furthermore, because Mr. Jalowiec has shown substantive grounds for relief on his First and Second Grounds for Relief, discovery is especially important. In Short, allowing discovery sought will ensure due process and fundamental fairness, will conserve judicial recorces, and will serve the interest of justice.

For the foregoing reasons, Stanley E. Jalowiec respectfully requests that this Court grant his Motion for Discovery. Further, Mr. Jalowiec requests that this Court allow him leave to amend his petition to include additional constitutional claims identified after discovery is conducted and a hearing regarding this motion.

RESPECTFULLY SUBMITTED,

Stanley E. Jalowiec

Stanley E. Jalowiec
Man.C.I. #321-712
Post Office Box 788
Mansfield, Ohio 44901

Counsel For Petitioner
Pro Se



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the forgoing MOTION FOR DISCOVERY was forwarded by regular U.S. Mail to Gregory A. White, Lorain County Prosecutor, Lorain County Prosecutor's Office, 226 Middle Avenue, Elyria, Ohio 44035, this 16th day of July 2002.

Stanley E. Jalowiec
Man.C.I. #321-712
Post Office Box 788
Mansfield, Ohio 44901

Petitioner Pro Se



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*6060 NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

**STATE of Ohio, Plaintiff-Appellee,**
**v.**
**Daries SHERRILLS, Defendant-Appellant.**

No. 61882.
Court of Appeals of Ohio, Cuyahoga County.
Jan. 16, 1992.

Criminal Appeal from Common Pleas Court, No. CR-46839.

Stephanie Tubbs-Jones, L. Christopher Frey, Cuyahoga County Prosecutor, Cleveland, for plaintiff-appellee.

Daries Sherrills, pro se.

JOURNAL ENTRY and OPINION

PER CURIAM:

**1 This appeal was filed and briefed as an accelerated appeal pursuant to Local App.R. 25 of this court.

Appellant Daries Sherrills was convicted of one count of Grand Theft and one count of Theft, in violation of R.C. 2913.02. This court affirmed the convictions in *State v. Sherrills* (Apr. 17, 1980), Cuyahoga App. No. 41302, unreported, and Appellant's appeal to the Ohio Supreme Court was dismissed.

In March of 1991, Appellant filed a petition for post-conviction relief. On May 7, 1991, the trial court denied and dismissed the petition as moot.

Appellant, pro se, has timely appealed the dismissal of his petition for post-conviction relief and has filed a praecipe suggesting that a full transcript, pursuant to App.R. 9(B), would be necessary for the determination of this case. Accordingly, this court, *sua sponte*, amended the praecipe to reflect a record pursuant to App.R. 9(A)

In compliance with App.R. 11.1, it is the decision of this court that a petition for post-conviction relief is not moot because Appellant satisfied his sentence. The record on appeal is not replete with facts sufficient enough to enable this court to resolve the merits of the post-conviction petition; therefore, the matter is reversed and remanded.

The record transmitted by the clerk of the trial court indicates that a petition for post-conviction relief and a motion for discovery were filed on March 11, 1991. The clerk of the trial court further indicates that these documents and several others filed by Appellant are "missing from the file."

The record does contain the findings of fact and conclusions of law of the trial court. The trial court found that Appellant was convicted and began serving his sentence of five years on August 1, 1979. The trial court also found that the instant petition was filed on March 11, 1991. As a result of these findings, the trial court concluded that Appellant had served his five years, and on that basis, denied and dismissed the petition as moot. The trial court failed to make findings or conclusions with respect to the sufficiency or merits of the petition.

The trial court also denied Appellant's motion for discovery.

Appellant assigns seven errors for this court to review. For his fourth assignment of error he claims that the trial court erred in dismissing his post-conviction petition. Appellant argues that the trial court abused its discretion when it held the petition moot because the sentence had been served.

We agree with the Appellant's argument. Furthermore, we adopt the reasoning of *State v. Turpin* (1969), 19 Ohio App.2d 116, 119, which held that under R.C. 2953.21, as amended effective December 9, 1967, a petitioner need no longer be under sentence to be entitled to relief.

The law provides that:

Any person convicted of a criminal offense or adjudged delinquent claiming that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a petition, *at any time* in the court which imposed sentence, stating the grounds for relief

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DEFENDANT'S EXHIBIT A

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relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. * * * R.C. 2953.21(A). (Emphasis added.)

**2 In the instant case the record does not contain sufficient facts to enable this court to resolve the merits of the petition. The sole grounds for the dismissal was that it was moot.

We are familiar with the Supreme Court's decision in *State v. Berndt* (1987), 29 Ohio St.3d 3, which holds that the appellate court shall not review matters that are moot when the appellant has voluntarily completed his sentence and paid the fine. However, we do not believe that *Berndt* overrules *State v. Turpin, supra.* The majority of the Supreme Court in the *Berndt* decision did not hold that cases contemplating the relief available under R.C. 2953.21 were foreclosed from appeal because the time had been served, primarily because the relief afforded to a petitioner is not limited to custodial relief or setting aside the sentence.

Moreover, an action for post-conviction relief is distinguishable from direct appeal of a criminal case, because it is a civil proceeding. *State v. Milanovich* (1975), 42 Ohio St.2d 46, 49. A direct appeal of a criminal conviction presumes that there is no disability where an appellant is not in custody or serving a sentence. See, *State v. Wilson* (1975), 41 Ohio St.2d 236. However, post-conviction relief as a civil matter has no such presumption.

Even if this court were to take the view that the standard for demonstrating collateral disability applies to post-conviction relief, we must reverse the trial court's decision. A determination of whether there is collateral disability requires a finding by the trial court, or at least a review by this court of the "missing" petition. Compare *Wilson* with *State, ex rel. Brown v. Court* (1986), 23 Ohio St.3d 46.

Accordingly, we conclude that Appellant's fourth assignment of error is well taken.

Appellant's first, second and sixth assignments of error argue that the dismissal was improper because the petition was supported with evidentiary materials warranting a hearing. A determination of whether Appellant's petition was supported by evidentiary materials demonstrating substantive grounds for relief requires a review of the petition itself. See, *State v. Ledger* (1984), 17 Ohio App.3d 94, 96. The motion, *sub judice,* is "missing" and, therefore, cannot be reviewed.

Appellant's third assignment of error raises the question of whether the dismissal was improper because his claims were not *res judicata* to his appeal, since they were based on evidence dehors the record. A petitioner is barred under the doctrine of *res judicata* if after a review of the issues in the petition it is determined that they could have been raised by petitioner on appeal from the original judgment. *E.g. State v. Perry* (1987), 10 Ohio St.2d 175. This court cannot make such a determination without the petition.

Appellate courts are restrained from making premature declarations upon merely potential controversies. *Frank v. Vulcan Materials Co.* (1988), 55 Ohio App.3d 153, 156. Even though we are reversing the dismissal of the trial court, it is not clear whether dismissal would be warranted on other grounds or whether an evidentiary hearing is proper. Therefore, Appellant's first, second, third and sixth assignments of error are not ripe for review nor well taken.

**3. Appellant's fifth and seventh assignments of error raise the issue of whether the trial court abused its discretion in denying discovery. We disagree. This request is premature because it presumes that Appellant's petition will warrant an evidentiary hearing.

Regulation of discovery is within the discretion of the trial court. *Smith v. Klein* (1985), 23 Ohio App.3d 146. Should the petition for post-conviction relief be properly dismissed without hearing, then the issue of discovery would be moot. In a petition for post-conviction relief under R.C. 2953.21, the petitioner must *first* meet the burden of production of documents demonstrating substantive grounds for relief. See, *Ledger.* (Emphasis added.) Until that burden is met, it is not an abuse of discretion to deny discovery.

Appellant's fifth and seventh assignments of error are not well taken.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof

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this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

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*20299 NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

**STATE of Ohio, Plaintiff-Appellee,**
**v.**
**Warren OTSTOT, Defendant-Appellant.**

**No. 2500.**
Court of Appeals of Ohio, Clark County.
March 7, 1989.

Stephen A. Schumaker, Prosecuting Attorney for Clark County by William F. Baader, Springfield, for plaintiff-appellee.

Timothy S. Chappars, Xenia, for defendant-appellant.

OPINION

FAIN, Judge.

**1 Defendant-appellant Warren Otstot appeals from the trial court's denial of his petition for post-conviction relief. Otstot contends that the trial court erred by dismissing his petition without a hearing. We conclude that the trial court erred by dismissing Otstot's petition, *sua sponte* and without a hearing, because Otstot was deprived of the opportunity to seek discovery of the facts necessary to substantiate his claim that, contrary to the record in his case, his guilty plea was induced by promises that were not kept by the State. Accordingly, the dismissal of Otstot's petition for post-conviction relief will be reversed.

I

Otstot was charged with three counts of Passing Bad Checks, one count of Failure to Transfer an Automobile Title, and one count of Felonious Assault. Pursuant to a plea bargain, Otstot pled guilty to the three counts of Passing Bad Checks and the remaining two counts were dismissed. Otstot was sentenced to three consecutive two-year terms on each count, for a total of six years.

Otstot filed this petition for post-conviction relief, alleging that, even though it is not reflected in the record, he had entered into a bargain with the prosecutor whereby he would be admitted to probation in exchange for his agreement to "set up" a prominent Springfield resident. Otstot alleged that he was precluded by the "state authorities" from carrying through with that bargain, because he was not provided with the proper opportunities and resources in order to "set up" the prominent Springfield resident.

Otstot moved for summary judgment and supported his motion with his own affidavit. Otstot presented no other affidavits in support of his petition.

The State filed a memorandum contra Otstot's petition for post conviction relief, but did not file its own motion for summary judgment. Neither did the State file a motion to dismiss Otstot's petition for post-conviction relief.

The trial court denied both Otstot's motion for summary judgment and his petition for post-conviction relief on the basis that the allegations in his petition were contradicted by the record, and he did not support his petition with any affidavits other than his own self-serving affidavit.

From the denial of his petition for post-conviction relief, Otstot appeals.

II

Otstot assigns the following errors:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY FAILING TO CONDUCT AN EVIDENTIARY HEARING.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S PETITION FOR POST-CONVICTION RELIEF AND NOT VACATING HIS GUILTY PLEA.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR SUMMARY JUDGMENT WITHOUT A HEARING OR EVEN PROVIDING NOTICE OF A HEARING OR A

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DEFENDANT'S EXHIBIT B

RULING DATE.

Essentially, Otstot argues that the trial court erred by denying his petition for post-conviction relief without a hearing. The trial court correctly relied upon *State v. Kapper, supra,* for the proposition that a petition for post-conviction relief is subject to dismissal without a hearing when the record indicates that the petitioner is not entitled to relief, and the petitioner fails to submit any affidavits in support of his claim other than his own self-serving affidavit.

**2. In *State v. Kapper, supra,* the State had moved to dismiss the petition for post-conviction relief. In the case before us, the State had not moved to dismiss the petition. Otstot contends that he was prejudiced by the trial court's having dismissed his petition on its own motion, without notice of its intent to do so, because he had intended to take the depositions of the assistant prosecutor and the defense counsel who participated in the plea bargain, in an effort to substantiate his allegations.

Although Otstot's petition for post-conviction relief was clearly vulnerable to dismissal pursuant to *State v. Kapper* (1983), 5 Ohio St.3d 36, we agree with Otstot that he should have had the opportunity to take the depositions of the trial counsel who participated in the plea bargain before his petition was dismissed. Since the State had neither moved to dismiss his petition nor moved for summary judgment, Otstot did not have the opportunity to seek a continuance of any disposition of his motion until such time as he had had the opportunity to take those depositions.

A petitioner for post-conviction relief, in order to win a hearing on his petition, is required by *State v. Kapper, supra,* to present some evidentiary material, other than his own self-serving affidavit, to contradict the record when the record does not support him. Clearly, then, he must be given a reasonable opportunity to conduct the necessary discovery to develop that evidence. In the case before us, the dismissal of Otstot's petition for post-conviction relief, without having afforded him any notice that his petition was about to be dismissed, impermissibly curtailed his opportunity to conduct the discovery reasonably necessary to substantiate his claim.

We sustain Otstot's Assignments of Error to the extent that we hold that the trial court erred by dismissing his petition for post-conviction relief without any pending motion by the State to dismiss or for summary judgment. If and when the State should file such a motion, Otstot can then seek to present evidence in accordance with *State v. Kapper, supra,* and can apply for relief under Civ.R. 56(F) if he should need further time to develop such evidence.

III

Otstot's Assignments of Error having been sustained, the judgment of the trial court will be reversed, and this cause will be remanded for further proceedings consistent with this opinion.

WOLFF, P.J., and BROGAN, J., concur.

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ENTERED

FILED
LORAIN COUNTY
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CLERK OF COMMON PLEAS
RON NABAKOWSKI

RECEIVED
JUL 17 2002
JUDGE KOSMO J. GLAVAS

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

| | | |
|---|---|---|
| STATE OF OHIO | : | TRIAL NO. 95CR046840 |
| | : | |
| Plaintiff-Respondent, | : | JUDGE KOSMO J. GLAVAS |
| | : | |
| -vs- | : | SECOND PETITION FOR POST-CONVICTION RELIEF |
| | : | |
| STANLEY E. JALOWIEC, | : | |
| | : | EVIDENTIARY HEARING REQUESTED |
| Defendant-Petitioner. | : | |

ORIGINAL

PETITION TO VACATE OR SET ASIDE
SENTENCE AND JUDGMENT PURSUANT TO
OHIO REVISED CODE §2953.23 (A)(1)(a) & (2)

Now comes Petitioner, Stanley E. Jalowiec, Pro Se, and petitions this Honorable Court with his Second Petition for Post-Conviction Relief pursuant to Ohio Revised Code §2953.23 (A)(1)(a) & (2).

A Second Petition for Post-Conviction Relief filed under Ohio Revised Code §2953.25 must meet the following:

> (a) The petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief;
>
> (2) The petitioner shows by clear and convincing evidence that, but for the constitutional error at trial, no reasonable fact finder would have found the petitioner guilty of the offense of which the petitioner was convicted ...

Petitioner believes that his petition demonstrates the two prerequisites mandated by Ohio Revised Code §2953.23, thus,



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permitting this Honorable Court to entertain it. There was serious denials and infringements of Petitioner Jalowiec's rights so as to render the judgment against him void or voidable under the Ohio Constitution and the United States Constitution.

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 effective assistance of counsel during the guilt innocence phase of his trial. Counsel fell far below a minimum standard of reasonable representation by numerous actions and failures to act in violation of the Petitioner's constitutional rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I Section 2, 9, 10, and 16 of the Ohio Constitution.

## INTRODUCTION

Trial counsel did not adequately represent the Petitioner. Defense counsel failed to investigate the case in chief for the trial phase. Chief lead counsel Joseph C. Grunda, was representing the Petitioner while at the same time as representing one of the states key witnesses, therefore creation an actual conflict of interest. The Petitioner, throughout ALL HIS PROCEEDINGS, HAS AND CONTINUES TO MAINTAIN HIS INNOCENCE.



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The claims presented below support that his trial counsel were prejudicially ineffective and that the State engaged in misconduct at his capital trial. Petitioner contends that he was **unavoidably prevented from discovery of the facts upon which he relies on in his claims for relief** and his claims show, by clear and convincing evidence that, but for the constitutional error at trial complained herein, no reasonable fact finder would have found the Petitioner guilty of the offense of which the Petitioner was convicted.

There was a significant amount of evidence available for the jury and the Trial Court to consider, as is demonstrated by this Second Petition. But, due to the ineffective assistance of the trial counsel for failing to investigate and due to the state's failure to turn over the clear Brady material presented in this petition prior to trial, there was a violation of the Petitioner's rights pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

JURISDICTIONAL FACTS:

1.) On March 8, 1995, a Lorain County Grand Jury indicted 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 on or about his person or under his control while committing the aggravated murder a firearm. The second alleged that the decedent



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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 entered a plea of not guilty at his arraignment on March 14, 1995.

3.) On June 1, 1995 the State of Ohio filed a motion to take a deposition of Michael Smith on June 15, 1995.

4.) On June 6, 1995, Attorney Michael Duff, counsel for Danial D. Smith, a co-defendant, filed a motion for continuance and the State on June 7, 1995 filed objections to the continuance.

5.) On June 12, 1995 a hearing was held on the objections to the State of Ohio's motion to take a deposition of Michael Smith.

6.) On June 13, 1995, the Court ordered that the deposition of Michael Smith be taken on June 16, 1995 and the deposition was taken on June 16, 1995 as was ordered.

7.) A jury trial began on March 12, 1996. The Jury found the Petitioner guilty of aggravated murder and both specifications on March 20, 1996.

8.) The penalty phase began on April 9, 1996. The jury recommended the death penalty. On the same day, the Trial Court accepted the recommendation and imposed a sentence of death.



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9.) The Petitioner filed a timely notice of appeal on May 9, 1996. The Ninth District Court of Appeals issued its opinion in this case on April 15, 1998.

10.) The Petitioner timely filed his first Post-Conviction Petition for relief on March 17, 1997, and Amended Petition was filed on April 17, 1997 and a Second Amended Petition was filed on August 16, 1997. The Petition and its Amendments were filed by Attorney Patricia J. Smith.

11.) On March 30, 1998, the Petitioner moved this Court to Strike the Petitions filed by counsel and asked to be permitted to file his own pro se Petition for Post-Conviction Relief.

12.) No decision was made on the March 30, 1998 motion, thus the Petitioner filed a Third Amended Petition for Post-Conviction Relief Pursuant to O.R.C. §2953.21 (F). And a Motion Requesting Discovery. On April 9, 2001 the State filed its motion in reply to Petitioners Petitions and the Trial Court dismissed the Petitions on April 12, 2001. Petitioner timely filed his Notice of Appeal on May 14, 2001 and on March 6, 2002 the Ninth District Court of Appeals affirmed the Trial Courts decision.

13.) A timely Notice of Appeal and Memorandum In Support of Jurisdiction was filed in the Ohio Supreme Court on April 17, 2002 and is presently pending a decision.



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14.) The Petitioner alleges a denial or infringement of his rights as to render his judgment and conviction void or voidable under the Ohio Constitution and the United States Constitution.

15.) 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

16.) Petitioner Jalowiec incorporates paragraph 1 through 15 as if fully rewritten herein.

17.) The Petitioner violated due process pursuant to constitutional standards of reliability for 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 Mental Health Records of Michael Smith documenting his lack of competency to testify and very serious impeachment evidence.

18.) The Petitioner was denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, section 10 and 16 of the Ohio Constitution.

19.) Petitioner alleges that the State of Ohio failed to provide pertinent impeachment evidence regarding their key material witness, Michael Smith, who testified at his trial in violation of **Brady v.**



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Maryland, 373 U.S. 83 (1963). This claim could not have been presented in his original Petition for Post-Conviction Relief because he was unavoidably prevented from discovery of the facts upon which he must rely on to present the claim for relief.

20.) The State violated the rule of Brady v. Maryland when it failed to reveal discrepancies as to what prompted Michael Smith to come forward as a State's witness.

21.) On November 30, 1995, the Trial Court in State of Ohio v. Raymond Smith, Case No. 95CR046838, felt it important enough to order All Medical and Psychiatric records of Michael Smith, D.O.B. [redacted] from the Cleveland Psychiatric Institute be provided to counsel in that case. Raymond Smith is Petitioner's co-defendant.[n1]

22.) Petitioner, on good faith and reasonable belief and in due diligence, contends that these and other Medical and Psychiatric records of Michael Smith contains relevant Brady material. (Exhibit B)

23.) Petitioner, on good faith and reasonable belief and in due diligence, contends that had these documents and others been produced by the State, at Petitioner's trial, no reasonable fact finder would have found the Petitioner guilty of the offense, for which he was convicted.

1
Exhibit A is the Court Docket Sheet of Raymond Smith



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THE IMPLICATION OF THE CPI RECORDS:

* Nowhere in the CPI records is there any reference whatsoever to the alleged fact that Michael Smith had witnessed the killing and/or that the killing was responsible for his depression;

24.) This fact would have allowed the defense to question the credibility of Michael Smith's alleged reason for going to see Detective Leiby in the first place. It would have laid the foundation for some other motivation other than his desire to alleviate his "mental anguish."

* Each record recounts an extensive history of crack cocaine and alcohol abuse;

* Each record ties his continual depression specifically to his crack cocaine, alcohol and substance abuse.

* The 3-9-1995 records indicate that in addition to the depression, he has been "experiencing hallucinatory symptoms, hearing voices telling him to kill himself."

25.) Michael Smith, in the June 16, 1995 deposition, attempted to down play his use of alcohol. (Exhibit D, Depo. pg. 79) The presence of hallucinatory symptoms would have been an area from which to challenge the credibility of Michael Smith's observations as well as his competency as a witness altogether. Given his deposition three months later, it would have been appropriate to have Michael Smith examined psychologically prior to taking his deposition, and should, at a minimum, have forced inquiry into the inquiry into the nature of any medication that he was taking, or not taking, at the time.



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26.) As the 5-10-1994 records reflect, Michael Smith "has been highly non-compliant" with his treatments. And the 4-2-1995 records noted that Mr. Smith was treated with Prozac but "he often runs out of medication and does not take it."

* The 3-9-1995 records reveal that the "Patient claimed to have been sexually abused by [his] father [co-defendant Raymond Smith] and a male neighbor. Patient claimed to have had a poor childhood."

* The 4-2-1995 record reveals that Michael Smith was having some psycho-social stressors including marital discord, and his father and brother are currently in jail charged with murder.

27.) This information suggests a legitimate area of inquiry into the potential bias that Michael Smith might have had against his father, and raises further questions as to whether Michael Smith was being manipulative in going to the police because, as he claimed, of his "mental anguish." It is upon information and belief that Michael Smith came forward in an attempt to protect his younger brother Danny Smith, another co-defendant who happen to be found not guilty.

28.) It is clear that Michael Smith had a pattern of attempting to take the blame for crimes his little brother Danny Smith has committed. Michael Smith, prior to the murder of Ronald Lally, had contacted Police Detective Alan Leiby and attempted to assist Danny Smith by claiming that he (Michael) sold the drug's to the police informant and got angry when the detective did not believe him. (Exhibit E, pg. 11)



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* The 3-9-1995 records reveal that [h]e is allegedly on probation of which he is on currently for five years in Cuyahoga County for robbery. He had also been arrested for other offenses in the past.

29.) The fact that Michael Smith was on probation for robbery at the time he gave his statement to the police, and the fact that Michael Smith, although allegedly present at the killing, was the only person not to have been charged with the homicide, suggests that he may have been offered some consideration in exchange for his testimony against Petitioner.

* The 3-9-1995 records indicate that Michael Smith "denied having any blackouts but he has become depressed and exhibits hallucinatory symptoms when drinking or abusing drugs."[2] The records also indicate that he "has a long history of polysubstance abuse in the past five years, from glue sniffing to smoking cocaine and marijuana and also drinking beer."

30.) The fact that Michael Smith was noted to have hallucinatory symptoms when drinking and abusing drugs would have been powerful areas of impeachment as to both his credibility and his ability to recall and recount the homicide that he allegedly witnessed, given his admission that he was drunk and high from smoking crack cocaine during his alleged witnessing of the homicide. This would have supported the challenge to the competency of the witness.

2 In his deposition testimony Michael Smith deposed that on the night of the killing he was high on crack cocaine as well as "pretty drunk" on malt liquor. (Exhibit D, Deposition of Michael Smith, pp. 33-35) It should also be noted that Michael Smith claimed that "was not a heavy drinker." (Exhibit D, Deposition of Michael Smith, pg. 79)



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* The 3-9-1995 records indicate that Michael Smith "appeared and claimed to be depressed but he is unable to explain why."

31.) Questions are raised as to Michael Smith's apparent inability to explain why he is depressed to his psychiatrist/ psychologist in March 1995, but is apparently able to alleviate his mental anguish to the police a month later. This again impeaches his "motive" for coming forward to clear himself, but implicate Mr. Jalowiec. Could his attempt to protect his brother, Danny Smith, seeing how Danny Smith was charged March 12, 1995?

32.) All of the above implications, which come from only a hand full of medical records, identify that the reliability of Michael Smith is questionable. They undermine the credibility of his "motive," for coming forward, they also reasonably undermine the determination of guilt made by the jury. These, and other medical records would have assisted Petitioner in impeaching Michael Smith about his lack of drinking beer.

33.) This Brady material not only reveals discrepancies as to what prompted Michael Smith to come forward and implicate Petitioner, an innocent man, but it also presents issues on his credibility and outright competency to testify. (Exhibit B)

34.) Had discovery been provided to Petitioner, he could have cross-examined extensively on all of these implications. The



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Petitioner was prejudiced by the State's violations of the Rule of Brady v. Maryland. A cursory review of these records reveal that there are numerous significant areas of cross-examination, areas that reflect a serious basis for Michael Smith to have bias or prejudice against his father, Raymond Smith, Petitioner's co-defendant; areas to impeach his testimony generally; areas to impeach his ability to recall the alleged event's; areas to impeach his down play on drinking all the time; and areas to outright challenge Michael Smith's competency to testify altogether. (Exhibit B)

35.) Courts have ruled that evidence is admissible concerning a "witness's mental incapacity at a time about which he proposes to testify." United States v. Partin, 493 F.2d 750, 762 (5th Cir. 1974). 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 this Honorable Court order the production of any and ALL Medical and Psychiatric Records of Michael Smith, Petitioner further requests that funds be provided for expert Witnesses in the field of Psychiatry and Forensic Psychiatry, Substance Abuse, Forensic Psychiatric Evaluations and Witness Competencies. Denial of this request for Discovery as it relates to this claim for relief would amount to a denial of substantive and procedural due process as guaranteed by the Fifth, and Fourteenth Amendments to the United States Constitution and the Ohio State Constitution.



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SECOND CLAIM FOR RELIEF

36.) Petitioner Jalowiec incorporates paragraph 1 through 34 as if fully rewritten herein.

37.) The failure of defense counsel to conduct an investigation into the background of Michael Smith, the States Key witness and to adequately represent the Petitioner at the guilt-innocent determination stage resulted in a sentence of death that does not comply with the minimum constitutional standards of reliability required under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 16 of the Ohio Constitution.

38.) The Petitioner was denied the effective assistance of counsel in the guilt-innocent determination phase of the trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 16 of the Ohio Constitution. Strickland v. Washington (1984), 466 U.S. 668.

39.) The acts and omissions of Petitioners trial counsel, particularly with respect to the failure to investigate into Michael's background and mental health condition, entirely failed to subject the states case to meaningful adversarial testing. As a consequence, Petitioner was deprived of his Sixth Amendment right to the assistance of counsel and the adversary process in his case was presumptively unreliable. United States v. Cronic, 466 U.S.



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648, 104 S.Ct. 2039 (1984). Petitioner's counsel were merely physically present during this critical stage of his trial and did not fulfill the State's Sixth Amendment obligation to him; they may as well have slept through the entire process. McCoy v. Wainwright, 804 F.2d 1196, 1198 (11th Cir. 1986).

40.) **Trial counsel's failure to seek discovery and investigate was clearly ineffective assistance.** Trial counsel's failure to seek a continuance of Michael Smith's Deposition upon revelations of Michael Smith's stay in several mental health hospitals was clearly ineffective assistance.

TRIAL COUNSEL FAILED TO FOLLOW UP OR ACT UPON THE REVELATIONS BEFORE AND DURING THE DEPOSITION OF MICHAEL SMITH'S PSYCHOLOGICAL PROBLEMS AND ABUSE OF DRUGS

41.) Whether or not counsel should have known that Michael Smith would become a witness against Petitioner, or whether they could have known of his mental illness beforehand, they were certainly apprised of his problem once the state moved to take the deposition.

42.) Michael Smith's psychological problems were revealed to trial counsel by the prosecutor on June 12, 1995; this included his suicide attempts and an admission to CPI. (Exhibit C, Hg. Tr. 14).

43.) Michael, himself, acknowledged the problems at the June Deposition, however he down played his medical condition majorly by claiming only "major derpession," and revealed suicide attempts,



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psychiatric hospitalizations. (Exhibit D, Depo. Tr. 19, 40-43, 45, 73-74).

44.) At the deposition, Michael revealed he had been admitted to Metro General Hospital, Huron Road Hospital, and Hanna Pavilion at University Hospital. (Exhibit D, Depo. Tr. 6, 42, 75).

45.) At the Deposition, Michael repeatedly revealed that he had been under the influence of crack cocaine and alcohol the night of the homicide. (Exhibit D, Depo. Tr. 33-35, 38, 51, 60, 78, 79, 87-88).

46.) Trial counsel utterly ignored the evidence of Michael Smith's serious mental illness and failed at any time to challenge his mental competence.

47.) "Bias, prejudice, interest or motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence." Ohio Evid. Rule 616.

48.) The untruthfulness of Michael's statement that his problems were brought on by having witnessed the Lally murder is apparent from the Hospital Records that could have been obtained by trial counsel. (Exhibit B)

49.) The fact of and powerful influence of Michael's drug abuse on his mental health is apparent from the Hospital records that could have been obtained by trial counsel. (Exhibit B)



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50.) Trial counsel failed to object to the competency of Michael Smith at the time of the taking of the deposition, and counsel failed to conduct their own investigation of Michael's competency to testify.

51.) Counsel failed either to subpoena or to move for the production of the records from Metro General Hospital, Huron Road Hospital, St. Vincent Charity Hospital, Elyria Memorial Hospital, CPI Records. and Hanna Pavilion at University Hospital, all named by Michael Smith.

52.) Counsel failed to pursue this information under Brady doctrine. They never moved for the state to produce any of the following information in its possesion:

a) Michael's Mental Health Records;
b) Information about his condition possessed by Det. Leiby and others;
c) Mental Health information kept by Lorain County Probation Department;
d) Drug and alcohol abuse and dependency information kept by the Probation Department;
e) Examples of Michael's probation violations and other misconduct occasioned by his mental condition and/or his drug and alcohol abuse.

53.) Once Michael Smith was deposed, it would have been apparent to trial counsel that his deposition testimony and/or trial testimony would be devastating to Petitioner if it were not challenged and suppressed. Inherent in counsel's responsibilities is the duty to investigate. "[c]ounsel has a duty to make reasonable investigations



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or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691; Sims v. Livesay, 970 F.2d 1575, 1580-81 (6th Cir. 1992); See also O'Hara v. Wigginton, 24 F.3d 823, 828, (6th Cir. 1994) (Failure to investigate, especially as to key evidence, must be supported by a reasoned and deliberate determination that investigation was lacking, so counsel's performance was deficient.)

54.) Trial counsel's performance during the entire process was so ineffective that counsel's performance fell far below an objective standard of reasonableness and as a result of counsel's deficient performance, it prejudiced the Petitioner resulting in an unreliable and fundamentally unfair outcome. There was never a meaningful adversarial testing of the principal witness against Petitioner. As addressed below, the implication of the CPI records recently obtained by Petitioner reveal that there are numerous significant areas for cross-examination that reflect a basis for Michael Smith to have bias or prejudice against his father, Raymond Smith; areas to impeach his testimony generally; areas to impeach his ability to recall the alleged events; areas to impeach his reason's for coming forward to the Police at the time that he came forward; and areas to outright challenge his competency to testify altogether.

55.) Courts have ruled that evidence is admissible concerning a "witnesses mental incapacity at a time about which he proposes to testify." United States v. Partin, 493 F.2d 750, 762 (5th Cir. 1974); accord United States v. Lindstorm, 698 F.2d 1154, 1163 (11th Cir.



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1983) (Admissibility of "a history of psychiatric disorders ... having specific relevance to the facts at issue.") The jury should, within reason, be informed of all matters affecting a witness's credibility to aid in their determination of the truth. See gen., Partin, supra, 762-765.

56.) Failure of defense counsel to secure these records prior to trial, prior to taking Michael Smith's deposition, and/or prior to concluding the deposition without reservation of the right to secure these records and continue a cross-examination at a future date, forms and supports the basis for claims of ineffective assistance of counsel.

57.) Specifically, some of the prejudicial implications of the partial CPI Records (Attached as Exhibit B), are as follows:

THE IMPLICATION OF THE CPI RECORDS:

* Nowhere in the CPI Records is there any reference whatsoever to the alleged fact that Michael Smith had witnessed the killing and/or that the killing was responsible for his depression;

58.) This fact would have allowed Petitioner to question the credibility of Michael Smith's alleged reason for going to see Detective Leiby in the first place. It would have laid the foundation for some other motivation other than his desire to alleviate his "mental anguish."



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* Each record recounts an extensive history of crack cocaine and alcohol abuse;

* Each record ties his continual depression specifically to his crack cocaine, alcohol and substance abuse;

* The 3-9-1995 records indicate that in addition to the depression, he has been "experiencing hallucinatory symptoms, hearing voices telling him to kill himself."

59.) Michael Smith, in the June 16, 1995 deposition, attempted to down play his use of alcohol. (Exhibit D, Depo. pg. 79) The presence of hallucinatory symptoms would have been an area from which to challenge the credibility of Michael's observations as well as his competency as a witness altogether. Given his deposition three months later, it would have been appropriate to have Michael Smith examined psychologically prior to taking his deposition, and should, at a minimum, have forced inquiry into the nature of any medication that he was taking, or not taking, at the time.

60.) As the 5-10-1994 records reflect, Michael Smith "has been highly non-compliant" with his treatments. And the 4-2-1995 records noted that Mr. Smith was treated with Prozac but "he often runs out of medication and does not take it."

* The 3-9-1995 records reveal that the "Patient claimed to have been sexually abused by [his] father [co-defendant Raymond Smith] and a male neighbor. Patient claimed to have had a poor childhood."

* The 4-2-1995 record reveals that Michael Smith was having some psycho-social stressors including marital discord, and his father and brother are currently in jail charged with murder.



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61.) This information suggests a legitimate area of inquiry into the potential bias that Michael Smith might have had against his father, and raises further questions as to whether Michael Smith was being manipulative in going to the police because, as he claimed, of his "mental anguish." It is upon information and belief that Michael Smith came forward in an attempt to protect his younger brother Danny Smith, another co-defendant who happen to be found not guilty.

62.) It is clear that Michael Smith had a pattern of attempting to take the blame for crimes his little brother Danny Smith has committed. Michael Smith, prior to the murder of Ronald Lally, had contacted Police Detective Alan Leiby and attempted to assist Danny Smith by claiming that he (Michael) sold the drug's to the police informant and he (Michael) "got angry," when the detective did not believe him. (Exhibit E. pg. 11)

* The 3-9-1995 records reveal that [h]e is allegedly on probation of which he is on currently for five years in Cuyahoga County for robbery. He had also been arrested for other offenses in the past.

63.) The fact that Michael Smith was on probation for robbery at the time he gave his statement to the police, and the fact that Michael Smith, although allegedly present at the killing, was the only person not to have been charged with the homicide, suggests that he may have been offered some consideration in exchange for his testimony against Petitioner.



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* The 3-9-1995 records indicate that Michael Smith "denied having any blackouts but he has become depressed and exhibits hallucinatory symptoms when drinking or abusing drugs." The records also indicate that he "has a long history of polysubstance abuse in the past five years, from glue sniffing to smoking cocaine and marijuana and also drinking beer."

64.) In his deposition testimony Michael Smith deposed that on the night of the killing he was high on crack cocaine as well as "pretty drunk" on malt liquor. (Exhibit D, Depo. pp. 33-35) It should also be noted that Michael Smith claimed he "was not a heavy drinker." (Exhibit D, Depo. pg. 79)

65.) The Fact that Michael Smith was noted to have hallucinatory symptoms when drinking and abusing drugs would have been powerful areas of impeachment as to both his credibility and his ability to recall and recount the homicide that he allegedly witnessed, given his admission that he was drunk and high from smoking crack cocaine during his alleged witnessing of the homicide. This would have supported the challenge to the competency of the witness.

* The 3-9-1995 records indicate that Michael Smith "appeared and claimed to be depressed but he is unable to explain why."

66.) Questions are raised as to Michael Smith's apparent inability to explain why he is depressed to his psychiatrist/psychologist in March 1998, but is apparently able to alleviate his mental anguish to the police a month later. This again impeaches his "motive" for coming forward to clear himself, but implicate Mr. Jalowiec. Could



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his attempt to protect his brother, Danny Smith, be his motivation for such an act, seeing how Danny Smith was charged March 12, 1995?

* **The records of 4-2-95 only indicate that Michael indicated that "he is having some psycho-social stressors including marital discord."**

67.) As above, cross-examination should have made inquiry as to as to why Michael Smith can identify marital discord as stressors but make no mention of the fact that he had allegedly witnessed a homicide, which was causing him great "mental anguish."

68.) As clearly indicated by the above, these documents would have assisted Petitioner in a great deal during cross-examination and in challenging Michael Smith's competency. Trial counsel's failure to investigate the back ground of Michael does and should constitute ineffective assistance of counsel, thus showing their deficient performance resulting in prejudice to Petitioner.

69.) Counsel's performance was not reasonable under prevailing professional norms. Strickland v. Washington (1984), 466 U.S. 668.

70.) The Petitioner requires discovery as provided by the Ohio Rules of Civil Procedure in order to fully develop this claim. Specifically, Petitioner request's that depositions be taken of his trial counsel, that funds be provided for and investigator and other expert witnesses in the field of psychology and an expert in the field of ineffective assistance of counsel. Petitioner further seeks the assistance of expert's in the field of drug and alcohol abuse, and



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Petitioner seek's this Honorable Court to order the production of any and all medical and psychiatric records of Michael Smith.

THIRD CLAIM FOR RELIEF

71.) Petitioner Jalowiec incorporates paragraph 1 through 70 as if fully rewritten herein.

72.) Ohio's Post-Conviction scheme, Ohio Rev. Code §§2953.21, et seq., fails to provide an adequate and effective corrective process for reviewing constitutional challenges to a conviction or sentence, and because Ohio Re. Code §2953.32(A)(2) is facially unconstitutional unconstitutional as applied to Petitioner, Petitioner was deprived of his rights to due process, equal protection protection, the effective assistance of counsel, and to be free from cruel and unusual punishment, all as guaranteed by the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Ammendments.

**A. Ohio's Post-Conviction process fails to provide an adequate and effective corrective process for reviewing constitutional challenges to a conviction or sentence.**

73.) The death penalty is like no other penalty both in terms of its finality and scope. Lockett v. Ohio, 438 U.S. 586, 605 (1978). Because of the nature of the penalty at stake, capital cases require additional procedural and substantive protections. Herrera v. Collins, 506 U.S. 390, 399; Gardner v. Florida, 430 U.S. 349 (1977); Woodson v. North Carolina, 428 U.S. 280, 305 (1976).



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74.) Under our Constitution and laws, Petitioner is entitled to receive every safeguard before and after a sentence of death. Lockett v. Ohio, 438 U.S. at 604 (1978); Gardner v. Florida, 430 U.S. at 358 (1977); Gregg v. Georgia, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. at 305 (1976); Reid v. Covert, 354 U.S. 1, 77 (1957)(Harlan, J., concurring in result); Powell v. Alabama, 287 U.S. 45, 71 (1932).

75.) This due process protection extends beyond the initial trial to the direct appeal of right, Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1983), and it also protects a capital defendant in the pursuit of clemency. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998).

76.) Although the level of due process varies at every step of the process, this only enhances Petitioner's due process right at state Post-Conviction. Surly, is Petitioner is entitled to some, as yet unknown, level of due process at the very end of capital litigation, clemency, then his is entitled to significantly more due process at his first opportunity to litigate claims of constitutional violation de hors the record, i.e., in state Post-Conviction proceedings.

77.) The Sixth Circuit recognized that due process protections do extend to post-conviction proceedings. Woodard v. Ohio Adult Parol Authority, 107 F.3d 1178, 1186 (6th Cir. 1997), rev'd on other grounds Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998).



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78.) It is axiomatic that when state chooses to act, even though it is not required to act, the act must conform with the dictates of the Constitution, particularly with the dictates of the United States Constitution, particularly with the dictates of the Due Process Clause. Evitts.

79.) Ohio has chosen to provide a post-conviction process to review defendants' claims of federal constitutional violations and this process must comport with the Due Process Clause. Evitts, 469 U.S. at 401.

80.) Ohio's post-conviction statue was passed in response to Case v. Nebraska, 381 U.S. 336 (1965), which strongly suggested the need for "some adequate corrective process for the hearing and determination of claims of violations of federal constitutional guarantees." Id., 381 U.S. at 337, which Ohio lacked. See Knox v. Maxwell, 277 F.Supp. 593, 596-597 (N.D. Ohio 1967). Ohio Rev. Code §§2953.21, et seq., were enacted in 1965.

81.) Almost since the enactment of Ohio's Post-Conviction law, the Sixth Circuit has criticized the law as inadequate. Keener v. Ridenour, 594 F.2d 581, 587 (6th Cir. 1979)("greatly restricts the scope of Post-Conviction Relief under Ohio Law"); Coley v. Alvis, 381 F.2d 870, 872 (6th Cir. 1967) ("The Perry decision has rendered such process [the Ohio Post-Conviction statue] ineffective to protect the rights of Appellant"); and Allen v. Perini, 424



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F.2d 134, 140-141 (6th Cir. 1970) ("We have been cited to no decision, however, that convinces us that the Supreme Court of Ohio did not mean what it said in State v. Perry, [10 Ohio St.2d 175, 226 N.E.2d 104 (1967)"]. These cases all recognized the futility of presenting claims to the Ohio Post-Conviction courts and this futility excused any failure to present the claim.

82.) Nothing has changed to bring the process up to code. Since the reenactment of Ohio's present death penalty scheme in 1981 only one of the more than one hundred and ninety-five death-sentenced individuals who filed post-conviction petitions has been granted post-conviction relief.

83.) The Ohio Supreme Court has held that it has discretionary review regarding capital post-conviction cases. It has denied every memoranda in support of jurisdiction filed in capital post-conviction cases. It has never accepted a capital post-conviction case for review.

84.) Ohio's post-conviction scheme is therefore a meaningless ritual for capital defendants, and renders Ohio death penalty scheme unconstitutional. For Ohio's death penalty scheme to have been constitutionally applied to Petitioner, he would have be provided with due process and equal protection at every step of the process. See Gregg v. Georgia, 428 U.S. 153 (1976).



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B. O.R.C. §2953.23 (A)(2) Violate The Supremacy Clause.

85.) The Supremacy Clause, Art. VI, cl.2 of the United States Constitution, states that "the Laws of the United States... shall be the supreme Law of the Land; the Judges in every State shall be bound thereby." The Supremacy Clause dictates that federal law prevails over competing state exercise of power unless the state law affords greater constitutional protections than the federal law. State courts cannot refuse to apply federal law. Testa v. Katt, 330 U.S. 386, 389 (1974). In effect, the federal courts' interpretation of the federal constitution is the supreme law of the land. Therefore, the Ohio General Assembly cannot adopt a law which conflicts with the United States Constitution.

86.) O.R.C. §2953.23(A) establishes the standard of proof for a post-conviction petitioner to prove a federal constitutional violation. O.R.C. §2953.23(A)(2) requires a successor post-conviction petitioner to not only establish by competent evidence a violation of his federal constitutional rights but also that the petitioner prove by clear and convincing evidence that "but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of [conviction]."

87.) The federal courts have already determined the standards of proof necessary to give relief to convicted persons who have had their constitutional rights violated. For example, if a petitioner is denied counsel, petitioner has only to show a denial of counsel - prejudice is presumed. United States v. Cronic, 466 U.S. 648, 659 (1984). Where the Prosecutor knows or should have



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known that he was using false evidence, a petitioner need only establish that there is a reasonable likelihood that the false evidence could have effected the judgment of the jury. United States v. Agurs, 427 U.S. 97, 103 (1976). Claims of juror bias require the state to establish that the error is harmless beyond a reasonable doubt. Smith v. Phillips, 455 U.S. 209, 229 (1976). For violations of the rule of Brady v. Maryland, 373 U.S. 83, 87 (1963), a person need only establish whether in the absence of the suppressed materials he received a fair trial, which is understood as "a trial resulting in a verdict worthy of confidence." Kyles v. Whitely, 514 U.S. 419 (1995). None of these federal decisions require a person to establish that "but for constitutional error at trial, no reasonable fact-finder would have found petitioner guilty of the offense."

88.) As a result, O.R.C. §2953.23(A)(2) is a legislative enactment that subverts the binding precedent of United States Supreme Court for the resolution of claims for relief arising under the United States Constitution and is, therefore, violative of the Supremacy Clause.

**C. O.R.C. §2953.23(A)(2) Upsurps Judicial Power In Violation Of The Doctrine Of Separation Of Powers.**

89.) A statue that violates the doctrine of seperation of powers is unconstitutional. State, ex rel OATL v. Sheward, 86 Ohio St.3d



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451, 475 (1999). The Ohio Constitution prohibits the General Assembly from exercising "any judicial power, not herein expressly conferred." Section 32, Article II, Ohio Constitution. The functions of interpreting and providing remedies for violations of constitutional rights is exclusively the province of the judiciary. By enacting O.R.C. §2953.23(A)(2), the General Assembly has attempted to exercise power that belongs exclusively to the judiciary. See Beagle v. Walden, 78 Ohio St.3d 59, 62 (1997).

90.) The General Assembly may not enact legislation that limits the power of a court to enforce a constitutional right because "[w]hat the constitution grants, no statue may take away." State ex rel. Hoel v. Brown, 105 Ohio St. 479 (1922) syl. para. 3.

91.) O.R.C. §2953.23(A)(2) runs afoul of the State and Federal Constitutions because the statue attempts to limit the Ohio courts' ability to "entertain" claims alleging a denial of state and federal constitutional rights. A person can only prevail when he establishes the legislative requirement that, but for the violation no reasonable jury would have found the person guilty of the offense of conviction. Thus, the statue imposes new and insurmountable requirements for the granting or relief for previously undiscovered violations of a convicted person's constitutional rights. As such, the statue impermissibly infringes on the judiciary's exclusive power to define the scope and extent of constitutional protections, and to provide a meaningful remedy.



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D. O.R.C. §2953.23(A)(2) Violates The "Due Course Of Law" And "Open Courts" Provisions Of Section 16, Article I Of The Ohio Constitution.

92.) There is no rational relationship between the discovery of a constitutional violation and a demonstration that the person is not guilty of the offense of conviction. Nor is there a rational relationship between the retroactive application of a newly recognized federal or state right and clear and convincing evidence that the person is not guilty of the offense. The absence of such a rational relationship constitutes a violation of the federal and state constitutional rights to due process and equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and Ohio Const. Art. I, §16.

93.) Many denials of a convicted person's constitutional rights do not manifest themselves immediately. For example, judicial and juror bias, Brady violations, prosecutorial use of false testimony and ineffective assistance of counsel may all be discovered long after a person is unjustly convicted, completes direct appeal, and avails himself of collateral relief. In Kimmelman v. Morrison, 477 U.S. 365, 378 (1986) the United States Supreme Court held "a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults with another lawyer about the case." The logic applies to other constitutional violations.



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94.) In addition, there are federal constitutional violations that require reversal even though they have no impact on a jury's decision as to the issue of guilt, for example: denial of counsel at critical stages of the proceedings; denial of the right to appeal; and denial of the right to a speedy trial. O.R.C. §2953.23 (A)(2) does not permit these constitutional violations to be remedied in a successive post-conviction petition pursuant to the standards created by the federal court. Instead, the petitioner must establish that he was unavoidably prevented from discoverying the operative facts and present a clear and convincing evidence that but for the claimed error he is innocent of the offense of conviction.

95.) The statue denies successive post-conviction petitioners their right to "due course of law" and "open courts" because it conditions the right to a remedy for constitutional violations upon establishing by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact-finder would have found the petitioner guilty of the offense of conviction. Absent such a showing, the petitioner filling a successor petition simply loses his right to relief for the constitutional violations. Thus, successive post-conviction petitioners are treated as second class litigants even though they may be "unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief." As a result, O.R.C. §2953.23(A)(2)



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is arbitrary, unreasonable and denies a successive post-conviction petitioner his rights under Section 16, Article I of the Ohio Constitution.

E. O.R.C. §2953.23 (A)(2) Is Unconstitutional As Applied To Petitioner.

96.) On September 21, 1995, Ohio Senate Bill 4 became effective and substantially rewrote O.R.C. §2953.21, Ohio Post-Conviction statue. As applied to Petitioner's case, the revised statue ignores the complex and evolving body of equitable principles established by judicial decisions.

97.) Petitioner has plead two separate constitutional violations. The Standard for granting relief established by the United States Supreme Court as to both of these two claims do not require a demonstration that: (1) the claim could not have been identified earlier; (2) the claim involved a new constitutional basis; or (3) that no juror would have convicted Petitioner of the offense if the constitutional violation had not occurred. However, under O.R.C. §2953.23(A)(2), for Petitioner to prevail on either of his claims, he must first demonstrate certain factors that have never been required by the United States Supreme Court.

98.) In sum, O.R.C. §2953.23(A)(2) impermissibly threatens the institutional independence and integrity of the Judicial Branch.



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The statue on its face violates the Supremacy Clause, and the separation of powers doctrine of the United States Constitution, in addition to violating the "due course of law" and "open courts" provisions of the Ohio Constitution. As applied to Petitioner, the statue denies him the benefit of a rational and more lenient standard of review provided by federal rules of decision. Only the judiciary has the power to determine whether a person is entitled to relief for violations of his constitutional rights. O.R.C. §2953.23(A)(2) is a legislative attempt to deprive convicted persons of the benefit of standards of review set forth by the Ohio and United States Supreme Courts.

## CONCLUSION

99.) Petitioner Jalowiec has shown that there was a substantive Constitutional violation in both of the claims above, 1) a serious Brady violation and 2) a major ineffective assistance of counsel claim at the time of the trial. Strickland.

100.) This Petition has demonstrated the two prerequisites mandated by Ohio Revised Code §2953.23, thus, permitting this Honorable Court to entertain it. 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.



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101.) The documents in support of this Second Petition could not have been included in Petitioner's original Petition for Post-Conviction because the State of Ohio withheld the material from defense counsel in violation of the Brady doctrine, and the CPI records were unknown to Petitioner.

## PRAYER FOR RELIEF

WHEREFORE, the Petitioner, Stanley E. Jalowiec, respectfully requests the following relief:

1) That his conviction and sentence of death be vacated and that he be retried;

2) That the conviction and sentence be determined void or voiadable and that he be granted a New Trial;

3) That discovery be ordered and an evidentiary hearing be held in order for the Petitioner to fully develop these claims.

4) For such other relief as this Honorable Court may deem Just and proper.

RESPECTFULLY SUBMITTED,

Stanley E. Jalowiec
Man.C.I. #321-712
Post Office Box 788
Mansfield, Ohio 44901

Petitioner Pro Se



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Second Petition for Post-Conviction Relief was forwarded by regular U.S. Mail to Gregory A. White, Lorain County Prosecutor, Lorain County Prosecutor's Office, 226 Middle Avenue, Elyria, Ohio 44035, this 16th day of July 2002.

Stanley E. Jalowiec
Man.C.I. #321-712
Post Office Box 788
Mansfield, Ohio 44901

Petitioner Pro Se



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APPENDIX

SECOND POST-CONVICTION PETITION EXHIBITS A - E

11/27/95

JUDGMENT ENTRY ON DEFT.'S MOTIONS. (1.) MOTION TO SUPPRESS STATEMENTS. MOTION DENIED. (KJG)
(2.) MOTION TO PERMIT DEFT. TO DRESS IN NON-JAIL CLOTHES DURING TRIAL. MOTION GRANTED.
(3.) MOTION IN LIMINE TO EXCLUDE THE DEPOSITION OF MICHAEL SMITH. MOTION DENIED.
(4.) SUPPLEMENTAL MOTION FOR CONTINUANCE OF TRIAL. MOTION DENIED. SEE JOURNAL.
VOLUME 730 PAGE 1036

11/27/95

SUPPLEMENTAL DISCOVERY FILED BY STATE FILING

11/27/95

SUPPLEMENTAL MOTION FOR CONTINUANCE OF TRIAL FILED BY DEFT FILING

11/27/95

MOTION FILED MOTION
BY DEFT TO PERMIT DEFT TO DRESS IN NON-JAIL CLOTHES DURING TRIAL

11/27/95

MOTION FILED MOTION
BY DEFT TO SUPPRESS STATEMENTS

11/27/95

RESPONSE TO REQUEST FOR DISCOVERY PURSUANT TO RULE 16 FILED BY DEFT FILING

11/27/95

MOTION FILED MOTION
BY DEFENDANT IN LIMINE TO EXCLUDE THE DEPOSITION OF MICHAEL SMITH.

11/30/95

UPON REQUEST OF THE DEFENSE IN THE ABOVE CAPTIONED MATTER, IT IS HEREBY ORDERED THAT ALL MEDICAL AND PSYCHIATRIC RECORDS OF MICHAEL SMITH, D.O.B. 3/28/67, FROM THE CLEVELAND PSYCHIATRIC INSTITUTE BE PROVIDED TO DEFENSE COUNSEL, HARVEY B. BRUNER, AT THE COURT OF COMMON PLEAS, LORAIN COUNTY, OHIO, 308 2ND STREET, COURTROOM #3, ON NOVEMBER 30,1995 AT 9:00 A.M. (KJG)
IT IS SO ORDERED.
VOL 731 PAGE 17

12/05/95

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. (KJG)
MEDIA REQUEST ATTACHED.
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12/05/95

THE COURT HEREBY GRANTS PERMISSION TO THE PLAIN DEALER 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. (KJG)
MEDIA REQUEST ATTACHED.
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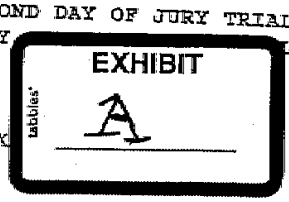
12/05/95

(11/28/95) FIRST DAY OF JURY TRIAL. VOIR DIRE OF JURY COMMENCED. ADJOURNED UNTIL 8:45 A.M. ON 11/29/95. (KJG)
VOLUME 731 PAGE 571

12/05/95

(11/29/95) SECOND DAY OF JURY TRIAL. FURTHER VOIR DIRE COMMENCED. JURY [illegible]LED AND SWORN. (KJG)

http://www.loraincountycpcourt.org/nx



State of Ohio
FACSIMILE COVER LETTER
DMH-OIS-020

Case No. 95CR046838

Please deliver the following pages to:

| Name of Recipient | FAX PHONE NUMBER: |
|---|---|
| Judge Glavas | 1-216-329-5404 |
| Department/Office/Facility Location: Lorain County Common Pleas Court | |

| Date | Time | AM/PM | Total Number of Pages Including Cover Letter |
|---|---|---|---|
| 12-1-95 | 10:00 | PM | 14 |

From:

| Name of Sender | Office Telephone No. | Fax Telephone No. |
|---|---|---|
| Valerie Romain, ART | 787-0757 | 787-0403 |
| Department/Office/Facility: Medical Records Dept. - North Campus - Northcoast Behavioral Healthcare System (formerly Cleveland Psychiatric Institute) | | |

[X] "X" here if pages should be picked up immediately by the receiver. Otherwise they will be delivered at a regularly scheduled time before the end of the day.

Confidential Information:

[X] "X" here if pages are confidential.

Note: Pursuant to State law, the information that is being transmitted is confidential and it must not be reviewed by unauthorized parties. It must be immediately given to the person listed as the recipient. If this information has been transmitted to you in error, please immediately notify the sender.

[ ] To acknowledge receipt of the above faxed information, please call: (  )  
Telephone No.

[XX] THIS INFORMATION HAS BEEN DISCLOSED TO YOU FROM RECORDS WHOSE CONFIDENTIALITY IS PROTECTED BY STATE LAW. SECTION 5122.31 OF THE OHIO REVISED CODE PROHIBITS YOU FROM MAKING ANY FURTHER DISCLOSURE OF IT WITHOUT THE SPECIFIC WRITTEN CONSENT OF THE PERSON TO WHOM IT PERTAINS, OR AS OTHERWISE PERMITTED BY LAW. A GENERAL AUTHORIZATION FOR THE RELEASE OF MEDICAL OR OTHER INFORMATION IS NOT SUFFICIENT FOR THIS PURPOSE.

THIS INFORMATION MUST NOT BE REVIEWED BY UNAUTHORIZED PARTIES. IT MUST BE IMMEDIATELY GIVEN TO THE PERSON LISTED AS THE RECIPIENT. THANK YOU.

EXHIBIT
tabbies
B

DMH-0526 (Rev. 1/93)

**ACKNOWLEDGEMENT OF REQUEST FOR INFORMATION**
Ohio Department of Mental Health
DMH-MedR-003

TO: Mr. Harvey Bruner, Esq.
1600 Illuminating Building
55 Public Square
Cleveland, Ohio 44113

Date: 12-1-95

Re.: Smith, Michael

Record No.: 709055

Your request for information regarding the above individual has been received. The following checked item is applicable to your request.

☐ Copies of the requested information are enclosed

NOTE: This information has been disclosed to you from records whose confidentiality is protected from disclosure by State law. Section 5122.31 and/or Section 3701.243 of the Ohio Revised Code prohibit you from making any further disclosure of it without the specific written and informed release of the person to whom it pertains, or as otherwise permitted by law. A general authorization for the release of medical or other information is NOT sufficient for this purpose.

Information Enclosed:

| | | |
|---|---|---|
| ☐ Narrative Summary | ☐ Social Work Assess./Psychosocial Assess. | ☐ Orders |
| ☐ Social Work Report | ☐ Progress Notes | Other (specify): |
| ☐ Psychiatric Examination | ☐ Lab Results | ☐ |
| ☐ History and Physical | ☐ Treatment Plan | ☐ |
| ☐ Psychology Report | ☐ Consultations | ☐ |

☐ Signed authorization of the person is needed. Please have the person complete, sign, and date the attached authorization.

☐ Patient is a minor. Authorization must be signed by parent or guardian. A copy of the guardian papers must accompany authorization.

☐ A copy of the legal guardian/executor of the estate/power of attorney papers must accompany authorization.

☐ We are unable to locate a record of hospitalization. If you are able to furnish additional information or have another name under which this person might have been hospitalized, we will be glad to check our files.

☐ We destroy medical records 10 years after a person is discharged.

☒ Other: Narrative Summaries from admissions dated 5-10-94, 3-9-95, & 4-2-95; and Psychology Report from admission dated 3-9-95.

Sincerely, Valerie Romain

Valerie Romain, ART
Medical Records Administrator
Northcoast Behavioral Healthcare
System-North Campus (formerly C.P.I
1708 Southpoint Dr.
Cleveland, Ohio 44109

MH-0107 (Rev. 2/96) White - Requestor, Canary - Medical Record

# NARRATIVE SUMMARY

| Date of Admission | Date of Release | Legal Status | | Name of Facility |
|---|---|---|---|---|
| | | On Admission | On Discharge | |
| 5/10/1994 | 5/18/1994 | | | Cleveland Psych. Institute |

Include: Reason for admission and initial diagnoses; past history; type of treatment received (chemotherapy, psychotherapy, pertinent events); significant physical, lab and x-ray findings; clients progress in course of treatment; final and secondary diagnoses (psychiatric and physical); brief summary of aftercare plan; exact dosage of medication given; disposition; signature and title of person preparing report and physician's signature.

PRESENT ILLNESS: This patient is a 28-year-old, married, biracial male, who was admitted to the Cleveland Psychiatric Institute on 5/10/1994 for suicidal ideation. He had been abusing crack cocaine and marijuana on a regular basis for the last several months. He recently binged on marijuana as well as cocaine at the same time, then got very depressed. He called police, saying that he was feeling suicidal and they brought him into the emergency room for an evaluation. This patient stated that he has had a longstanding history of cocaine and marijuana dependence for many years. He often gets very depressed when he binges on alcohol, cocaine and marijuana. He states that there had been some rare periods in which he has been free from drugs and alcohol, at which time he was feeling much better, with less depression and no suicidal ideation. He said that since he has been using drugs on a chronically and regular basis for a long time he often feels very depressed and suicidal. He had attempted suicide back in March of 1994 by trying to hang himself, requiring medical stabilization at the Metro Health Medical Center. There, patient had been at the Psychiatric Unit for a few days at which time an anti-depressant was given. However, patient stated that anti-depressants have not been effective, although he says that he has been taking them intermittently. However, the problem is that he continues to abuse street drugs, such as cocaine and marijuana while he is taking anti-depressants and his depression is not alleviated. Patient also has been given some outpatient treatments at the Nord mental health center in the past but he has been highly noncompliant with these treatments, often not showing up for any of the follow-ups.

PSYCHIATRIC HISTORY: (As described above in Present Illness.)

MEDICAL AND SURGICAL HISTORY: Patient denies any history of any kind of active medical problems.

SUBSTANCE USE HISTORY: (As described above in Present illness.)

MENTAL STATUS EXAMINATION: Patient showed a somewhat demanding, hostile and manipulative manner during the interview. He maintained good eye contact. Affect was blunted. Mood was mildly dysphoric. He denies any suicidal or homicidal ideations or intent or plans. Patient admits that he has a drug problem and that he often feels he is at rock bottom and has felt suicidal when he has recently abused alcohol and drugs.

SMITH, Michael

Hospital No.: 709055

Ward: 4-LEFT

Dict.: 5/20/1994

Trans.: 5/20/1994

(continue on reverse side)



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# NARRATIVE SUMMARY

| Date of Admission | Date of Release | Legal Status | | Name of Facility |
|---|---|---|---|---|
| | | On Admission | On Discharge | Cleveland Psych. Institut |

Include Reason for admission and initial diagnoses; past history; type of treatment received (chemotherapy, psychotherapy, pertinent events); significant physical, lab and x-ray findings; clients progress in course of treatment; final and secondary diagnoses (psychiatric and physical); brief summary of aftercare plan; exact dosage of medication given; disposition; signature and title of person preparing report and physician's signature.

MENTAL STATUS EXAMINATION: (continued) He admits that when he stops using crack cocaine and goes into a cocaine withdrawal the dysphoria gets much worse and he feels very suicidal. Patient denies any auditory or visual hallucinations. There is no evidence of any delusion or any thought disorder on examination. He was alert and oriented to person, place and time. His abstraction ability was intact. Long-term memory was intact. His judgment was fair. His insight at this time is fair in the sense that he does admit he has a drug problem and needs some help.

PHYSICAL EXAMINATION: "Eczema of cubital fossa."

LABORATORY STUDIES: Serum chemistries were all within normal limits. Complete blood count was normal. Thyroid function tests were all normal. His serology, RPR was nonreactive. TSH was less than .3, which was somewhat lower than the expected range. However, his free thyroxine index was normal at 8.0. T4 level was normal at 6.5 and thyroxine uptake level was normal at .81.

X RAY FINDINGS, EEG, EKG, PSYCHOLOGICAL TESTING, CONSULTATIONS: Not done.

HOSPITAL COURSE: Patient was admitted to the inpatient unit at CPI. He was initially put on Suicide Precautions. He showed no evidence of any suicide attempt. Patient also was treated with some Hydrocortisone cream for five days for eczema of the elbow. Patient's affect improved fairly quickly while he was in CPI. He did not show any kind of suicidal behavior or any suicide attempts while he was in CPI. Patient was treated with some individual psychotherapy. Since his dysphoria completely went away, since he has been cocaine-free for the past few days, it was felt that his dysphoria was due to his use of drugs--such as, cocaine and marijuana. He was pleasant, cooperative, interacting appropriately with the staff. His appetite was good. He showed some drug-seeking behavior as he was somewhat demanding about wanting to get some medications for his problem with sleep, however, according to the nursing notes, he seemed to sleep most of the night without any problems. He showed no disruptive behavior while he was in CPI. His appetite was excellent. His energy level was good. There was no significant evidence of clinical depression. Because of that, it was felt that his depression that he had experienced was probably secondary to his continual cocaine and marijuana abuse and he seems to get even more dysphoric when he is withdrawing from cocaine.

SMITH, Michael

Hospital No.: 709055

Ward: 4-LEFT



(continue on reverse side)

NAR.

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 5225

NARRATIVE SUMMARY

| Date of Admission | Date of Release | Legal Status | | Name of Facility |
|---|---|---|---|---|
| page 2 | | On Admission | On Discharge | CLEVELAND PSYCHIATRIC INSTITUTE |

Include Reason for admission and initial diagnoses; past history; type of treatment received (chemotherapy, psychotherapy, pertinent events); significant physical, lab and x-ray findings; clients progress in course of treatment; final and secondary diagnoses (psychiatric and physical); brief summary of aftercare plan; exact dosage of medication given; disposition; signature and title of person preparing report and physician's signature.

DISPOSITION: Patient was discharged to self.

DISCHARGE MEDICATIONS: Zoloft 100 mg. qd. Desyrel 150 mg. qhs.

PSYCHIATRIC DIAGNOSIS: PROVISIONAL - Major Depressive Disorder. History Alcohol/Drug Abuse. Anti-Social Personality Features.

Axis I: Major Depressive Disorder.
History Alcohol/Drug Abuse.

Axis II: Anti-Social Personality Features.

Axis III: No Acute Medical Problems.

PROGNOSIS: Fair.

OUTCOME: Improved.

RECOMMENDATION: Follow-up with W.G. Nord Mental Health Center for counselling and therapy as well as LCCADA for alcohol and drug chemical dependency.

EL/ljw

E. Lee, M.D.

SMITH, MICHAEL

HOSPITAL NO.: 709055

WARD: 4-LEFT

004

(continue on reverse side)

# NARRATIVE SUMMARY

| Date of Admission | Date of Release | Legal Status | | Name of Facility |
|---|---|---|---|---|
| | | On Admission | On Discharge | |
| 3/9/1995 | 3/21/1995 | | | NCBHCS/North Campus |

Include: Reason for admission and initial diagnoses; past history; type of treatment received (chemotherapy, psychotherapy, pertinent events); significant physical, lab and x-ray findings; clients progress in course of treatment; final and secondary diagnoses (psychiatric and physical); brief summary of aftercare plan; exact dosage of medication given; disposition; signature and title of person preparing report and physician's signature.

PRESENT ILLNESS: Patient is a 28-year-old, black, separated, unemployed male, who was admitted here for the second time on a Voluntary referral on 3/9/1995 through Meridia Huron Road and St. Vincent charity hospitals because of his alleged depression, with suicidal ideation, marijuana and cocaine abuse, domestic, marital and legal problems. Since patient's last CPI discharge in May of 1994, he had apparently been living in a group home monitored by the Money and Mailbox mental health agency, where he has been referred upon his discharge from CPI. Patient allegedly never followed the counselor's advice. In addition, he has been abusing crack cocaine and marijuana and has allegedly become depressed, experiencing hallucinatory symptoms, hearing voices telling him to kill himself. Thus, patient walked to the Emergency Room at Meridia Huron Road Hospital, where he was evaluated and from where he was subsequently referred to SVCH and eventually to CPI for further hospitalization and treatment.

PAST HISTORY: Patient had allegedly been at the Cuyahoga Boys' School for one year at age 15. He had subsequently been admitted to Elyria Memorial Hospital twice, once in 1985 and once in 1993. He had also been hospitalized at Hanna Pavilion at University Hospitals once in 1985 after taking an overdose of pills. He had also been hospitalized at the Metro Health Medical Center in 1994 for one week for allegedly trying to hang himself with a sheet. He has also been at St. Luke's Hospital twice, in 1993 and at the ESP unit of the Nord center in 1993. He had also been hospitalized at CPI between 5/10/1994 till 5/18/1994 for allegedly being depressed and also due to his using crack cocaine and marijuana. He had been discharged without medication and referred to the Money and Mailbox mental health agency. Patient was born in Elyria, Ohio on 3/30/1966 as the eldest of two boys. He has a younger brother who is aged 23. He was raised in Cleveland. He was only able to reach the 12th grade but was allegedly unable to finish high school, getting his GED later. Patient claimed to have been sexually abused by father and a male neighbor. Patient claimed to have had a very poor childhood. He got married at age 25 and divorced after a month. He was allegedly married a few months ago and he is currently separated. He had fathered three children. He has a very poor employment history. He is unable to keep a job. He is apparently on general assistance. He has been staying in a group home that is monitored by the Money and Mailbox mental health agency. He has no allergies or history of trauma. He had tonsillectomy and adenoidectomy at age 5.

SMITH, Michael

Hospital No.: 709055

Ward: 5-LEFT/6-RIGHT

Dict.: 10/6/1995

Trans.: 10/25/1995

## NARRATIVE SUMMARY

| Date of Admission | Date of Release | Legal Status | | Name of Facility |
|---|---|---|---|---|
| | | On Admission | On Discharge | NCBHCS/North Campus |

Include: Reason for admission and initial diagnoses; past history; type of treatment received (chemotherapy, psychotherapy, pertinent events); significant physical, lab and x-ray findings; clients progress in course of treatment; final and secondary diagnoses (psychiatric and physical); brief summary of aftercare plan; exact dosage of medication given; disposition; signature and title of person preparing report and physician's signature.

PST HISTORY: (continued) He is allegedly on probation of which he is on currently for five years in Cuyahoga County for robbery. He had also been arrested for other offenses in the past. Patient has been in jail anywhere from overnight to 14 days for unauthorized use of a motor vehicle. Patient has a long history of polysubstance abuse in the past five years, from glue-sniffing to smoking cocaine and marijuana and also drinking beer. His last use was a few days prior to admission. Patient had been placed in alcohol-rehab treatment programs in the past. He denied having any blackouts but he has become depressed and exhibits hallucinatory symptoms when drinking or abusing drugs. Father, at age 50, is allegedly in prison for drug offenses. Patient's mother, at age 42, is apparently in good health. Patient's parents have been divorced for nine years. Patient has a biological brother who has also been in jail for drug trafficking.

MENTAL STATUS: Patient is a tall, ambulatory, fair-complexioned, stocky, black male, who is dressed casually and fairly neat. He has slow psychomotor activity. He appeared downcast and with poor attention span and concentration. Patient slouches in the chair and has limited eye contact but appeared alert, fully oriented in all spheres, with intact memory recall. Speech was coherent and relevant, though he lacked verbal spontaneity. He appeared and claimed to be depressed but he is unable to explain why. He is without any definite plans of suicide. He denied being homicidal or to have any hallucinatory symptoms. Insight is fairly adequate. Patient expressed motivation for help and treatment. He verbalized wanting just to stay in the hospital and be left alone.

PHYSICAL EXAMINATION: Patient is an alert, ambulatory, fair-complexioned, black male, in no acute physical distress, with stable vital signs.

LABORATORY STUDIES: Clinically insignificant, with unremarkable liver function tests, thyroid profile, with negative serology. Urinalysis was not done as the sample could not apparently be obtained.

X RAY FINDINGS, EEG, EKG, CONSULTATIONS: No clinical indication, therefore not done.

PSYCHOLOGICAL TESTING: Test administered: MMPI. "Test results apparently invalid."

SMITH, Michael

Hospital No.: 709055

Ward: 6-LEFT/6-RIGHT



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Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 5228

## NARRATIVE SUMMARY

| Date of Admission | Date of Release | Legal Status | | Name of Facility |
|---|---|---|---|---|
| | | On Admission | On Discharge | NCBHCS/North Campus |

Include: Reason for admission and initial diagnoses; past history; type of treatment received (chemotherapy, psychotherapy, pertinent events); significant physical, lab and x-ray findings; clients progress in course of treatment; final and secondary diagnoses (psychiatric and physical); brief summary of aftercare plan; exact dosage of medication given; disposition; signature and title of person preparing report and physician's signature.

HOSPITAL COURSE: Upon admission patient had been maintained on a regular diet and on Suicidal Precaution. He was initially admitted to Ward 6-LEFT because of his being in that geographic catchment area. He was eventually transferred to Ward 6-RIGHT. Patient has been initially prescribed Zoloft which he consistently refused. Patient had been referred to Psychology for further diagnostic testing. Per protocol, visitor restriction has been implemented. Patient has always kept to himself, only getting out of bed at mealtimes, sleeping all day and at times had difficulty sleeping at night, requiring 10 mg of Ambien at 1 or 2 A.M. Patient claimed to have inability to sleep. He was advised about not sleeping in the daytime. He had been rendered Supervised Privileges. Thus, Zoloft has been discontinued. He had been ordered Benadryl for his sleeplessness which he also refused to take. Patient apparently felt too comfortable in the hospital. He never showed motivation to do anything nor was he receptive to any program. But, otherwise, he had never shown any unmanageable behavior or aggressiveness. With patient's apparent clinical stability, the team felt that he has obtained his maximum benefit of his hospitalization and that he had achieved his optimum level of functioning, thus, he had been discharged per team's recommendation to his case manager of the Money and Mailbox mental health agency for outpatient care and treatment.

MEDICATION AND TREATMENT: Chemotherapy as described above, which patient never took, in conjunction with other modalities of treatment, such as Supportive and Milieu, Therapy.

COMPLICATIONS: None.

PSYCHIATRIC DIAGNOSES:
PROVISIONAL: Cocaine- and Marijuana-Induced Depressive Disorder.
Cocaine and Marijuana Dependency.
AXIS I.: Cocaine-Induced, Depressive Disorder in Remission.
cocaine and Cannabis Dependency.
AXIS II.: Personality Disorder with Antisocial and Dependent Features.
AXIS III.: Essentially Healthy, Adult, Black Male.
AXIS IV.: 2—Longstanding polysubstance problem. Unemployment.
Characterological Disorder. Domestic and marital problem.
AXIS V.: 70.

SMITH, Michael

Hospital No.: 709055

Ward: 6-LEFT/6-RIGHT

## NARRATIVE SUMMARY

| Date of Admission | Date of Release | Legal Status | | Name of Facility |
|---|---|---|---|---|
| | | On Admission | On Discharge | NCBHCS/North Campus |

Include: Reason for admission and initial diagnoses; past history; type of treatment received (chemotherapy, psychotherapy, pertinent events); significant physical, lab and x-ray findings; clients progress in course of treatment; final and secondary diagnoses (psychiatric and physical); brief summary of aftercare plan; exact dosage of medication given; disposition; signature and title of person preparing report and physician's signature.

PROGNOSIS: Poor due to patient's characterological disorder and lack of insight and motivation.

OUTCOME: Improved. He is not depressed, not suicidal or homicidal.

DISPOSITION: Patient was discharged to case manager as of 3/21/1995 to reside at Laneway Manor at 449 East 115th Street, Cleveland, Ohio 44108.

RECOMMENDATIONS: Patient is to continue with outpatient follow-up with David Bound of the Money and Mailbox mental health agency. Patient is also recommended to get involved with NA or counseling.

DISCHARGE MEDICATIONS: None.

Julio Sales, MD JS:amc

SMITH, Michael

Hospital No.: 709055

Ward: 6-LEFT/6-RIGHT

-0004 (Rev. 1/93)

# NARRATIVE SUMMARY

| Date of Admission | Date of Release | Legal Status | | Name of Facility |
|---|---|---|---|---|
| | | On Admission | On Discharge | |
| 4/2/95 | 4/6/95 | | | CLEVELAND PSYCHIATRIC INSTITUTE |

Include, Reason for admission and initial diagnoses; past history; type of treatment received (chemotherapy, psychotherapy, pertinent events); significant physical, lab and x-ray findings; clients progress in course of treatment; final and secondary diagnoses (psychiatric and physical); brief summary of aftercare plan; exact dosage of medication given; disposition; signature and title of person preparing report and physician's signature.

PRESENT ILLNESS: The patient is a 29 year old male admitted to Cleveland Psychiatric Institute as an Emergency. Patient has a history of alcohol and Crack cocaine abuse. He was brought in to the Elyria Memorial Hospital Emergency Room by the Elyria police after he was found sitting in a bridge. He claimed at that time that he was thinking about jumping off the bridge and kill himself. He said he as been depressed recently and for quite some time. He has been using a lot of drugs as well as alcohol but he also claims that during those periods when he has been sober and clean. He continues to remain depressed. He states he is having some psycho-social stressors including marital discord. His father and brother are currently in jail charged with murder. Patient also has been using a lot of drugs and alcohol. When evaluated in the emergency room patient was depressed and feeling suicidal wanting to jump off the bridge and it was felt that patient needed to come in to CPI for in-patient treatment. He has had some serious suicide attempts including trying to hang himself and overdose, has a lengthy history of alcohol and drug abuse.

PAST HISTORY: Patient has numerous chemical dependency treatments in the past, also has been in Compas House in 1992; at CPI x 2; MetroHealth Medical Center Intensive Care Unit after suicide attempt by hanging. He has been treated with Prozac in the past and he states that Prozac has helped in reducing his depression however states he often runs out of medication and does not take it. He also uses alcohol and drugs.

MENTAL STATUS: On admission patient was depressed, affect labile. He was having thoughts of wanting to kill himself, was mildly anxious, denied visual/auditory hallucinations, no evidence of delusions, cognitively was alert, oriented x 3.

PHYSICAL EXAMINATION: Essentially unremarkable.

LABORATORY FINDINGS: RPR non-reactive; Thyroid function tests normal; chemistry normal, CBC normal.

X-RAY, EEG, EKG, PSYCHOLOGICAL TESTING: Not requested.

CONSULTATIONS: None.

HOSPITAL COURSE: The patient had symptoms consistent with depression as well as chemical dependency. He was given anti-depressants Zoloft as well as Desyrel for sleep. He showed considerable improved, affect was brighter, mood euthymic, denied suicidal intent or plans, thought process was normal, no evidence of psychotic features. Patient was discharged to self as improved.

COMPLICATIONS: None.

SMITH, MICHAEL

HOSPITAL NO.: 709055

WARD: 4-LEFT

DICT 4/17/95
TRNS 4/17/95

continued on page 2



(continue on reverse side)

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 5231

The State of Ohio )
County of Lorain ) SS:

IN THE COURT OF COMMON PLEAS

| | | |
|---|---|---|
| The State of Ohio, | ) | |
| Plaintiff, | ) | |
| vs. | ) | NOS. 95 CRO 46840 |
| Stanley E. Jalowiec, | ) | 95 CRO 46839 |
| Daniel Smith, | ) | 95 CRO 46838 |
| and | ) | |
| Raymond Augustus Smith, | ) | |
| Defendants. | ) | |

* * *

COMPLETE TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-ENTITLED MATTER ON MONDAY, THE 12TH DAY OF JUNE, 1995, BEFORE THE HONORABLE KOSMA J. GLAVAS, PRESIDING JUDGE OF SAID COURT; IN RE: OBJECTION TO THE STATE OF OHIO'S MOTION TO TAKE A DEPOSITION OF MICHAEL SMITH.

* * *

Exhibit "C"

Case No. 08-3249
Jalowiec v. Bradshaw
Warden's Appendix Pg. 5232

APPEARANCES:

Appearing on behalf of the State of Ohio:

Gregory A. White,

Lorain County Prosecuting Attorney, by

Jonathan Rosenbaum,

Assistant County Prosecuting Attorney.

Appearing on behalf of the Defendant,

Stanley E. Jalowiec:

Joseph C. Grunda, Esq. and

Edward Cleary, Esq.

Appearing on behalf of the Defendant,

Danny Smith:

Michael Duff, Esq. and

Daniel Wightman, Esq.

Appearing on behalf of the Defendant,

Raymond Augustus Smith:

Kenneth Lieux, Esq. and

Thomas Elwell, Esq.

* * *

P R O C E E D I N G S

MR. ROSENBAUM: State of Ohio versus Stanley Jalowiec, 95 CRO 46840, Daniel Smith, 95 CRO 46839, and Raymond Smith, 95 CRO 46838.

All three Defendants are present in the courtroom, your Honor, counsel is here, I think, everybody except Mr. Wightman.

The issue before the Court is the deposition that has been ordered for Thursday of this week. The Defendants want it continued, the State has opposed that.

THE COURT: Who wants to tell me why?

MR. DUFF: We oppose it for several reasons.

I think initially if you look at our Criminal Rule 15, Mr. Rosenbaum has not shown the necessary requirements for the holding of a deposition pursuant to that rule.

He states in the motion that the deposition should be taken to preserve his testimony in the event that he will not be able to attend the trial, Michael Smith.

The rule requires that it appears probable that a witness be unable to attend or will be

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Jalowiec v. Bradshaw
Warden's Appendix Pg. 5234

prevented from attending a trial or hearing. No showing has been done by Mr. Rosenbaum.

And further, it appears that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice.

That is the threshold which he has not met, your Honor. I don't think he met that.

THE COURT: Mr. Duff, are you spokesman for everybody or does everybody want an opportunity to say something?

Who else wants to talk about this?

MR. LIEUX: My client is Raymond Smith, along with Tom Elwell.

We concur with the statements made by Mr. Duff and secondly, your Honor, the date selection was just -- we both have conflicts in our schedule. We were not consulted with the date and time for the deposition and I agree with Mr. Duff's statement that the Prosecutor needs to make a threshold showing under Rule 15 and that is not done.

THE COURT: This is why we are here.

One, that the deposition be ordered and two,

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Jalowiec v. Bradshaw
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that the date and time be selected to a time that is agreeable to all counsel, very well.

MR. GRUNDA: We concur with Mr. Duff and the prosecution's requirement to show the two-fold requirement and further we were not asked about the date and Mr. Cleary and myself have a problem with that date because of the short notice.

When we got it we had other court things.

THE COURT: Mr. Rosenbaum?

MR. ROSENBAUM: Your Honor, as the Court is aware, in my response to their motion to continue the deposition we have indicated to the Court and are prepared to offer testimony today that the witness was present at the scene of the murder.

His testimony certainly is material. He has suffered a death threat. The State has him in seclusion. The fact that he may be killed as a witness like the Defendants are charged with for killing an informant against them certainly indicates that there is a substantial probability that he may not be present or able to testify at trial.

There is precedent to taking depositions

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of the people that are in danger to preserve their testimony, to make sure that they come to trial.

Obviously the Defendants will be aware that once Mr. Smith's testimony is taken, that it could be used even if he cannot come to trial and therefor the reason that existed to kill him would no longer have any logic.

We can offer the testimony to support that if needed.

MR. DUFF: Your Honor, if I may go back, the date was bad for me. I told Mr. Rosenbaum that. He said we can adjust, but he wanted to move backwards, not forwards on the time.

Your Honor, he has given us voluminous discovery which I have not had a chance to review totally yet, but I do notice Michael Smith is not even on the witness list.

He is not on the list, so how can he be such a crucial witness if he is not listed as a witness?

THE COURT: He is an eyewitness. I can give you that answer to that. Those are the witnesses and he is not on there. That is on

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Jalowiec v. Bradshaw
Warden's Appendix Pg. 5237

behalf of your client at this point, Mr. Duff.

MR. LIEUX: I think he needs to make a showing and if he wishes to do that, fine.

THE COURT: Mr. Grunda, you concur?

MR. GRUNDA: Yes, your Honor.

THE COURT: I am not trying to force you to say it.

MR. GRUNDA: He is not listed as a witness and yet they are trying to take the deposition.

Now, I think it would be proper to supplement the discovery and then after that, take it if he is not listed.

THE COURT: Mr. Rosenbaum, do you want to present testimony?

MR. ROSENBAUM: Yeah.

Al, do you want to take the stand?

Thereupon, the State of Ohio, in order to further maintain the issues on its part to be maintained, called ALAN LEIBY as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF ALAN LEIBY

BY MR. ROSENBAUM:

Q State your name, please, sir?

A Al Leiby.

Q Spell the last name?

A L-E-I-B-Y.

Q Are you employed, sir?

A I am.

Q Will you tell the Court what you do for a living?

A Detective for the City of Elyria.

Q How long have you served the City of Elyria as a Police Officer?

A Approximately 18 years.

Q How long have you served in the Detective Bureau?

A Approximately seven years.

Q Are you the Officer or Detective in charge of the investigation concerning the three cases of State of Ohio versus Jalowiec, Danny Smith and Raymond Smith?

A I am.

Q Are you familiar with a person by the name of

Michael Smith?
A I am.
Q How do you know him?
A He is the brother of Daniel and the son of Raymond.
Q Have you interviewed Michael Smith regarding any potential testimony he may have regarding the death of Ron Lally?
A I have.
Q And can you tell the Court if he has any knowledge, direct knowledge, personal knowledge, pertaining to the death of Ron Lally?
A Michael Smith has given us a taped statement that he was present when he was killed. He witnessed it and will testify to that fact.
Q Now, when did you learn of Michael Smith as a potential witness?
A I don't have the exact date. We were able to locate Michael Smith approximately five weeks ago, six weeks ago.
Q After the case was indicted?
A Yes.
Q Now, do you know where Michael Smith is now?
A I do.
Q And where is that, not specifically?
A He is placed somewhere by the State for his own safety.
Q Why is that, sir?

A Because he received a threat.
Q What threat was that?
A He received a threat on his answering machine.
MR. DUFF: Objection.
THE COURT: Hearsay?
MR. DUFF: How does he know this?
THE COURT: How do you know this?
THE WITNESS: I interviewed Michael Smith and he advised me that he received a threat on his answering machine.
MR. DUFF: Objection.
THE COURT: He is not telling you what it is, just a threat, correct?
THE WITNESS: I can tell you.
THE COURT: I don't want to know that.
Q It was a serious threat?
A Yes.
Q Was it a life threatening threat?
A He perceived it as life threatening, yes.
MR. DUFF: Objection to that.
Q Allegedly who did the three people kill in the cases?
A Ron Lally.

Case No. 08-3249
Jalowiec v. Bradshaw
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Q And what relationship was he to you?
A He was a drug informant who worked for me.
Q Do you feel that it is necessary to take Michael Smith's deposition to insure his safety?
A Yes.
Q Do you feel if we do not, he will be unable to attend the trial?
A Yes.
Q Does he have some health problems as a result of what he has seen that necessitates the taking of the deposition?
A He has some psychological problems.
Q Dealing with what he saw?
A With the homicide, that is correct.

MR. ROSENBAUM: Nothing further.

THE COURT: Mr. Duff, you may inquire.

CROSS-EXAMINATION OF ALAN LEIBY

BY MR. DUFF:

Q You learned of this gentleman about five weeks ago?
A I knew of him for quite awhile. I was only able to locate him and interview him within the last five weeks. I don't have the exact date.

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Q But you know where he lives, where he is at now?
A I know where he is now.
Q Other than that, where was he residing before that?
A He moves around, mostly in Cleveland.
Q He is a lifelong resident of this area, is he not?
A Of Lorain County, Cuyahoga County.
Q Never left the area?
A To go to Cleveland and stay in Cleveland, yes.
Q But his mother lives here?
A Lives in Elyria.
Q And his mother knows his whereabouts?
A I don't know if she does or not. If she does, he made her aware of that.
Q He is married, is he not?
A Yes.
Q He lives with his wife?
A No.
Q They are separated?
A They have been staying apart.
Q Does he have children?
A One.
Q Does he have a job?
A At this time, no. He quit the job because of the threat.
Q But he was working in this area?

A He was working in Cleveland.
Q Commuting from Elyria?
A No, he was living in Cleveland, working in Cleveland.
Q You would agree that he is a lifelong resident of Lorain County, this area?
A If you include Cleveland, yes. He lived out of state. I believe he was a prison guard. I know he was a prison guard for a considerable amount of time. I believe it was Illinois, but I am not sure.
Q Now, the only thing you know of is the threat on the answering machine?
A That is correct.
Q When was that made?
A Thursday, 6-2-95.
Q A statement on the answering machine?
A Yes.
Q Now, you know all three Defendants in this case are incarcerated?
A Correct.
Q So you would agree that all three of these Defendants individually could not hurt this man?
A As individuals, no, they cannot because they are in jail.
Q Right. So they don't present any threat to him?
A They present a considerable threat.

Q Individually, I mean, they, themselves?
A They, themselves, physically, no, they are incarcerated.
Q So, it is this sole individual threat on an answering machine that is your basis for stating that Michael Smith will be unable to attend any trial in this case?
A Upon receiving the first threat we hid him so he received no more threats.
Q He only received one threat?
A That is correct.
Q And that is your basis for assuming or believing that he will be unable to attend the trial in this case?
A That and his psychological problems.
Q What are the psychological problems?
A He has attempted suicide.
Q When was this?
A I believe he attempted suicide two or three times this year.
Q This year?
A Yes.
Q How did you become aware of this?
A The way that I was able to locate him is that I read a report that he was transported to CPI after an incident.
Q Did you talk to the doctor about those attempted suicides?

A No.
Q Now, the indictments in this case, they were all obtained prior to ever knowing about Michael Smith's testimony, is that correct?
A That is correct.
Q So, his testimony was not material to your obtaining those indictments?
A Not to obtaining indictments, no.
Q Have you spoken to Michael's mother about finding Michael?
A No, my primary officer, Officer Whitely, who is on vice, spoke to Mrs. Smith. It is not Mrs. Smith now, but he has spoke to her.
Q When did he quit his work?
A Sometime just prior to the second.
Q He was working full time living with his wife, living in this area?
A He was not living with his wife. He was not living in this area. He was in a halfway house in Cleveland and visiting his wife and children in Lorain.
Q And he would visit his mother on a regular basis?
A I can't answer that question, Mr. Duff.

MR. DUFF: Nothing else.

THE COURT: Mr. Lieux, do you have any questions, sir?

MR. LIEUX: Thank you, your Honor.

CROSS-EXAMINATION OF ALAN LEIBY

BY MR. LIEUX:

Q Detective Leiby, you mentioned a tape from an answering machine?

A It is an answering machine that does not have a tape in it. There was a message left on an answering machine.

Q Was this message that was put on the tape -- I take it, was given to you?

A It was put on an answering machine, I am not sure what type of machine it is. We do not have the tape. When Mr. Smith left the halfway house, or didn't return to the halfway house, the people there packed all those things up.

Q So the message that was to be left on the answering machine, you do not have?

A That is correct.

Q What you do have is a statement from Mr. Smith, a man with known psychological problems to you about this supposed threat he received on his answering machine?

A That is correct.

Q And you don't have the actual tape?

A No, sir.

Q Of this threat?

A No, sir.

MR. LIEUX: Nothing further.

THE COURT: Mr. Grunda?

MR. GRUNDA: Mr. Cleary will do it, your Honor.

CROSS-EXAMINATION OF ALAN LEIBY

BY MR. CLEARY:

Q You stated that this first threat was received on June 2nd?

A That is correct.

Q Are you aware that the motion was filed on the first to take the deposition?

A No.

Q Sir, you looked at your notes a moment ago.

Did you use those to refresh your recollection?

A Of the date only. Only one paragraph. All it is is dates.

Q When was this taped statement given?

A We obtained the taped statement approximately four weeks ago.

Q So, you have been aware of this witness for over a month, the location, and you have had a statement for nearly a month, correct?

A That is correct.

Q And though the witness is not named on June 1st, a motion is made to preserve the testimony of an unknown witness?

A I don't know what date the motion was filed.

Q And thereafter threats were received, but not after?

A A threat.

Q And to date no other threats?

A That is correct.

Q Do you have anyone else to corroborate this message, this alleged threatening message?

A No, sir.

MR. CLEARY: No further questions.

THE COURT: Mr. Rosenbaum?

REDIRECT EXAMINATION OF ALAN LEIBY

BY MR. ROSENBAUM:

Q Detective, was the motion filed before the threat?

MR. DUFF: Objection.

Q Let me ask you this.

The filing of the notice of deposition is what told everybody that Michael Smith was going to testify against them, is that correct?

A That is correct. Your filing caused it to be in the papers.

MR. DUFF: Objection.

THE COURT: What is your objection, Mr. Duff?

MR. DUFF: He is testifying for him. He is saying --

THE COURT: Leading?

MR. DUFF: Yeah, a little bit.

MR. CLEARY: Your Honor, he is asking him to give testimony what our clients know.

THE COURT: I am not going to fight the three of you at this point. Get your heads together and see who is going to do this sort of thing.

Your objection is what now, Mr. Cleary?

MR. CLEARY: Your Honor, his question asked the witness to testify as to what my client might know.

THE COURT: He is leading him?

MR. CLEARY: Not just leading, he is asking him to testify as to someone else's knowledge.

THE COURT: Rephrase the question.

MR. ROSENBAUM: Your Honor, I disagree with the categorization of my witness.

Q Were we concerned for Michael Smith's safety as soon as we learned that he was a potential witness?

A We were.

Q And did I delay in filing any type of motion for about a month?

A That is correct.

Q And after I filed this motion, for whatever reason, the threat was received, is that correct?

A The threat was received right after the motion was filed.

Q Which corroborates our position that he might be in danger and that this deposition is necessary?

A That is correct.

MR. ROSENBAUM: I have no further questions.

THE COURT: Mr. Duff?

This is just a motion, we are not in trial yet.

MR. DUFF: Your Honor, it is an important deposition.

THE COURT: Okay. Go ahead.

RECROSS-EXAMINATION OF ALAN LEIBY

BY MR. DUFF:

Q So, Detective Leiby, you became aware of a threat against him on June 2nd?

A That is correct.

Q Prior to that no other threats were made against him as far as you know?

A That is correct, as far as I know.

Q Prior to June 2nd when this threat was made, your basis for being concerned about this witness was not based upon any threats against him, correct?

A Correct.

Q It was only that he did not want to get involved in this case and testify?

A No, sir, he is more than willing to testify.

Q He is?

A Yes.

Q So, we can expect him to be attending the trial, he will be available for trial?

A I can't answer that.
Q You said he is more than willing to stick around?
A I didn't say to stick around and be available for trial, I said willing to testify.

MR. DUFF: Nothing else, your Honor.

THE COURT: Mr. Lieux?

MR. LIEUX: No further questions, your Honor.

THE COURT: Mr. Cleary, anything further?

RECROSS-EXAMINATION OF ALAN LEIBY

BY MR. CLEARY:
Q Is he safe where he is, Officer?
A I would imagine for a period of time. It is kind of hard to keep somebody concealed.
Q Does he have his family with him?
A The wife and son have been staying with him on and off.
Q Have they been staying at home?
A I don't understand the question.
Q At this point when he is off not visiting with

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them --

A He is staying in one place, they go and stay with him or with her parents and I am not sure what nights they stay with who.

Q It says that he fears for his life and the safety of his family?

THE COURT: Mr. Cleary, this is recross-examination, stay within the purview of it.

Q If he were kept there, is there any reason to believe that he will be unavailable for trial?

A I don't believe that we can keep him sequestered like we have. There is not the availability of room space because of other considerations.

Q What considerations are those?

A We cannot keep him in the hotels in Elyria because we have the Elyria police at Wilkes Villa and several families put in motels, so we have to keep him outside the city.

Q These other families have priorities?

THE COURT: He said Elyria Police Department keeps a lot of people from Wilkes Villa in motels.

A In the Elyria motels we are having difficulty.

Q There is no available motels located in Lorain County for this person?

MR. ROSENBAUM: The question is not can he be hidden forever, the question is do we need to take the deposition.

THE COURT: Do you feel that there are motels available in this area?

THE WITNESS: No.

MR. ROSENBAUM: Thanks very much, but now I guess we are not going to have him in a hotel after about five minutes because now the search is limited to hotels because we have just now given everybody a clue as to where he is so he can be guaranteed we will be moving him.

Let's put him at your house.

Would it be safe to put him there or just put him in with the Defendants?

THE COURT: The Court is conducting a hearing. The Court is dealing with adults, competent, very competent attorneys. Please conduct yourselves in that manner.

There will be no bantering between counsel. Anything you want to address to counsel will be done through the Court. Any violation of that rule right now will end up in contempt.

This is nonsense. Proceed, Mr. Cleary.

MR. CLEARY: No further

questions.

THE COURT: Thank you.

Mr. Rosenbaum?

MR. ROSENBAUM: I have nothing further.

THE COURT: Anything further from anybody?

MR. ROSENBAUM: I have some argument.

(Witness excused.)

* * *

THE COURT: Proceed.

MR. ROSENBAUM: I would like not to disagree with the Court, but categorizing some of the argument as competent, this is nonsense. They think the test is, can we go on forever to hide him.

They are arguing since he has ties to the family, he has been around for a long time, the family is accused of killing someone, the family is who we are afraid of.

To say that he can visit the mother is beyond ludicrous as well. We have someone who witnessed a homicide. He needs to have the deposition taken to preserve his safety. We are not obligated to

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secrete him anywhere in hopes that we have done a good job.

He may be able to testify at trial, he may not. I don't think that is the test. The test is, do we need to take the deposition to preserve the testimony.

We are saying he might not be available because of health reasons and because of the fact that he may suffer the same fate as Ron Lally.

THE COURT: Mr. Duff?

MR. DUFF: Your Honor, the test is laid out in Rule 15. They have to show a probability that he will be unavailable to attend a trial.

They have not shown that. They have shown an attempted threat that came on an answering machine that they lost that was coincidentally done a day after they filed the motion, so they had no basis to file the motion when they did so, your Honor.

Every witness is reluctant to come into Court. They have a right to confront any witnesses and under the circumstances more important than any concern, this Detective or Mr. Rosenbaum has is, the Sixth Amendment right goes to the basis of our fundamental system and

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they can't circumvent that by saying he is scared or we got a statement of a death threat the day after they filed the motion.

They are going to get a statement so a guy can come into Court without looking this guy in the face.

THE COURT: The deposition is taken to preserve this testimony. If this witness is able and capable of testifying at the time of trial, he will testify. We will not substitute the deposition in the case.

MR. DUFF: I understand the rule, your Honor, but the rule is being used by the Prosecutor to circumvent --

THE COURT: To preserve the testimony, sir.

MR. DUFF: They have not shown any probabilities under the rule.

THE COURT: And I guess that is why I wear the robe and that is why I am up here, to make that decision.

Is that correct?

MR. DUFF: I would think so. Your Honor, I think they are trying to circumvent the confrontation right of the Defendants by using

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this deposition.

MR. LIEUX: Your Honor, I would ask the Court to look seriously at alleged threats. We have a supposed phone call from who knows who to an answering machine that we don't have the tape of.

All we have is a witness with a history of psychological problems who was, during this time frame, admitted to CPI by Detective's testimony who says that he got a threat on the answering machine, not in person, and we don't have the tape to corroborate what sort of threat, by who or to even indulge in any evaluation of what kind of threat it is, so we don't know what it is.

To call this a death threat begs the question. We don't have any authority that there has been a threat on this person's life.

If we had a tape, that would be one thing, but we have hearsay upon hearsay from a person with psychological history and, based upon that, your Honor, I would ask that the motion be turned down.

THE COURT: Mr. Grunda?

MR. GRUNDA: Only thing I would

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add to that, your Honor, in addition to what they both said is the fact that they are begging the question that some harm will come to him from the Defendants who are incarcerated and I don't see how that is a possibility.

If they are in jail, they have no means or ways or manner to carry this out and secondly, it seems from what was testified to, that in the particular circumstances -- what it appears they want to do is take the deposition and then they don't have to keep track of him or whatever so he can be unavailable, not that they will have him come in.

It seems to me that they will take the deposition so he doesn't have to come in and testify and he will become unavailable.

THE COURT: The Court is not going to argue with you and say that that is impossible. Certainly that is possible.

However, this Court has been concerned under what the particulars are and understands that the prosecution also has its right to preserve testimony under certain circumstances.

I have to make a decision. However, if for some reason this person is given a ticket

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and said, get lost, and the Court knows about this -- and I am sure that you guys will know about it -- if that be the case, then the deposition can't be used under those circumstances and the Court is putting everybody on notice of that right now.

If the deposition is to be taken, the deposition is taken for the purpose of preserving testimony. However, if the individual is available to testify at the time of trial, he will testify and the deposition will not be used.

Do I say that wrongly?

MR. GRUNDA: No.

THE COURT: Mr. Duff?

MR. DUFF: I would agree with you, Judge, but you know my feelings.

THE COURT: Mr. Lieux, did I say that wrongly?

MR. LIEUX: No, your Honor.

THE COURT: Anything further?

MR. GRUNDA: If the Court goes along with the deposition to be taken, I would ask that it be set at a convenient date to all counsel. Because of the short timing in which we were given the notice, we do have other court appearances and I do understand that it is a

problem because there are three Defendants with other counsel.

I would ask to try to coordinate something.

THE COURT: I think if you gentlemen would agree in some way, shape or form to be cooperative with each other, that a date to take the deposition could have been worked out, but I think everybody agrees that the decision is being put to the Court to make.

Now, if the Court is going to make a decision, I guarantee you that seven counsel involved, seven or five are going to be unhappy and how do I know these things?

I think by far you know your schedules and you will be able to work them out, but you have not.

MR. GRUNDA: I understand that, your Honor.

The only offer was to move it to the 15th.

THE COURT: And the reason being because of the threats.

MR. GRUNDA: It appears that he is safe now and it is another week or so, what difference does it make?

I understand that the trial is a long ways

away. You have your calendar scheduled with hearings, pretrials and stuff. So do we.

THE COURT: And that is one of the reasons in this case why we appoint two counsel. I understand that, regardless of what day you come up with, you are not going to be able to accommodate all three counsel.

I do agree with you gentlemen that you are busy, so are the courts and everything else and that is why we do appoint two counsel, so that that can be done. That is all.

MR. DUFF: I don't think that is the reason we appoint two counsel. It is because of the severity of the case.

THE COURT: To help each other.

MR. DUFF: So I think both counsel should be present at the deposition, your Honor.

THE COURT: That is ideal, Mr. Duff, yes, and that would be fine if that be the case.

Anything further from anybody?

MR. ROSENBAUM: I would like to point out that when I sent them notice there was two weeks' notice. Now, I didn't hear from

anybody.

THE COURT: If the notices went out on the 2nd of June, this is the 12th --

MR. ROSENBAUM: It was set for the 15th, which was two weeks -- which would have given anybody some chance to rearrange the schedule had any effort been made, which I don't think there was.

We didn't get a motion to continue this until like two or three days ago.

THE COURT: I understand that, Mr. Rosenbaum.

Anything further?

I want to give everybody an opportunity to have a shot at me.

MR. CLEARY: Your Honor, in reference to Mr. Rosenbaum's point, I have been in trial for the past two weeks. My problem with this date is, there is a capital punishment seminar that I need to attend.

THE COURT: It is not as though your client is not represented, is it?

You know, Mr. Cleary, somebody is going to say of the seven, why do it on that date?

That is fine, but if the Court says you will

do it on that date, you will do it on that date.

MR. CLEARY: That is your call to make, your Honor.

THE COURT: That is correct and I have the prerogative of being unavailable at that point.

MR. CLEARY: Your Honor, as long as our objections are noted, that is fine.

THE COURT: And they are and I have never denied you that, Mr. Cleary, have I?

MR. CLEARY: No, sir.

THE COURT: Make your own record at this point.

MR. DUFF: Judge, my objection sets forth numerous cases I had in Lorain Muni on that date and Mr. Rosenbaum responded with the capital cases should take priority over misdemeanors. A lot of those are felonies in court and I don't think we can move 25 cases because this is what Jon picked as the date.

THE COURT: Who is your Judge?

MR. DUFF: Nunez.

THE COURT: How about if I call him?

I bet you he would accommodate you. I

wouldn't do it, Mr. Duff, but I bet he would.

Well, okay. Everybody has had an opportunity to say what they want to say.

The Court will order the deposition taken. The Court will order the deposition taken prior to the 16th of June. Work it out, get your best available date.

Anything further?

MR. ROSENBAUM: I am afraid we have to have seven agree on a date here.

THE COURT: No, pick the best date available that you can get those people there.

MR. DUFF: I have another deposition at that time, but I will move it.

THE COURT: Mr. Duff, thank you.

MR. CLEARY: Note my objections, your Honor.

THE COURT: Exceptions to everybody.

* * *

HEARING CONCLUDED.

* * *

# CERTIFICATE

The State of Ohio, )
County of Lorain. ) SS:

I, Thomas B. Masterson, Official Court Reporter of the Court of Common Pleas, Lorain County, Ohio, do hereby certify that this is a correct transcript of the proceedings held on June 12, 1995, in this case.

I further certify that this is a complete transcript of said proceedings.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name this 2nd day of January, 1997.

Thomas B. Masterson

Thomas B. Masterson
Notary Public, State of Ohio
Lorain County Courthouse
Elyria, Ohio 44035
My Commission Expires 10-11-2001

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## DEPOSITION OF MICHAEL A. SMITH


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DATE TAKEN: JUNE 16, 1995

Exhibit D


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COPY

The State of Ohio, )
County of Lorain. ) SS:

IN THE COURT OF COMMON PLEAS

| | | |
|---|---|---|
| The State of Ohio, | ) | |
| | ) | |
| Plaintiff | ) | |
| vs. | ) | Case Nos. 95CR046838 |
| | | 95CR046839 |
| Raymond A. Smith, | ) | 95CR046840 |
| Daniel Dean Smith, and | ) | |
| Stanley Jalowiec, | ) | |
| Defendants | ) | |

* * *

Deposition of MICHAEL A. SMITH, a Witness herein, called by the State of Ohio as upon direct examination, taken before Jacquelyn Hellwig, Registered Professional Reporter and a Notary Public within and for the State of Ohio, at the Lorain County Courthouse, Elyria, Ohio, on Friday, June 16, 1995, at 2:00 p.m.

* * *

CAMILLO COURT REPORTERS

COMPUTERIZED TRANSCRIPTION

589 W. BROAD STREET

ELYRIA, OHIO 44035

(216) 323-3381

APPEARANCES:

On behalf of the State of Ohio:

Gregory A. White, Prosecuting Attorney, by
Jonathan E. Rosenbaum, Assistant Prosecuting Attorney

On behalf of the Defendant, Raymond Smith:

Thomas J. Elwell, Jr., Esq.

On behalf of the Defendant, Daniel Smith:

Michael J. Duff, Esq.
and
Smith & Smith, by
Daniel G. Wightman, Esq.

On behalf of the Defendant, Stanley Jalowiec:

Grunda & Grunda, by
Joseph C. Grunda, Esq.

ALSO PRESENT:

Det. Al Leiby
Det. Duane Whitely
Patty Lane, Probation Officer
Gerald Mielcarek, Investigator
Raymond Smith
Daniel Dean Smith
Stanley Jalowiec

MR. ROSENBAUM: I guess the record should reflect we're here to take a deposition in the case of the State of Ohio versus Stanley Jalowiec, State of Ohio versus Danny Smith, and the State of Ohio versus Raymond Smith.

Present for the State is myself, Jonathan Rosenbaum, Det. Al Leiby. The deposition witness is Michael Smith, and you have the names of all counsel.

And the record should reflect that each Defendant is present with his lawyer.

MR. DUFF: I'd like to make an objection here, Jon.

MR. ROSENBAUM: Okay.

MR. DUFF: Det. Whitely at the end of the table here, I'd object to his presence. I believe he's on the witness list. I know you're entitled to have one Officer here with you at this table; that would be Det. Leiby. But we'd object to the other Detective being present.

MR. ROSENBAUM: Okay.

MR. DUFF: And we'd object to Patty Lane.

MR. ROSENBAUM: And what is your position?

MISS LANE: Michael Smith's Probation Officer.

MR. DUFF: We'd object to her presence.

MR. ROSENBAUM: Fine. I object to your non-lawyer investigator sitting at the table.

MR. DUFF: So you're allowed to have one, we're allowed to have one.

MR. ROSENBAUM: You have one, and that's your client. You're not allowed to have someone else. So, if we want to get goofy, we could get as goofy as you'd like.

Anyway, so those objections are noted for the record.

Is there anything else before we begin?

MR. DUFF: Anything else?

MR. WIGHTMAN: Just a general objection to the deposition being taken, to preserve the record.

MR. DUFF: Right. Do you guys join that?

MR. ELWELL: Yes.

MR. GRUNDA: Yes.

DIRECT EXAMINATION OF MICHAEL A. SMITH

BY MR. ROSENBAUM:

Q Will you state your name, sir.

A Michael Smith.

Q And do you know the three gentlemen at the table who are not dressed today in coats and ties?

A Yes, I do.

Q Okay. Starting from two seats away from me, my left, can you tell us the name of that person?

A Danny Smith.

Q Are you related to him?

A Yes, I am.

Q How are you related to him, sir?
A He's my younger brother.
Q And then there's a gentleman in a suit and tie, Attorney Elwell; and there's another person. Who is that person?
A Raymond Smith.
Q How do you know him?
A He's my father.
Q And, then, seated next to him, another gentleman; do you know him?
A Stan Jalowiec.
Q And how long have you known him for?
A About two years.
Q How do you know him?
A Through association with my brother.
Q Are you related to him in any way, shape or form?
A No.
Q Now, you came forward, did you not, with some testimony and contacted Det. Leiby?
A Yes, I did.
Q And can you state for the record why it is you elected to contact Det. Libby.
MR. DUFF: Object as to why.
Q Go ahead.
A For over a year and a half, I've been dealing with an

issue and a situation that happened back in the early part of '94 that I just couldn't deal with anymore. It was mentally breaking me down, and I had to somewhere along the line come to grips with what happened and go on with my life, and that was the only way I could do it.

Q And, when you say mentally breaking you down, what do you mean?

A I -- just depression. Depression was real deep. I wound up in a -- I was hospitalized.

Q How many times?

A Three or four times. I can't quite remember. I know it was more than twice.

Q Did you attempt to hurt yourself?

A Yes, I did.

Q How?

A One incident I tried to hang myself, and I was found by Lorain Police Department, Life Flighted to Metro, and there I was -- I stayed there for like two weeks.

Q Can you tell us for the record what this issue was that you couldn't deal with mentally?

A The murder of Ron Lally.

Q And why is it that it caused you distress?

A Because it -- it -- it was senseless.

Q I guess my question is --

A I was there, and I couldn't handle it.

Q Now, are you saying you were present at the time of the murder of Ronald Lally?
A Yes, I was.
Q And who was present there with you?
A Raymond Smith, my father; and Stan Jalowiec.
Q And when did this occur?
A It was the beginning of '94.
Q Can you tell us, what time of day did it occur?
A This was early in the morning. It was like around 3:30, 4:00 o'clock.
Q And where did it take place?
A Woodland Cemetery.
Q And what city is that in?
A Cleveland.
Q What state?
A Ohio.
Q Now, prior to going to Cleveland, where were you?
A In Elyria, Ohio.
Q Could you describe the events that led up to your going to Cleveland and witnessing that death?
A On that night I had met -- I had went over to Mom's Open Kitchen, where I see my father and my brother and --
Q Your father?
A Raymond Smith and my brother Danny Smith. And we all sat there and we were eating breakfast.

MR. DUFF: Time frame on this, Jon?

Q Do you know what time it was?

A After the bars close, quarter to 3:00.

Q And Mom's Open Kitchen is what?

A 24-hour restaurant.

Q In what city?

A Elyria.

Q County?

A Lorain.

Q State?

A Ohio.

Q What happened when you saw your brother Danny and your father Raymond?

A We were sitting there and we were eating, and my father had made a phone call; and, after that phone call, it was -- it was like, "We're going to take a ride. Do you want to go?"

And I said, "Yeah."

And so we got in the car.

MR. DUFF: Objection. Who's "we"?

Q Who got in the car with you?

A It was me, my father Raymond Smith and my brother Danny Smith. And we rode out to Middle Avenue in Elyria and --

Q Who was driving that car?

T.

A My brother Danny Smith was driving.
Q Whose car was that?
A My brother's, Danny Smith.
Q And you went to where on Middle Avenue?
A It was down by the railroad tracks. It was out just on the road.
Q And what happened on the road on Middle Avenue?
A Danny dropped us off. And, about 20 minutes later, Stan Jalowiec pulled up in a blue LeBaron drop top. It was him and another gentleman who I come to find out at that time was Ron Lally.
Q Did you know him prior to this date?
A No, I had never seen Ron Lally before.
Q Did you learn his name that night?
A Yeah.
Q His first and last or just his first name?
A Just his first name that night.
Q And it was Ron?
A Yeah.
Q Whose car was Stanley Jalowiec driving when he picked you up at Middle Avenue?
A Lady by the name of Queen Bee.
Q And do you know what kind of car this was?
A It was a blue drop top LeBaron.
Q And this would have been about what time in the morning?

A About -- this had to be about 3:00, 3:15; about then.
Q And then what happened?
A I had got in the car on the driver's side in the back seat. Ron had got in the back with me, and my father Raymond Smith got in the front seat, and we got to driving. At that point --
Q Who was driving?
A Stan Jalowiec was driving.
And, at that point, my father Raymond Smith had brandished a gun and told Ron, "Don't make any sudden moves."
And Ron said, "I ain't. I ain't gonna move. I ain't gonna do nothing."
And so we were driving, and we had -- we were talking, and my father was asking Ron about --
MR. DUFF: Could you speak up? I can't hear with the chains.
Q Can you talk a little louder?
A He was asking my brother -- or asking Ron, did he set my brother up.
And he said -- at the time Ron had said no, you know. He didn't know what he was talking about.
Q Your brother would be whom?
A Danny Smith.
Q And, when you say, "set up," do you know what the conversation was about?

T. 781

T. 782

A Some drug buys where Ron was wired.
Q Okay. And was your brother Danny charged with those at this time?
A Yes.
Q Then what happened?
A After a few minutes, Ron had admitted to setting my brother up, and --
Q Did your father say how he knew that he did it after Ron denied it?
MR. ELWELL: Object.
A Yeah, we --
Q Go ahead.
A We had heard the tape; and that's when Ron had admitted to doing it.
And so we were riding, and we had stopped at Speedway and got some gas, and then we got back on the highway. And dad -- and Raymond, my father Raymond had asked Ron, you know, where did he want to go. We were going to put him on a bus and give him some money and told him that he's not to return.
Q And did Ron Lally agree to this?
A Yes.
Q After that, did the atmosphere in the car become more friendly?
A Yes.

Q What was done then on the way into Cleveland?
A We were all getting high. We were all smoking crack on the way to Cleveland. And, so, when we got to Cleveland, you know, we -- we rode around. We were talking about getting some more for Ron, you know, for his trip. And we rode up into East Cleveland, and we didn't go too far into East Cleveland, Ohio, because there was police and stuff out there. Something was going on. So we rode around a little bit longer and then we headed back towards downtown. And at that time is where we wound up going over to the Woodland Cemetery.

And we went up into the cemetery, and Stan parked the car. And then my father got out, and he pulled the gun out and put it in Ron's face, told him to get out the car.

And Ron got out the car. And there was some words exchanged, but I couldn't hear exactly what was being said at that time. And then I heard the gunshot, and I heard Ron say, "Oh, you shot me in my head. Please don't kill me. Please don't kill me."

And then my father called for me and Stanley to help him, and Stanley got out the car.

Q How many gunshots did you hear?
A One.
Q Did you hear anything that might tell you why there wasn't another gunshot?

A Something about the gun was jammed.
Q Who said that?
A My father, Raymond Smith.
Q Was that before or after he asked you and Stanley to get out of the car and help?
A I can't quite remember exactly how that went. I think that was before.
Q Did you get out of the car?
A I didn't get out the car.
Q Did your father ask for anything else when you realized the gun was jammed or after the gun was jammed?
A When him -- I heard -- I heard them. I turned around and I heard them beating on Ron.

And dad asked Stanley, "Do you have a knife," because Ron was still alive and --

Q What did he ask Stanley for?
A A knife.

And Stan said, "No, I don't have a knife, but there's some on this key chain."

And, basically, that -- that was really the last words I really heard. And then everybody got back in the car.

I was like, "Come on. Come on, he's dead. Come on."

Q Well, prior to that did Ron Lally say anything else?
A He was just -- he more or less was just begging for his life. He was pleading for his life.

Q Did he say anything about testifying?
A Last words I heard him say was, "I won't testify. I won't testify"; that was it.
Q And then what happened when everyone got back in the car?
A Stanley backed the car up over Ron Lally two or three times, and then we pulled out.
Q How fast was the car going when he did this?
A It wasn't going too fast because it wasn't -- the distance wasn't that far. It just was like boom, boom. Plus, it was ice, so he couldn't get a good grip.
Q Did Ron Lally's body stop the momentum of the car?
A Yeah, it stopped the momentum of the car.
Q Could you describe what you heard, if anything, while Stanley Jalowiec and your father were beating Ron Lally? How did that sound?
A It was -- you could just hear the thumps and the smacks. It was just --
Q You could hear it in the car?
A Yeah. Window was down.
Q Were the windows open or closed?
A The window was down.
Q What was the weather like?
A It was cold. It was snowing.
Q After Stanley drove the car in reverse into Ron Lally --

A On the way back, we was arguing. Me and my father Raymond was arguing because I wasn't helping like they thought I should or they wanted me to. And, you know, it was like dad was taking the gun apart and tossing it out on the road, like every two or three miles would toss a piece out on the road.



you said how many times?
A Two or three times.
Q What happened?
A We pulled off.
Q And where did you go?
A We got back on Rte. 2.
Q I'm sorry. Prior to them getting in the car, did they try to do anything else to Ron Lally?
A They tried to put him in the trunk, but he wouldn't fit.
Q Who did this?
A Stan Jalowiec and Raymond Smith, my father.
Q Did they lift him?
A Yeah.
Q Did they actually get part of him in the trunk?
A They must have, because --
Q If you know, say so; if you don't, say so.
A I don't -- I'm not sure.
Q But you know they made an effort to put him in the trunk?
A Yes.

Q Then what happened?
A And then there was some words exchanged, and I couldn't really hear exactly what was being said, and then I heard a gunshot.
Q Did you hear anything else?
A I heard -- I heard Ron say out loud that, "Oh, you shot me in the head. You shot me in the head."
And, at that point, my father had told us to get out the car. And Stan got out the car and he helped my father beat him. And they said something about the gun being jammed.
Q Who said that?
A My father did.
And so he asked -- asked Stan did he have a knife, and Stan said no, but there's some on this key chain. And so he came back to the car and got the keys.
And, at that point, after the beating and whatnot, there was nothing else to be heard.
Q Can you describe this beating? Could you hear it?
A Yeah, you could hear the thumps and the smacks and the stomps. It was --
Q What was Ron Lally doing during this?
A He was, you know, talking about, "I won't tell nobody. Don't kill me. Please don't kill me." And those were the last words you would hear.
Q Then what happened?

A Everybody got back in the -- well, they tried to put him in the trunk, but he wouldn't fit. At this point they got back in the car.

Q Who tried to put him in the trunk?

A My father Raymond and Stan.

And at this point everybody got back in the car, and Stan backed the car up over Ron two or three times.

Q How did he do that?

A He put the car in reverse and just kept backing it up, putting it in reverse, putting it in drive, putting it in reverse, putting it in drive.

Q Did Ron Lally's body stop the movement of the car?

A Yes, it did.

Q Okay. Then what happened?

A We pulled out of the cemetery and we got on the highway, and we was arguing about what I didn't do or what I should have done; and my father was taking the gun apart and throwing it away piece by piece two or three miles down the road going down Rte. 2.

Q And what happened after that?

A They dropped me off at my brother's apartment and then they left.

Q Did you ever discuss this then with either --

A No.

Q -- your brother, Stan Jalowiec --

A No.
Q - or your father?
A No.
MR. ROSENBAUM: I have no questions again.
MR. DUFF: Mr. Smith --
MR. ROSENBAUM: We'll stipulate for the record that he made a statement and there it is.
MR. DUFF: To Elyria Police Department?
MR. ROSENBAUM: Right. There's a transcript of it. So now we'll take a break.
(Recess had.)

CROSS-EXAMINATION OF MICHAEL A. SMITH

BY MR. DUFF:
Q Michael, I'd like to ask you some questions. My name is Mike Duff. I represent your brother Danny, okay? Do you understand that?
A Yes.
Q All right. And I've had a chance to go over the statement you gave on April 12th, 1995; and that was done at the Justice Center, Downtown Cleveland?
A Yes, it was.
Q Okay. That's the only statement you gave to them that was tape-recorded as far as you know?
A As far as I know, yes.
Q All right. No other handwritten statements were given

to them?
A No.
Q And that's the first time you discussed this incident with the police?
A Yes.
Q Now, I understand your Probation Officer is present here in Court today?
A Yes.
Q Can you tell me what you're on probation for?
A Robbery.
Q All right. What Judge is that?
A Glavas. Judge Glavas.
Q And what was the sentence you received in that case?
A Five-year probation.
Q Do you know what was suspended, though? What amount of time of incarceration was suspended?
A I don't -- I can't recall. I don't know.
Q Well, what year were you convicted of that robbery?
A '94.
Q What was that a robbery of?
A A gift shop in Lorain.
Q Margie's Hallmark?
A Yeah.
Q Now, were you alone when you did that?
A Yes, I was.

MR. ROSENBAUM: Objection.

Q Danny wasn't involved in that, was he?

A No, he wasn't.

Q And any other criminal record on your part? Have you been convicted of any other felonies?

A No.

Q Just that one?

A Yes.

Q All right. How about misdemeanors involving theft or anything like that?

A Not that I can remember, no.

Q You don't have any misdemeanor theft convictions?

A No.

Q Receiving stolen property convictions?

A Oh, yeah. I do have a receiving stolen property. Oh, no. Uh-uh.

Q What do you have?

A How was that put? Improper -- unauthorized use of a motor vehicle.

Q All right. What year was that?

A '93? No. What is this, '95? '93, I think it was. '93.

Q All right. What Judge handled that case, do you know, what Court?

A It was Cuyahoga Falls.

Q Were you on probation for that?
A No.
Q So you're just on probation for the robbery?
A Yes.
Q Do you have any other criminal offenses in your background?
A No.
Q Now, do you know when this incident occurred approximately?
A It was sometime in January of '94.
Q And you recall telling the police in your statement -- have you had a chance to review your statement?
A No, I haven't.
Q Have you ever read the statement you gave?
A No, I haven't.
Q Have you met the Prosecutor and gone over the testimony here today?
A Yes, I have.
Q How many times have you met with Mr. Rosenbaum and discussed this?
A Just today.
Q When was that?
A About 11:30.
Q 11:30 at his office?
A Yes.

Q You went up to his office?
A Yes, I did.
Q And he went through what he was going to expect you to testify to?
A He went through for me to say what was the truth.
Q He went through what your testimony would be?
A What my testimony was as I stated it, yes.
Q And you didn't get a chance to review this statement?
A No, I didn't.
Q Do you remember telling the police back in April when you met with them in Cleveland that your brother Danny, my client Danny, never mentioned at any time to you hurting Ron Lally; do you remember telling them that?
A Not -- I don't. I don't remember. Me and my brother never discussed that.
Q You never did?
A I don't remember. I don't remember saying it.
Q Pardon?
A I do not remember.
Q Saying that?
A Right.
Q All right. On Page 2 of your statement, "M.S.: And, you know, it was like my" --

MR. ROSENBAUM: Well, just show an objection for the record because I don't think that's inconsistent with

anything he said on direct.

MR. DUFF: He said he didn't remember.

Q Does that refresh your recollection? Do you want to take a minute and read that?

Michael, what I'm asking you -- make it real simple, Michael.

A Okay.

Q Did you state in here, "My brother never mentioned doing anything wrong, physically, whatever"?

He never mentioned anything like that?

A No, he never mentioned that.

Q And that's what you told the police, correct?

A Correct.

Q All right. And, in fact, your statement to the police was that you couldn't believe that your brother had anything to do with this, your brother Danny?

A Yes, that's the statement I made.

Q Pardon?

A Yes.

Q And that's the truth, correct?

A Correct. That's the truth.

Q And you didn't participate in any conspiracy to kill Mr. Lally, did you?

A No, I didn't.

Q And, as far as you know, your brother did not, your

brother Danny did not?
A As far as I know.
Q As far as you know, he did not?
A As far as I know.
Q Now, the key chain that you spoke about, whose key chain was that?
A I believe that was Queen Bee's because it was in the car. It was in the ignition.
Q Now, did this key chain have some kind of knife attached to --
A That's the statement that I heard. I don't know. I didn't see for myself, so I can't -- I can't say.
Q You didn't see the key chain?
A No, I didn't.
Q Now, you'd admit, and I think you admitted to the police, you'd admit it now, this whole night you were drunk?
A I was high, yes.
Q Drunk, too; drinking alcohol?
A Yes.
Q What, drinking malt liquor?
A Yes.
Q And you were also using drugs this night?
A Yes.
Q What do you smoke, crack?
A I did then, yes.

Q That night?
A Yes.
Q So you had crack in your system and you were drinking alcohol?
A Yes.
Q Malt liquor?
A Yes.
Q And I think you told the police several times that you were real drunk that night, correct?
A No, I don't remember telling them I was real drunk, but I did tell them that I was drunk.
Q All right. But you did tell them that you were drunk?
A Yes.
Q Several times in the statement back in April when you talked to them, do you remember telling them a couple different times that you were drunk during this whole incident?
A It's possible.
Q Do you want me to show it to you?
A Yeah.
Q Page 20, 6 and 16.
Your statement was, "Shit, we was all under the influence"; is that correct? Is that what you told them?
A Right.
Q Do you remember telling them that?

A Correct.

MR. GRUNDA: What page is that?

A 20.

Q On Page 16, "All this shit jumped off. I was pretty drunk." Do you remember telling them that? Is that correct?

What do you mean by the word "jumped"? Started? When this stuff commenced; is that what you mean by the word "jumped"?

A Yes.

Q So you mean when this night started you were all pretty drunk?

A I was under the influence.

Q Can we agree that you were pretty drunk?

A I was pretty drunk.

Q On Page 6, do you remember telling the police, "I mean, I was drunk that night"; you told them that, right?

A Yes.

Q All right. Not only were you drunk, but you were using drugs, correct?

A Correct.

Q And do you remember telling the police on April 12th at the Justice Center that Tammy Green drove you and your father out to Middle Avenue; do you remember telling them that?

A No, I don't.

Q You don't remember saying that?

MR. DUFF: The statement, by Det. Leiby, Page 6, Mr. Rosenbaum.

MR. ROSENBAUM: Well, go ahead.

Q "This girl drove you guys out there?" Question by Det. Leiby.

"M.S." is you, correct?

A Yeah, that's -- I think. I mean, I was drunk that night.

Q That was what you thought. You thought that the girl drove you out there, Tammy?

A I couldn't remember whether Tammy was in the car or not. I know I was out there with my brother. My brother dropped us off.

Q Well, did you state that the girl drove the car, Tammy; you thought that?

A That's what I stated.

Q Is your memory better today than April 12th?

A Some things I can remember, some things I can't.

Q All right. Page 16. So the question was: Did you tell the police that it wasn't Danny that dropped you off?

A That it wasn't Danny that dropped me off?

Q That it wasn't Danny that drove and dropped you off on Middle Avenue? Where at on Middle Avenue was that?

A Towards -- it was past Wood Street by the railroad tracks.

Q Is that South Middle Avenue?
A South Middle Avenue.
Q All right. Let's call it South Middle Avenue.
Now, did you tell Det. Leiby on April 12th that it wasn't -- I'll show you. You can't consult with Mr. Leiby.
A I was just looking at that.
Q When I want you to see something, I'll show it to you.
Did you tell Det. Leiby on April 12th that -- specifically, that it wasn't your brother who dropped you off, that it wasn't Danny? Did you ever tell him that? Do you remember that, yes or no?
A No.
Q All right. May I show you Page 16.
Det. Leiby, "A.L.: So she was in the car?"
MR. ROSENBAUM: Do you want to read that?
Q I'm reading it to him.
MR. ROSENBAUM: If he wants to read the whole thing, he has the right to see it, not just parts of it.
Q Did you make the statement, "No. Shit. I don't know. It was"--
MR. ROSENBAUM: Did you get to read it all yet?
Q Michael, are you done reading it? Have you read it?
"It wasn't my brother that dropped me off"; did you make that statement?

A He probably drove. My brother was there, too. I forgot.
Q Now, you testified on your direct examination --
A Okay.
Q -- that Danny drove; is that what you said?
A That's what I said.
Q And you were under oath the second time you told that story, correct? You swore to tell the truth?
A I -- I'm not saying I didn't tell the truth. I forgot.
Q You forgot a lot of this, haven't you?
A Okay. Yeah.
Q And the truth of the matter is you can't say for sure now, because you were drunk and on drugs, who drove that car out there; you can't be sure about that?
A Not at this point.
Q All right. When you told the police that your brother here, Michael, Danny, that he never arranged for Ron Lally to leave town, because Ron Lally and your brother wouldn't even talk, would they?
A That's correct.
Q They weren't on talking terms, were they?
A That's correct.
Q So Danny would have had nothing to do with arranging for Ron Lally to leave town; is that correct?
A Correct.

Q And, after you got back that night, you never discussed this with Danny, did you?
A No.
Q You went right to sleep?
A Yes.
Q And, when you got to Danny's house, Tammy Green was there, correct?
A Correct.
Q All right. She was Danny's girlfriend?
A Correct.
Q All right. You never discussed this case with her?
A No.
Q What happened?
A No.
Q And you never have ever?
A No.
Q You don't know if Dan, your brother -- has Dan always lived in -- no, strike that.
So, at any time after the incident, you never discussed this matter with Danny, did you?
A No.
Q And, as far as you know, Danny played no role in this killing, as far as you know?
A As far as I know, no.
Q And, as far as you know, Danny played no role in the

planning or the conspiring to do this killing?
A As far as I know, no.
Q And you know that Danny wasn't there when this occurred, correct?
A I know that for a fact, yes.
Q Because you're claiming you were there, right?
A Correct.
Q Have you ever been diagnosed with a psychological or psychiatric problem?
A Yes, I have.
Q What is the nature of your problem?
A Major depression.
Q Major depression.
Who was the doctor that diagnosed that?
A Doctor -- I forgot his -- I forgot his name. He's at Elyria Memorial. Dr. Young, I think it is.
Q What is it?
A Dr. Young, I believe.
Q And it would be a fair statement that at no time prior to this incident did your brother Danny ever mention to you any type of hurting of Ron Lally?
A No, he didn't.
Q And you have no evidence to give to this Court that would indicate Danny Smith, your brother, was involved in this murder before it occurred?

A No, I don't.
Q You have no knowledge of any evidence of that sort?
A No, I don't.
MR. DUFF: Dan?
MR. WIGHTMAN: That should do it.
MR. DUFF: All right. I don't have anything else.
MR. GRUNDA: Mr. Smith, my name is Joe Grunda. I represent Stan Jalowiec, okay? Obviously, I get to ask you questions, too.
THE WITNESS: Okay.

CROSS-EXAMINATION OF MICHAEL A. SMITH

BY MR. GRUNDA:
Q First, to follow up on what Mr. Duff just asked you, on your diagnosis for the psychiatric problem, were you on medication?
A At one point I was, yes.
Q Can you tell me when and what you were on?
A I was on Prozac just this past year.
Q In '94?
A Latter part of '94. Around May they put me on it.
Q And I believe it was your testimony that you said being there at this incident is what caused a lot of your depression and your psychological problems?
A At that point, yes.

Q And that at no time prior to that did you have any problems, psychological or otherwise?
A None for years, no.
Q So you did have psychological problems before this?
A Yes, I had some.
Q And, in fact, you tried to kill yourself before the time of this alleged incident, right?
A Yes, years prior to that.
Q And how many times is that, two or three times?
A Well, once.
Q Just once?
A Yes.
Q And that's --
A That I can remember.
Q Is that the time when you tried to hang yourself?
A No, that was after this incident.
Q What did you do at that time, the time before this incident?
A Oh, I had took some pills. That was back in '86. Back in '86, I had took some pills.
Q Did you leave a note at that time?
A No. Where I was staying at, some people at the house, they had found me and had found the empty bottle. They had called the ambulance.
Q You left no note, though?

A No.
Q And you're saying that's the only time before this alleged incident in '94 that you had any psychological problems and attempted to kill yourself?
A Yes.
Q And do you recall a time when you tried to kill yourself and left a note to your girlfriend that you used the money that she was going to use, I believe, for a car payment, you used it for crack? That was after this incident?
A It was after this incident.
Q So, in fact, all your psychological problems are not as a result of this alleged incident then, right?
A The majority of them are.
Q Okay. But you said before they were all from this incident, right?
A I didn't say they were all from this incident.
Q Well, we know now there's another one that is not as a result of this incident. It is from your crack usage, right?
A Partly.
Q Pardon?
A Partly.
Q Did you put in that note anything about this murder?
A No, I didn't.
Q You only put in there it was because you used her money for the car payment for crack, right?

A I don't even remember writing a note, to be honest with you; that's why I'm sitting up here thinking to myself, what note?
Q But you do agree that's all that was about, using her money for crack?
A Partly.
Q How much crack did you smoke back in 1993 and '94?
A That's -- I -- I couldn't even give you an estimate.
Q Were you using it every day?
A No, I wasn't.
Q You were using it a lot, though, right?
A It was quite a bit.
Q You on medication today?
A No, I'm not.
Q You on any other drugs today?
A No, I don't.
Q On alcohol?
A No, I don't.
Q I noticed you have a bump on your forehead.
A That's a cyst.
Q Now, other than giving your statement on April 12th, '95, at the Justice Center, and in talking to Mr. Rosenbaum today, you're saying you never had any contact with anybody else to discuss this, right?
A No, I haven't.

Q Well, let's go back over your testimony here.

Now, initially, you said you initiated this statement in April because you were mentally breaking down, right?

A Correct.

Q But you've also admitted today that you've had these other problems with crack, so it wasn't just because of this alleged incident, right?

A I'll put it to you like this --

Q No, just answer the question. Yes or no?

A Yes.

Q Then you said you'd been hospitalized two, three, four or five times, right?

A Correct.

Q Where were these hospitalizations at?

A Cleveland Psychiatric Institute, Huron Road Hospital, St. Vincent Charity, Elyria Memorial and Metro.

Q Do you recall the dates of those --

A No, not right offhand.

Q -- hospitalizations?

A Not right offhand, no, I don't.

Q Now, you indicated that you met your father and Danny at Mom's at about 2:45 a.m., at Mom's Open Kitchen, right?

A That's about the approximate time, yes.

Q Okay. Nobody else was there?

A Not that I can remember. Not that I can remember.

Q Then you said you ate breakfast, right?
A Correct.
Q Phone call was made, then the three of you left, right?
A Yes.
Q Yet Mr. Duff just asked you, in your statement to the police you indicated that a girl dropped you off, right?
A Yes.
Q And you do agree that something's wrong there because that's not consistent, right?
MR. ROSENBAUM: I object. Just show for the record that that is consistent with his statement on the bottom of Page 16 that Mr. Duff stated as he pointed out.
MR. DUFF: Object, Jon.
MR. ROSENBAUM: You can object all you want.
MR. DUFF: So can you.
MR. ROSENBAUM: I did.
MR. DUFF: I object to your objection.
MR. ROSENBAUM: Thank you.
BY MR. GRUNDA:
Q Now, what you just answered pursuant to the questions of Mr. Rosenbaum, you never mentioned a girl being there, right?
A I had forgotten, to be honest.
Q Well, the question was --
A Okay. She was.
Q You never mentioned it, right? When he asked you here

today, you never mentioned it, right?
A Right.
Q And you said you got dropped off at the railroad tracks?
A Correct.
Q Past Wood Street, right?
A Correct.
Q And then you said you stood around 20 to 30 minutes there, right?
A Correct.
Q What did you do in the 20 or 30 minutes?
A Stood there.
Q Why?
A Waiting.
Q Why?
A Because that's what we were supposed to do; that's what -- that's where we were supposed to wait at.
Q So now you're supposed to wait.
Who told you to wait there?
A My understanding from what I was told, my father said Stan was picking us up out there, okay? And that's what happened.
Q How cold was it?
A It was real cold.
Q And how far away from home were you?
A Quite a ways.

Not mentioned Before T. 781

Q And so you just stand there for 20 or 30 minutes, you don't bother to walk home?
A No.
Q Now, you said then after this 20 or 30 minutes, this car drives up?
A Correct.
Q You knew it to be Queen Bee's car?
A Yes.
Q And you said Stan was driving?
A Correct.
Q Ron Lally was in the front passenger seat?
A I said there was another person in the front passenger that I come to find out later it was Ron, yes.
Q So he's in the front passenger seat?
A At that time, yes.
Q Okay. Now, when they stopped -- it's a two-door car, right?
A Correct.
Q What color is it?
A Powder blue, light blue.
Q Is it also snowing out, too, at this time?
A Yes, it is.
Q Did Stan and Ron get out of the car?
A Yes, Stan. He had to get out for me to get in, yeah.
Q So you got in the driver's side?

A I got in the back seat on the driver's side, correct.
Q And then apparently Ron got out of the passenger side?
A And got in.
Q And got in the back seat next to you, right?
A Right. Right.
Q And you didn't see anything unusual at that point, right?
A I didn't know Ron Lally.
Q Okay. But I'm --
A So I didn't know what he looked like, so I don't know. I didn't see no --
Q But Stan wasn't forcing him to be in the car?
A No, not at that time.
Q In fact, this guy that you later learned was Ron Lally got out and got in the back seat?
A Right.
Q Nobody told him to, did they?
A My father told him to get in the back, he was getting in the front.
Q Stan didn't, right?
A No.
Q You didn't see Stan have a gun on him?
A Not at that time, no.
Q Stan never had a gun on him, did he?
A No.

Q Now, your position, Stan's driving, your father's in the front seat, you're in the back seat behind the driver, and Ron's in the passenger back seat?
A Correct.
Q Now, at that point, when they all got in the car in that position, nobody was forcing Ron to get in the back?
A No, they just told him to get in the back. He got in the back.
Q But nobody threatened him to get in there? There was no gun or knife on him to do that, was there?
A Not at that point, no.
Q Now, you make two statements today. The first one, before you were sworn in, you indicated that at that point after you got in the car, it's about 3:30. Then you said your father brandished the gun?
A Correct.
Q And that was before you went to the Speedway Station?
A Correct.
Q What does brandished mean?
A He put the gun in his face; that's what it means.
Q That's a police term, isn't it?
A Is it?
Q It's a police term, isn't it, brandishing?
A Yeah, that's what I used to use when I worked for the State of Illinois, brandish.

Q Describe the gun.
A It's a little semiautomatic.
Q What color was it?
A I can't remember.
Q You'd agree that there's a difference between chrome and blue, right?
A Correct.
Q You can't remember?
A Pretty sure it was -- I think it was -- it was chrome, if I am correct.
Q You think. You don't know, right?
A I can't quite remember, no.
Q You can't remember.
And part of the reason you can't remember is because you were drinking and doing drugs at the time?
A At that point, no.
Q You weren't high at that point?
A I was -- I was a little bit, but not that high as to why I don't know what a gun looks like.
Q Stan never had that gun, did he?
A No.
Q Didn't have any lights on inside the car, did you?
A No.
Q Then you went to Speedway Gas Station?
A Right.

Q Describe where it was at and how you got there.
A We went -- I don't remember how we got there. I can't -- I don't remember the actual way we took to get there.
Q Where was the Speedway located?
A On North Ridge by Rte. 2.
Q You don't remember which direction you took from when you were at Wood Street and got picked up to how you got to the Speedway Gas Station on North Ridge?
A We went down Middle. We went out -- we went out to -- we went down Middle, went over past the mall, went out 254.
Q Which way did you turn on 254?
A We would have to have turned right onto 254 for West River.
Q So you're saying you went past the mall? You could have got on 2 right there, but you didn't, right?
A Right.
Q You went down and turned right on 254. And you stopped and got gas at that point, right?
A Correct.
Q Who put the gas in?
A I don't -- I don't remember whether it was dad or Stan. I don't know which one put the gas in.
Q You didn't decide to get out of the car then, did you?
A No.

Q And leave?
A No.
Q You voluntarily went along with the situation, right?
A As far as I know, at that point he was just going to go to -- they was going to take him to Cleveland, drop him off at the bus stop. So, yeah, I went along with the situation.
Q That wasn't discussed, was it?
A On the way to Speedway, something about it was said.
Q Who said that?
A My father was talking to him about it.
Q Stan never said that, did he?
A No, Stan was just driving.
Q Did you have the windows up or down in the car at that point?
A They were up.
Q Then you said after you left the Speedway, that's when you got on Rte. 2, started to go to Cleveland?
A (Indicating affirmatively.)
Q And this was because the plan -- what was stated by your father was that you were just taking Ron to Cleveland and drop him off at the bus station, right?
A Make sure he get on the bus, go wherever he wanted to go.
Q And, at this point, all Stan's involvement is, he's just driving?

A At that point, yeah.
Q So, basically, your father's telling him to drive to Cleveland and drop him off at the bus station, right?
A My father didn't direct him. It was like he already knew where to go.
Q And, then, on the way there, you said apparently you were drinking and smoking crack at the time, right?
A Correct.
Q Everybody in the car was, right?
A Correct.
Q So it was not a threatening situation?
A At that time, no.
Q Everybody was friendly and cordial, I guess, if you're all drinking and smoking crack, right?
A At that time, yes.
Q And you're saying Stan was drinking and smoking this crack while he was driving?
A Yes, he was.
Q How were you smoking the crack?
A In a little glass stem.
Q Okay. And, in order to smoke the crack then in a little glass stem, how would you have to do it?
A Hold it with one hand and light it with the other.
Q Takes two hands then, right?
A Yeah.

Q So, then, if you're saying Stan's doing that, then, obviously, he doesn't have his hands on the wheel, right?
A No, he doesn't.
Q You didn't crash along the way, did you?
A No, we didn't.
It's possible to smoke crack and drive at the same time.
Q I'm not --
A I've done it.
Q I'm asking you the questions, okay?
When you made your statement before, you were driving to Cleveland, you said you were going to drop him off because Ron supposedly had set up your brother, right?
A Correct.
Q And you said, we had heard the tape. When did you hear the tape?
A I went to my -- I had went with my brother to his lawyers and heard it.
Q So you heard the tape?
A Yes.
Q So you knew Ron was involved?
A I didn't know who it was at the time.
Q Well, here's the guy you heard on the tape, and you're sitting in the back seat with him, right?
A Okay.
Q So you know now it's the guy that supposedly set up your

brother?
A After he admitted to it, yes, because I couldn't really distinguish his voice on the tape. I didn't know Ron Lally.
Q You go to Cleveland, and you said you rode around for 45 minutes, right?
A About that.
Q Okay. Now, let's get some timing down.
What time did you leave Mom's?
A I don't know. It had to be about 3:15, 3:30, somewhere in there.
Q 3:15 or 3:30. Okay. How long did it take you to drive over to the Speedway?
A I -- I really -- it's hard for me because I didn't have a watch on. I wasn't really looking at the time. All I know, it was almost daybreak when we got back.
Q No. We're going step by step here.
A Okay.
Q How long did it take for you to get from -- you left Mom's, and you said you stood there about 20 or 30 minutes?
A Okay.
Q We knew that, right?
A Okay.
Q So you leave at 3:15, and there's another 20 to 30 minutes before you're picked up, right?
A Okay.

Q Then you drive over to the Speedway, right?
A Correct.
Q Now, how long does it take you from where you're picked up to get over to the Speedway?
A I don't know. About 20 more minutes.
Q And then how long were you stopped there at the Speedway getting gas?
A About 5 minutes.
Q Then how long did it take you to drive over to Cleveland?
A 30, 35 minutes.
Q Now, is that to downtown or to the East Side?
A Downtown.
Q Then how long did it take you to get over to the East Side where you said you saw these cops and problems?
A About another 30 minutes.
Q Then what, then you drove back downtown, right?
A Correct.
Q So I guess it would take about another 30 minutes, right?
A No, it didn't take that long because at that point they knew exactly where they were going, so about maybe 15, 20.
Q And then you're saying that it took 15 to 20 minutes to get to the cemetery?
A Correct.

Q How long were you at the cemetery?
A I don't know. I -- I don't know. I don't know.
Q Well, there's a big difference, you'd say, between 5 minutes and an hour, right? Would you agree with that there's a big difference between 5 minutes and an hour?
A Who said 5 minutes?
Q I'm asking you: Would you agree there's a big difference in time between 5 minutes and an hour, right?
A I don't understand the question.
Q I'm trying to understand how long you were at the cemetery.
A Okay. We were there more than 5 minutes; I know that.
Q Okay. Were you there more than an hour?
A No.
Q Were you there more than a half an hour?
A No, I don't think it was that long. About maybe, guesstimate, 20 minutes.
Q And then how long did it take you to drive home?
A I don't know. Maybe another 45 minutes.
Q And your testimony is you got home at what, 5:30?
A Might have been about 5:30, 6:00 o'clock, somewhere like that.
Q 5:30 to 6:00.
And you're sure about that time because it was just getting light out, right?

A Approximately.
Q Well, was it light or was it still dark?
A It was still -- it was still dark, but you could see it kind of glowing.
Q Well, we have a problem because then your times don't add up.
You start at 3:15. You get dropped off on the way. I'll give you the benefit of the doubt at all times. You said 15 to 20 minutes, so I'll say 20, so that makes it 3:35 okay?
A Okay.
Q Then it takes you 20 minutes to drive over to the Speedway, so that makes it 3:55?
A Okay.
Q 5 minutes to 4:00.
Then you're at the Speedway for five minutes?
A Okay.
Q So you're leaving there about 4:00 o'clock in the morning?
A Okay.
Q Then you said you get Downtown. It took you 30 to 35 minutes, so I'll give you 30, so you're at 4:30 in the morning, that's Downtown Cleveland. Then it took you another 30 minutes to go to the East Side; that's 5:00 o'clock. Then you said it took you another 15 to 20 minutes to get back

Downtown, so that's already 5:15. Then you said you were at the cemetery for 20 minutes, so that already makes it 5:30?
A Okay.
Q And then it took you another 45 minutes to get home, so that means it's already after 6:00; and that's giving you the benefit of the doubt on everything.
A So my time's off a little bit.
Q So your time's off?
A My time's off a little bit.
Q Like a lot of other things could be off.
MR. ROSENBAUM: Is that a question?
Q You do agree that a lot of things so far have been off, right?
A Some things I remember, some things I don't.
Q But, so far, you do agree that a lot of things you've said have been off, right?
A A little bit.
Q Now, to go back to where we were, on your way to Cleveland you were smoking crack and drinking beer, right?
A Correct.
Q Where did you get the beer?
A It was already in the car. It was in the car.
Q Back seat or front seat?
A I don't remember. All I know I was handed a beer.
Q And what were you drinking?

See Testimony

A I don't remember.
Q Do you remember anything at all?
A I remember this much: My father shot Ron Lally and Stan was there.
Q I'm asking you the questions.
A And I was there.
Q I'm asking you the questions and you respond to them. I don't care what you say. You answer my questions; do you understand? Do you understand English?
A One, two, three, four, five, six, seven, eight, nine, ten. Yes, sir.

MR. GRUNDA: Let the record reflect that he had to count to ten, showing that he's upset.

MR. ROSENBAUM: Let the record reflect that Joey Grunda is upset and badgering the witness and is yelling and screaming at him.

MR. GRUNDA: That's because the witness won't answer.

MR. ROSENBAUM: Then let the record reflect that's your opinion, also.

BY MR. GRUNDA:
Q Who was the one that brought the drugs?
A To be honest with you, I don't know whether Stan had them or my dad had them.
Q It wasn't your crack you were smoking?

A No.
Q Now, you go to East Cleveland, you go back downtown. You said you stopped at the cemetery, right?
A Correct.
Q What manner did you enter the cemetery?
A Through the entrance.
Q Did you drive around or was the car just one car length in and stopped?
A No, we went in and around to like a dead-end part where they had shoveled and stopped.
Q Was it just one lane?
A It was two, in and then turn.
Q Was there a median in there?
A Not that I can remember.
Q So it was just shoveled two lanes wide; is that what you're saying?
A No, it was shoveled one lane wide.
Q So there wasn't enough room for a car to turn around?
A We went in and we drove -- it's like you come in and then you turn onto the other lane. No, you'd have to back up and then pull back out.
Q Okay. So, when you drive in, and the way it was shoveled --
A When you drive in -- when you drive in, you go to your left, and there's a -- it connects into a road that goes this

way. That's the cemetery. You go one way and it connects into another road, like to a T.
Q And the road that was a T, that wasn't all shoveled?
A Where we were at, it was shoveled, yes.
Q So you're saying you drove down the one road, got to where it T'd, and you turned which way?
A We turned left.
Q Okay. Did you drive far and then stop or just backed up right there?
A No, it wasn't -- it wasn't too far, no.
Q Okay. So you turned left. So, then, in order for you to get back up, you'd have to back up?
A Correct.
Q Okay. And then go back down that road --
A Correct.
Q -- you came in on?
A Right.
Q Okay. Now, when you're there, you drive down, you turn left, okay, that's where we're at?
A Okay.
Q That's when your father and Ron Lally got out of the car, right?
A Correct.
Q Stan didn't get out of the car then, right?
A Not at that point, no.

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Q So you and Stan were on the driver's side. You stayed in the car, right?
A Correct.
Q Were the windows up or down?
A Windows were cracked. They were down.
Q Okay. When you say cracked, how far down?
A About midway.
Q Even though it was cold out and snowing?
A Yes.
Q Do you know who put the windows down?
A No, I don't. It wasn't me. I was in the back.
Q And this was a convertible you're in, right?
A Yes.
Q Are there windows in the back for the passenger, too, or just the windows are for the -- just up in the front for the front seat passengers?
A The windows, I don't think they come down in the back. I'm not sure. I know those were up.
Q But is there a window for the passengers in the back seat?
A Yes.
Q After they got out of the car, did you see where they went?
A They were behind the car, because my father --
Q On the passenger side, behind on the driver's side?

A Behind on the passenger side.
Q Did you see them go back there?
A That's the direction that they went, and I remember my father pushing Ron up against the car.
Q Okay. But did you see him go back there?
A No.
Q You didn't turn around and look or anything?
A No.
Q And you said that you couldn't hear exactly what they were saying, right?
A I couldn't hear everything they were saying, no.
Q Was it dark there?
A Yes, it was.
Q There was no lighting at all, right?
A No.
Q Were the car lights on or not?
A No.
Q Now, was the car running at that time, the engine, I mean?
A No, it wasn't.
Q And the lights you said were turned off?
A Correct.
Q And you didn't actually see what went on outside of the car, right?
A No.

Q Stan didn't have a gun on him, did he?
A No.
Q At the cemetery, we're talking about?
A No.
Q Never saw him touch it or anything like that?
A No.
Q You never saw him shoot him or do anything to Mr. Lally, did he?
A No.
Q In fact, he didn't do anything, did he?
A I didn't say that.
Q You didn't see him do anything, did you?
A I didn't see it. I heard it.
Q I asked you: Did you see him --
A No, I didn't.
Q -- with your own eyes --
A No, I didn't.
Q -- do anything to Mr. Lally?
A No, I didn't.
Q You just know something was going on behind the car?
A Correct.
Q More on the passenger side, right?
A Right.
Q Were you still drinking at the cemetery there?
A No, I wasn't.

Q Now, were the roads -- did they have -- even though they were plowed, were they -- was there snow on them or were they icy?
A They were icy.
Q And at no time up to this point did anybody ever discuss any harm coming to Mr. Lally while you were in the car?
A No.
Q Then you said you heard a shot, right?
A Right.
Q Only after the shot, that's when you heard your father tell you and Stan to get out of the car, right?
A No, after the shot, that's when I heard him say, "Oh, you shot me in the head."
Q But after that, that's when he wanted both of you to get out of the car, right?
A Correct.
Q And you said they tried to put him in the trunk?
A Correct.
Q Who opened the trunk?
A I -- I don't know for sure.
Q You didn't see any of them?
A No.
Q But you said he was too stiff to put in the trunk, right?
A That's what I heard them say, he was too stiff to put in

the trunk. Then I heard them drop him back on the ground; that's when they closed the trunk and got in the car.

Q But this is all things that you did not see with your eyes, right?

A These were things that I heard.

Q At that point, with your own eyes, you never saw Stan touch Mr. Lally, right?

A No.

Q Stan never threatened Mr. Lally, did he?

A No.

Q And, at that point, you knew there was apparently some legal proceeding against your brother, right?

A Yes.

Q There was no legal proceedings or anything against Stan Jalowiec, was there?

A None that I know of.

Q Now, you really don't know where Ron Lally was behind the car, right?

A Not directly, no.

Q You don't know if he was in the middle, off to one side, the passenger side or driver's side or whatever, right?

A No.

Q And, in order for you to get out, at that point everybody's back in the car and going to leave, right?

A Correct.

Q It is, by what you just briefly told me, because of this road being in a T you'd have to back up to go back out the road you came in on, right?
A Correct.
Q And he backed up, but you don't know, in fact, what was behind the car?
A They said, "Run his ass over."
Q Did you see anything behind the car?
A No, I didn't see it.
Q So you don't know what was behind the car, right?
A No.
Q And, in fact, you said that he was backing up, and whatever he hit stopped it so he couldn't go over it, right?
A Right.
Q So would it be fair to say your testimony is he never ran over what was behind the car, he ran up to it and stopped?
A I never said he ran him over.
Q But that's what I'm trying to bring out.
A Right.
Q Okay. So you do agree then that he never ran over whatever it was stopped the car, right?
A Yeah.
Q I just did not -- in case there's a misinterpretation, you're agreeing he didn't run over what it was, right?

A No. He didn't run him over completely, no.
Q Well, he didn't run him over, right?
A Ran into him.
Q And you do agree that running up to him and over him are two different things, right?
A Yes.
Q Then you said after he backed up that way, went back out the road, you came back to Lorain -- or I mean to Elyria, right?
A Correct.
Q Back down Rte. 2?
A Correct.
Q And, at that point, you never saw Stan handle the gun, touch the gun, anything like that in the car, right?
A No.
Q Did you ever physically see with your eyes Ron Lally there at the cemetery?
A Excuse me?
Q After he got out of the car?
A What do you mean, did I physically see him? He was there.
Q No. Did you see him?
A I seen him when he got out the car. He was still there.
Q Best of your recollection, that's what I'm saying, the last time you saw him was when he got out of the car?

A Was at the cemetery, right.
Q And, after he got out the door, you never saw him?
A No.
Q Or where he was or anything?
A No.
Q All right. Then you came home to Elyria, went to your brother's house, right, which would be Danny?
A Correct.
Q And then you went to sleep?
A Correct.
Q Never told anybody?
A No.
Q This incident that was so troubling to you that you went right to sleep?
A I went to sleep. I was hoping it was all a bad dream.

MR. GRUNDA: I have no further questions at this time.

DET. LEIBY: He has to use the restroom. I'll walk out with him.

(Brief recess had.)

MR. ELWELL: Mr. Smith, my name is Tom Elwell. I represent your father, Raymond. I have a series of questions as well. I hopefully won't cover ground that's already been covered, but, if I do, please bear with me.

CROSS-EXAMINATION OF MICHAEL A. SMITH

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BY MR. ELWELL:

Q How old are you?

A 29.

Q Where were you born, what city?

A Elyria.

Q So you've been a lifelong resident of this County?

A For the most part, yeah.

Q Did you live elsewhere?

A Yes.

Q Any other state?

A Illinois.

Q Over what span of time did you reside in Illinois?

A It was '88 to '92.

Q Did your whole family move there or just yourself?

A Just me.

Q For employment or for what reason?

A I was going to Job Corps at the time.

Q How far did you get in school?

A I got my GED. I went all the way to twelfth grade, but I dropped out and got my GED.

Q And your marital status right now?

A Married.

Q When were you married?

A I don't think that has anything to do with this. I choose not to answer that.

Q When were you married?

MR. ROSENBAUM: I've explained to him that he does not have to answer any questions regarding his family or his personal life as a result of him being in fear, so I will object to those questions and tell him not to answer. If you need to have a hearing, I guess we'll have to consult with Judge Glavas.

Q All right. You indicated that you've been in Cleveland Psychiatric Institute three or four times?

A Correct.

Q One time since this incident?

A No.

Q How many times since the incident?

A Three.

Wait a minute. One, two -- four. Four since this incident.

Q Four times at CPI since the incident?

A Correct.

Q How many times prior to the incident?

A I've never been to CPI prior to the incident.

Q Although you did attempt suicide several times before the incident?

A No, I didn't.

Q How many times did you attempt suicide prior to the incident?

A Once in '86.
Q Excuse me? What year?
A '86.
Q And that was by means of what?
A I took some pills. I was in Hanna Pavilion at University.
Q There were no other incidents of attempted suicide prior?
A No.
Q How about an incident where you were attempting to jump off a bridge in Cleveland?
A No, that was in Elyria.
Q A bridge in Elyria?
A Yeah.
Q And when was that?
A That was this past year in April.
Q When did you first contact authorities to discuss this matter?
A April.
Q How long prior to this statement that was made on April 12th?
A Excuse me?
Q Your statement was made on April 12th, correct?
A Correct.
Q How long prior to that had you contacted authorities?

A It was about -- I think it was -- I'm pretty sure it was a week before that.
Q Why did you wait so long?
A Because at that time I just couldn't see myself testifying against my family.
Q Who did you contact first?
A I had -- I had told a Police Officer that I needed to talk to Det. Leiby.
Q You asked to talk to Det. Leiby?
A Yes.
Q How did you know that Det. Leiby was the one to contact?
A Leiby was -- Leiby is really the only one that I know by name and face at the Department, so that's why I asked to speak to him.
Q And it was just a coincidence that he happened to be the Detective on the case?
A Yes.
Q You had no idea prior to this that he was the Detective on the case?
A No.
Q Had he contacted you or had any other member of the Elyria Police Department contacted you prior to this incident to discuss the case?
A No.
Q Do you remember what day of the week this alleged

killing took place?
A No, I don't.
Q Do you know if it was a weekday or a weekend?
A I can't remember if it was a weekday.
Q Were you employed at the time?
A No, I wasn't.
Q When is the last time you've been employed?
A About three weeks ago. No. Two weeks ago.
Q You indicated that you met at Mom's Open Kitchen at around quarter till 3:00 a.m.?
A Correct.
Q Where had you been earlier that evening?
A Bugsy's.
Q Excuse me?
A I had went into Bugsy's. I had been down to Camel's.
Q About what time did you start hitting the bars? What time of the evening?
A It was late in the evening. It was about 12:30. T. 788
Q That's when you started?
A Yeah.
Q And where had you been prior to that that evening before you started hitting the bars?
A I was at -- I was at my room. T. 788
Q Excuse me?
A I was at my room.

Q Doing what?
A Watching TV.
Q So at around 12:30 you went out to drink. Were you alone or with someone?
A I was alone.
Q Did you walk or drive or what? By what means did you get to these places?
A How did I get downtown that day? I -- I can't remember how I got downtown that night. Oh, there was someone that had a room out there with me -- well, out there by me, and I rode with them downtown; and then I basically walked because all the bars are together.
Q So somebody gave you a ride downtown?
A Yeah.
Q You don't remember the person?
A Girl named Dawn. Dawn -- I can't remember her last name.
Q Dawn is the first name?
A Yeah. I can't remember her last name.
Q It's a female?
A Yeah.
Q And you get downtown about 12:30?
A About 12:30.
Q And you first go to Bugsy's or to Camel's?
A I was in Camel's at first, but I walked down to Bugsy's.

T.788

Q How long were you at Camel's?
A About 45 minutes.
Q And you were drinking there?
A Yeah.
Q Colt 45?
A Yeah.
Q What size of Colt 45 were you drinking there?
A 12-ounce bottle.
Q How many of them did you have there?
A I think I had two.
Q Then where did you go?
A I went down to Bugsy's.
Q And how long did you remain there?
A I think I was there basically 'til they closed.
Q So, if you got to Camel's around 12:30 and stayed for, what did you say, a half an hour?
A About a half an hour, 45 minutes.
Q So around approximately 1:00 in the morning you're at Bugsy's?
A Right.
Q These are both on Broad Street, correct?
A Right.
Q Matter of a few minutes' walking distance between each other?
A Right.

Q And then you stayed at Bugsy's until you went to Mom's Open Kitchen --

A Right.

Q -- which is also on Broad Street; in fact, real close to Bugsy's, right?

A Correct.

Q So, if around 1:00 in the morning until 2:30 you were at Bugsy's --

A I won't say exactly 1:00 because, I mean, I did stop and talk to people on the way, and, you know, we talked for about 15, 20 minutes. It wasn't like I went straight from one bar to the other. I did hold conversation.

Q But, then, once you arrived at Bugsy's, you stayed there until you went to Mom's Open Kitchen?

A Correct.

Q Somewhere around a quarter to 3:00, you said?

A About 2:30, quarter to 3:00.

Q And continued to drink?

A I think I drank a couple. I'm not a heavy drinker.

Q Using any drugs up until this point?

A No.

Q No?

A No. No.

Q Are you still alone at this point when you're leaving Bugsy's?

A Yeah.
Q And did you know your father was going to be at Mom's Open Kitchen?
A No.
Q Was he already there when you got there or did he arrive after you?
A He was there when I got there. Him and my brother and Tammy was there when I got there.
Q And Tammy?
A Yeah.
Q Had they already eaten or were they just waiting to be served?
A They -- I don't think they had been there too much longer before I got there because they had not really ordered yet.
Q Did you sit down at the same table with them?
A Yeah.
Q And was any conversation going on?
A Talking about the night; basically, that's all.
Q So I take it there was no conversation at all at the table there about Ronald Lally?
A No.
Q And then a phone call was made, correct?
A Correct.
Q You don't know the nature of that call, correct?

A No.
Q In fact, you don't even know of your own personal knowledge who was called, correct?
A Who was called?
Q You don't know of your own personal knowledge?
A That someone was on the other end?
Q Yes, who was called.
A Oh, who was called? No, I don't.
Q And then I assume after you ate, you all got up and started to leave?
A Correct.
Q Did you know how you were going to get home?
A Not at that point.
Q Well, you walked with your brother and your father and --
A Tammy, yeah.
Q -- and Tammy out?
A (Indicating affirmatively.)
Q Did you ask them for a ride home or what?
A Well, at that point, I was asked did I want to go for a ride, and I said yeah; that's what I mean, you know. I didn't really expect to go home just yet.
Q Who asked you to go for a ride?
A My father.
Q And that's when you drove to this location on Middle

Avenue?
A Correct.
Q And you got out of the vehicle?
A Correct.
Q Why did you get out?
A Because he said we had another ride coming.
Q You didn't question him further about that?
A No. He's my father. I didn't think I had to.
Q It was very cold?
A Yeah, it was.
Q And you decided just to get out into the cold and wait for another ride?
A Yeah.
Q And, as was indicated in your previous testimony, you're not sure who actually drove you there, whether it was your brother or Tammy?
A Right. I -- I could not actually remember. I honestly forgot all about Tammy. I did.
Q And you stood in the cold for a half hour?
A 20 minutes to a half hour.
Q Just you and your father?
A (Indicating affirmatively.)
Q And are you speaking with him? Is there a conversation going on?
A I just asked him, I said, you know, "How much longer

before they get there?"

He just said, "They coming, they coming."

I was just talking about how cold it was; but, no, we didn't have a big conversation, no.

Q So finally this car arrives, this LeBaron, correct?

A Correct.

Q And did you recognize the driver?

A No, not right offhand.

Q Did you recognize the passenger?

A No.

Q Nobody introduced you to these persons?

A I knew the car.

Q I understand that.

Did anyone introduce you when you got into the car? Were introductions made as to who these other people were?

A When the car stopped, I knew who it was driving because Stan got out the car.

Q So you had met Stan prior to this date?

A Yes.

Q So you didn't need to be introduced to him?

A No.

Q How about the passenger in the front seat, were you introduced to that person?

A You mean the one what wound up in the back with me, Ron?

Q Yes.

A Yes, I was introduced to him.
Q Who introduced you to him?
A My father.
Q Is that the first time you'd ever heard that name?
A No, it wasn't the first time I heard it.
Q So you knew who the person was?
A No, I didn't. I had never seen Ron Lally. I knew nothing about Ron Lally.
Q But you had heard the name prior to that?
A I had heard the name before.
Q How did you know the name?
A I just had heard it.
Q From whom?
A I heard it when me and my bride had came down with my brother to a hearing and his lawyer had mentioned it; that's -- that's as far as I knew about Ron Lally.
Q So you knew this was the person who set up your brother?
A No, I didn't.
Q Well, you came to a Court hearing involved in that?
A He was not -- he wasn't there.
Q I realise that. But, by name, you knew who this person was then, correct?
A I knew I've heard the first name. I never heard -- I heard him mention Ron. I never heard him mention the last name.

Q But you're saying the name was mentioned when you went to Court with your brother, the name was mentioned by his lawyer, right?
A All he says was Ron. He didn't go into detail. All I knew was Ron. I didn't know the specifics of it.
Q Well, I asked if you had heard the name Ron Lally before, and you said, yes, correct?
A I heard the name Ron. I didn't hear Ron Lally. I didn't know Ron Lally until that night. It was after this was over with.
Q So now you're saying you never heard the name Ron Lally before that night?
A Correct.
Q When was this meeting at the lawyer's office with your brother? When was that?
A That was way before this; but at that time we just heard the tape and nobody knew who it was.
Q And you listened to this tape?
A I heard the tape, yeah.
Q And you heard the name Ron Lally then, correct?
A No, I did not hear the name Ron Lally.
Q So you're saying you had no idea who this person was when you met him?
A That's correct.
Q So you indicated shortly after everyone gets into the

car, your father turns around and tells this Ron, don't make any stupid moves?
A Correct.
Q Do you remember saying something different to the Police Officer who was questioning you at the Justice Center?
A No.
Q May I see the statement, please?
Directing you to Page 7 of your statement, if you'd read that, please.
A Okay.
Q Does that refresh your memory as to what you told the Detectives when you were being interviewed at the Justice Center?
A Yeah.
Q So there was never anything said about don't make any stupid moves?
A No, he did say that.
Q What?
A He did say that. Maybe I didn't say that in the statement, but he did say it.
Q Well, are you saying that your memory now is better than it was then?
A I -- I remember some things better than I did then, yeah.
Q Because all that's said according to your statement is

that he turned around and said, "We're going to get you out of town, put you on a bus"; nothing about don't make any stupid moves, right?

A Well, that's what he told him in beginning.

Q Which --

A He said, "Don't make any stupid moves."

And Ron said, "I ain't, man. I ain't gonna do nothing."

Q So your statement earlier isn't actually accurate in that respect?

A In that respect, no. A little mixed up.

Q So, then, on the way to Cleveland, you were smoking crack, correct?

A Correct.

Q All four of you?

A Correct.

Q Do you know how many rocks of crack were smoked?

A Not right offhand.

Q More than one?

A More than -- more than -- more than four.

Q More than four?

A About -- more than four, less than eight. About six or seven.

Q Six or seven rocks?

A Yeah, between the four of us.

Q Did all of you smoke an equal amount, in your opinion,

or was one smoking more than another, if you can recall?
A I -- I really -- I can't -- I don't know. I mean, it wasn't about who was smoking more or less.
Q All right. So you go to this cemetery and you indicate -- let me see if I understand this -- it was plowed, so that there was just one lane of travel?
A Correct.
Q And the entrance road meets another road in a T?
A Correct.
Q And then you turned left onto that road that the entrance road met, correct?
A Correct.
Q And that road that you then turned left onto, is that also plowed so that there was only one lane of travel?
A Yes, because it was like a dead end. It was like snow was piled up.
Q So there was only one lane of travel on that road as well?
A Correct.
Q And how far down that road did the car travel?
A A few feet. It didn't go very far at all.
Q Did the car make the turn completely onto that road?
A Yes, it did.
Q And then traveled only a few feet?
A Right.

Q And you remained in the car, correct?
A Correct.
Q In fact, you said you just sat there and looked forward?
A I -- right.
Q And the persons that left the car were not in your line of sight, correct?
A Correct.
Q You didn't watch them, correct?
A Correct.
Q You don't even know how far away from the car that they went, correct?
A They weren't too far from the car because they was bumping up against the car.
Q But you weren't watching?
A No, I didn't want to see it.
Q Were you listening to their conversation?
A I heard some of the conversation; I didn't hear it all.
Q But you remained seated, looking straight ahead, correct?
A I put my head down is what I did, on the seat.
Q Put your head down?
A I was like this (indicating).
Q Were you tired?
A Scared is what I was.
Q So, with your head in your hands leaning over, you

certainly didn't see anything at all, correct?
A No.
Q So you don't know what may have gone on between the two people who left the car, do you?
A No.
Q You don't know if this Lally had a weapon, do you?
A Not to my knowledge.
Q You don't know if Lally tried to attack your father, do you?
A Not to my knowledge.
Q You don't know if that happened or not, correct? You didn't see, correct?
A No.
Q You don't know if there was a struggle between them, do you?
A There was some bumping up against the car just before the gunshot went off.
Q And you don't know really what the nature of that bumping was, who started it or what caused it or what was going on between them, do you?
A No.
Q And then you indicate that the car was driven and had backed into what you think was a body, correct?
A Correct.
Q Again, you didn't see that?

A Correct.
Q You're just assuming it was, correct?
A Correct.
Q So apparently the body was blocking the car from going backwards, correct?
A Correct.
Q But you indicated that the car never ran over the body, correct?
A Correct.
Q Then how did the car get out of there?
A It just -- I just know it got out of there.
Q Well, there was one lane, correct?
A Right.
Q And, to get out, you would have had to back up, correct?
A It went over to the side. It turned, they cut over to the side and went out. It ran into the snow, I mean.
Q I thought you said it was a big embankment and it was only one lane?
A There was a big embankment in the front of the car.
Q So now you're saying there was room to go around; that's what you're saying now?
A Yeah.
Q And, then, on the way home, you argued with your father because you didn't help him?
A Correct.

Q So he apparently was indicating that he was in need of some help from you back there at the car?
A Correct.
Q So he may have been in some danger that you're not aware of; is that what you're saying?
A No, that's not what I'm saying.
Q But he was angry over you not helping?
A Correct.
Q You're on probation now, correct?
A Correct.
Q And I see your Probation Officer is here.
Has any proceeding been started to revoke your probation?
A No, there hasn't.
Q Has that been threatened?
A No, it hasn't.
Q Who is your lawyer in the case that you received probation on?
A Jeanne Mattes.
Q Is she still your lawyer?
A I don't have a lawyer. I don't need one.
Q Have you had any conversations with either the Prosecutor or any law enforcement official as to the fact that you won't be prosecuted if you testify?
A No, I haven't.

Q There's been no conversations whatsoever as to what benefit you would be provided by testifying?
A No. The only benefit I have is clearing my conscience.
Q And you've been offered no other incentive?
A No, except all I asked for was a bus ticket out of here, and that's it.
Q How would you describe your relationship with your father?
A I -- I really -- I don't know. That's --
Q How would you describe your relationship with your father, let's say going back several years through your childhood?
A I don't know. It was -- it was shady.
Q Excuse me?
A It was -- it was -- it was shady.
Q Shady?
A Yeah.
Q What do you mean by "shady"?
A It wasn't -- it wasn't that -- it was okay.
Q There's a lot of animosity between you and your father, is there not?
A No.
Q There's not?
A No.
Q Have you had any conversations with your father since

this incident?
A We've talked. We never talked in the last -- I don't know, two or three months, but we've talked.
Q Who was the Police Officer that you spoke to that you say you knew that got you in touch with Leiby?
A I really -- I don't know the Officer's name.
Q And you're willing to testify at the trial of this matter, correct?
A Yes, I am.
Q And you plan to make yourself available to testify at that matter, do you not?
A Yes, I do.
Q If our investigator wanted to ask you questions subsequent to today's date, after today's date, before trial, would you be available to answer questions?
MR. ROSENBAUM: He's not going to comment on that and we're not going to tell you where he is, and I'm going to certify that in Court. He's in danger that he feels --
Q Do you feel you're in danger?
A I did receive a threat.
Q That's not the question.
A Two weeks --
Q Do you feel you're in danger?
A Yeah. I feel I am, yeah, for me and my family.

Q Well, they're incarcerated, correct?
A So they're incarcerated.
Q Excuse me?
A They're incarcerated, and --
Q They're no real threat to you now, are they, yes or no?
A It's a possibility.

RAYMOND SMITH: -- kill --

MR. ELWELL: I have no further questions.

MR. ROSENBAUM: I thank you very much.

(Deposition concluded.)

C E R T I F I C A T E

The State of Ohio, )
County of Lorain. ) SS:

I, Jacquelyn Hellwig, Registered Professional Reporter and a Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within-named witness:

MICHAEL A. SMITH,

was by me duly sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid.

I do further certify that this deposition is a true record of the testimony given by the witness.

IN WITNESS WHEREOF, I have set my hand and affixed my seal of office at Elyria, Ohio, this 26th day of June, 1995.

Jacquelyn Hellwig, R.P.R.
Notary Public, State of Ohio
589 W. Broad Street
Elyria, Ohio 44035
My commission expires 10-24-95.

DATE: April 28, 1994

TIME: 10:50 P.M.

LOCATION: Elyria Police Station

Interview between Det. A. Leiby (AL), Lt. M. Medders (MM) and Mr. Daniel D. Smith (DS).

MM: We're interviewing a Mr. Daniel D. Smith regarding a possible homicide. Mr. Smith, do you understand your rights?

DS: Yes.

MM: OK in front of you you have a rights card, is that correct?

DS: Yes.

MM: OK what I'm going to do is going to read to you these rights.

You have the right to remain silent.
Anything you say may be used against you in a court of law.
You have the right to talk to a lawyer and have him present with you while being questioned.
If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.
You can decide at any time to exercise these rights and not answer any questions or make any statements.

Mr. Smith, you understand your rights?

DS: Yeah.

MM: OK, do you want to talk to us at this time?

DS: Yeah.

MM: OK, this is voluntary? Nobody is making you do this?

DS: Right.

MM: OK, Mr. Smith we're going to get started here if you don't mind. Basically....

AL: You want his signature on that?

MM: Yeah, you want to sign this for us?

AL: You need to put yes here, yes here and sign there. Didn't get enough sleep today, huh?

MM: Working late?

"Exhibit E"

DS: No, you know it's like you're nervous.

MM: No, I said you don't get enough sleep!

DS: Oh yeah.

MM: OK.

DS: I'm just tired.

MM: OK you started to mention the fact about what's his name...Ron Lally?

DS: Yeah.

MM: Well why don't you tell me what you know about this thing, alright? Just tell me what you heard and what you think is going on.

DS: Well for one I heard that he uh, dead.

MM: OK.

DS: Um, I heard he was in um....

MM: You know this person?

DS: Ron Lally?

MM: Yeah.

DS: Yeah.

MM: How do you know him?

DS: Through um, friends.

MM: OK.

DS: And uh...

MM: OK...

DS: So I heard that uh, he came up dead in Woodland and for one I don't know where Woodland is. All's I know it's in Cleveland. I heard that Woodlands was in Cleveland. That's all I know, I don't know where Woodland is in Cleveland.

MM: OK.

AL: What is Woodland?

DS: From what I heard it was a cemetery.

AL: OK.



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DS: Now if that's true, I don't know. I, I never heard of Woodland. OK, so...um, I had heard through my friends...they, they're the one that told me and the first person I had heard it from was um, it was uh, this uh, white dude named Duane...that's all, all's I know is his first name is named Duane.

MM: White dude named Duane?

DS: Yeah.

MM: OK, go ahead.

DS: And he came up to my house one day. He said uh, he asked me, he said, "Did you know that dude Ron Lally is dead?", and I said, "No." and then I thought he was playing with me. I said "Stop lying!", he said, "No serious, he's dead." So then I told him, I said, "Where did you hear this?" He said, "That he...." I guess he lived next door to him and he said that uh, he said that they had red tape, they had red tape across his door. And then he said that they uh, whoever killed him did a...he said "Mafia style." They told, they said he...told him to get on his knees and they shot him in his head and um, left him there to die. So then...I really, I believed him, but I didn't believe him. Because it was, it was weird. So then....

AL: Do you know about what day it was on that he told you this? Can you remember?

DS: No, I, I can't remember at all.

AL: OK.

MM: The white dude named?

DS: Duane.

MM: Duane?

DS: Yeah.

MM: What does he look like? Describe him to me.

DS: Um, about your, your size.

MM: OK for the tape, I'm about 6'2". My weight?

DS: Yeah.

MM: For the tape, I'm about 250 pounds.

DS: Yeah.

MM: What color is his hair?

DS: Um, black.



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MM: Black hair?

DS: Yeah.

MM: About how old is this guy?

DS: Um, about 24.

MM: Do you know where he lives at?

DS: Next door to um, where Ron used to live I guess. Over there by um...

MM: Next door to who?

DS: Ron Lally.

MM: OK.

DS: He said he lived next door to Ron Lally that's all I know about it.

AL: Does that mean in the same building?

DS: Uh, either the same building or next door in them other houses.

AL: OK.

MM: Alright go ahead I'm sorry...continue.

DS: OK, so then um, so then I heard um, a couple of my friends they said um, that they smoked with -UNCLEAR-. So then they, they had told me...they said, "Yeah, he's dead." So as far as him being dead all I know about was...that they told me he was dead. So basically that's all I know.

MM: OK you know when he...what day he died? About approximately? This is April...OK, this is April the 28th. How long ago was it this conversation took place with Duane?

DS: About, about a month ago.

MM: OK if we give you a date can you tell us basically if this was close to it? Will that help your memory a little bit if we could... Why don't you tell me a date that would be good as far as what we know here.

AL: OK, the date that the incident occurred was 11/18 of '94.

MM: 09/18..that's November, OK? Eighteenth is right before Christmas, before Thanksgiving. Does that sound about the same time this conversation took place?

DS: Yeah.



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MM: Is that...about how close to it was, do you remember?

DS: Um....I can't remember if it was after my birthday or before Christmas. I can't remember exactly. In fact, I don't, I don't know.

MM: If you're not sure that's alright. Let's go back to Mr. Lally here. How long have you known him? What kind of relation do you guys have?

DS: Um, I've known him for uh, about I'd say about mmmm....two, three years I've known him.

MM: Well are you good friends, associates or? What would you call it?

DS: Just...We was just associates. He came over to my apartment a few times. Uh, his girlfriend used to live uh, in the condominiums next door to a friend which I knew too. He used to come over there and I first met him down there on, on uh, on uh, around Bell through one of my friends. And uh, so then he told, he had told me that he knew my brother.

MM: And your brother's name?

DS: Mike Smith. He told me that he knew him. So then I was like..yeah Dan... Come to find out, I seen him one day riding with one of my good friends that I grew up with since I was a kid down the street from my mother's house. His name is Duane. So, you know...

AL: What's Duane's last name?

DS: Uh, Duane Moore.

AL: OK.

MM: This is another Duane, right?

DS: Yeah, no this is a different Duane. I grew up with him since I was a kid. And now...well really he grow up with my brother. I just...

MM: Right.

DS: You know hang...

AL: Now you don't, when you talk about brothers...do you only have one brother? Is Mike your only brother?

DS: Mike's, Mike's my only full brother..but I've got another brother with the same father.

AL: OK.

MM: What's his name?



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DS: Raymond Smith.

MM: OK.

DS: Same as my dad. And I've got two, two sisters.

MM: Well how did you get along with this guy Ron Lally?

DS: I got along with him alright. We, I never had not problem with him.

MM: You had no problem with him whatsoever?

DS: No.

MM: Are you sure? Think back now, this is a very serious question here.

DS: Oh probably as far as, as him..I heard the tape of him um, trying to bust me selling drugs to him.

MM: OK when you heard this tape, who, who did you hear this tape from?

DS: Um, my lawyer.

MM: Who's that?

DS: Um, uh, Michael Ross.

MM: So Michael Ross let you hear this tape where allegedly, Mr. Lilly was busting you type thing?

DS: Yeah.

MM: On a drug case?

DS: Yeah.

MM: Was Mr. Lilly involved in drugs as far as you know or Lally, I'm sorry.

DS: Yeah.

MM: Now, was you involved in drugs with him?

DS: Nhhhhhh.

MM: Now this...like I said we're here for a murder investigation. Let's be straight up about it alright?

DS: Alright.

MM: Now if you was...I mean let's face it, the man's...if he was involved with you in drugs...he's dead at this point in time, is that correct?



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DS: Yeah.

MM: So he can't testify against you, is that also correct? So I'm going to ask you this question one more time. Was you involved in drugs with this man?

DS: No not that I...I don't want to answer it.

MM: OK, you don't have to answer it...but it..for the sake of the argument here. You heard his voice on a tape busting you, is that correct?

DS: Correct.

MM: What did you think about that? Did that make you mad?

DS: Well it started like this...I first got busted and he came to my house. Um, I didn't know who it was, I didn't know nothing about it. All's I know is I got busted. I know somebody came to my house. So I went...I asked a couple people...I was like uh, "You know I got busted", and they was like you did. I said, "Yeah", I said...I was like, "Did you...", I said, "You didn't know...did you bust me?" I asked them like that and they said.

MM: You were asking Mr. Lally this is that correct?

DS: No, I didn't ask him.

MM: A friend of yours.

DS: I asked several people. I said, I said, "Did you try to bust me?" They said no. So then...I said, "Yeah", I said um, I said, "Well I heard it was you...you know." Trying to see if it was them, which I didn't know at the time. So then I um, there was a guy that live across the street from me. His name is Mike and he was real good friends with Ron Lally. I guess Ron went over there all of the time..almost every day. Then I went up to his house. I asked him, I said, "You know I got busted." I said, uh, I said, "Wasn't you was it?" He was like,"No....I said, "Well I figured", you know, I said, "I think it was Ron." And then he was like, "I don't think it was Ron because he never said nothing to us about it or...you know..he never acted like it." Or they never knew he -UNCLEAR- case about like that. So I was like yeah...so then, uh, one day Ron's girlfriend was outside and then she said that uh, she said she had heard that I heard that Ron had busted me. And so, she told um, Mike to come...for me to come down there and talk to her. So I went down there and was talking to her. And I said, "Yeah, well I heard that your boyfriend busted me." So...

MM: So what did she say?

DS: She, she said as far as she knows of that uh, he didn't bust me. She said because he had never said nothing to her about it. So I



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DS: was like fine. We had a little, little dispute there you know? And uh...

AL: So you did argue with her on that day?

DS: Yeah, we argued.

AL: Did you make any...did you make any threats that day?

DS: Well, well...no. The only thing I said to him, I said well...I said if it's him...me and him are going to have to fight over it. You know, I said, "If I see him, me and him is going to fight." I said stuff like that...I said, "I'll go and do the time, ain't no problem." So then when I heard he was dead....just like I told my lawyer...I said, "Doing, doing a little two years, three years on a drug case ain't nothing." I said, "Taking a man's life...that's something, that's something else."

MM: Let me ask you this Danny, straight up now. It's obvious that you was mad at this individual if he busted you, is that correct?

DS: Yeah.

MM: Now, this is a very critical question here...because you're..did anybody explain to you the laws of murder? There's different degrees of murder? Do you understand that?

DS: Yes sir, yeah...

MM: OK, you understand that I'm not going, I'm not going to play any games with you here. It does not look good for you whatsoever, you understand that?

DS: Mmhmm.

MM: What's the odds of this man dying on the day of the trial?

DS: What's the odds of him dying?

MM: Yeah.

AL: On the night before your trial.

MM: You're not stupid by no means OK. I'm trying...I don't play any games. I'm usually straight up with people.

DS: I, I don't understand what you're saying.

MM: Your trial...

DS: He died before my trial.

MM: That's correct.



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AL: You had a trial scheduled for the morning of 11/19 of '94. He died on the evening of 11/18/94.

MM: Now you see what I'm saying? It doesn't look good for you whatsoever.

DS: See now, I didn't know I had a trial until the 28th.

AL: It was postponed. I have a copy of the docket in here. I can show you, I've documented that already.

MM: Let's go right back over this again now. I've been trying to tell you before there is different degrees...one is called premeditated, it's serious business.

DS: Mmhmm.

MM: You understand that concept? One is if you get into a heat of passion and you start fighting and things happen. You understand that?

DS: Mmhmm.

MM: Sometimes it's, it gets down to the point where he hits you and you hit him back and then things get carried away. You understand there is different degrees on this thing? Now what I'm trying to get across to you is...the only way you're going to get the truth out of this thing is you're going to have to be straight with us and with yourself. Don't put yourself in a situation where you blocked yourself in and you can't get out. The only person who can help you at this point in time is for you to be honest, and be straight with everybody. If you start lying, you start trying to cover things up it's going to get a lot worse for you...you understand? I mean..he and I have nothing to invest in this thing. This is between you and Mr. Lally on this drug case. You understand? The only thing we do is our job on it. So if something happened on this, in this game or situation...be straight about it! Don't make yourself look worse than what it is. Now I'm just trying to be as honest with you as I can. You know I think you was there that night. I think there's.. you had some involvement in it. But you're going to have to be straight with me. You're going to have to come forward on this thing. Because like I said, the reason I'm here is...you know..we know what happened, OK? We're not stupid by no means.

DS: Well now wait a minute. You think I was there?

MM: I...put it this way. I, I know you know a little bit more than what you're telling me right now, OK? And I'm not going to lay off...lay this case in front of you..this case has been worked for a long time. This is only half the file, you know that.

DS: Mmhmm.



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MM: Now be straight with me at this point in time and tell me what you know on it. Don't be dancing on this thing because you're going to jam yourself up.

DS: Well, well as far as I know as I heard that it was somebody who had broke into his house.

MM: OK you heard that somebody broke into his house?

DS: Yeah...which the lady that told me...I don't think she, I do not know who she was. All's I know is she works at Mr. Hero's and she said he used to come in there a couple of times with some black lady. Her name I don't know because we was sitting up there at um, I was getting my car worked at at -UNCLEAR-.

AL: Do you know the Carter girl at Mr. Hero's....is it her?

DS: Excuse me?

AL: Carter? The one black girl that runs...that's Carter. Kind of a pretty girl?

DS: No...she wasn't....not, not to me, no.

AL: OK.

DS: I mean she...we was just sitting there and I was reading the newspaper. Then I happened to see him in the..his name in the paper.

MM: How did you feel about that?

DS: It, it...to me, it made me feel, it made me feel kind of sad because I ain't going to take nobody's life over a little sentence. Two year, three years...it might not have been that...it could have been, as far as my lawyer was talking it was probation. You know?

MM: Have you ever been to jail before for anything?

DS: Yeah.

MM: For what?

DS: Um, uh, corruption of a minor.

MM: Did you do any time on that?

DS: Yeah, I did four months down at Lancaster. So...you know, I figured to myself. I said, well...my um, lawyer the way he was talking I had more than, more than a 100% chance on probation. So I thought I was getting probation the whole time.

MM: On your drug cases?

DS: Yeah. Now as far as my dad and stuff like that, I don't know. My



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DS: dad said he was looking at some time, but I don't know about that. So, you know.....

AL: Which brings us to another prospect. Is there somebody else you might suspect was involved in this and might be in your family or something?

DS: Mmmm, I hardly doubt my dad would do it.

MM: Danny, you know who did it. Let's, let's be honest with each other here.

AL: I've got a hospital report on Michael too.

DS: Mike?

AL: Yeah.

DS: From where?

AL: From when he tried to hurt himself a little while back here.

DS: Oh, yeah? That was um, he was doing drugs and uh, he was doing drugs. Why...how this happened was...this girl he lives with..he was doing drugs and he had to pay a car note. He wound up spending all of his money. So if you find out from the, from the..Mike's background he's suicidal anyway. That's ain't the first time he did this. It's like the third, fourth time. You know he cut his wrists, hung himself...

AL: But you know that he called me and told me when I arrested you, you know that Michael called me and told me that I arrested the wrong guy. That it wasn't you that sold us the dope, that it was Dan..that was Michael.

DS: Mmhmm.

MM: You know that? Why do you think he did that?

AL: And he was angry that I didn't believe him and he implied that he might do something. Do you think he'd do it to keep your dad out of jail?

DS: Mmmm, I don't...I can't see Mike doing something like that. I, I don't know....he ain't...as far as I know he's not like that. I mean I can't see him killing nobody. Not me.

AL: What about somebody else that's around you? What about your right hand man, Stan?

DS: I mean do you all think Stan would kill somebody?

MM: What do you think? You know him better than I do.



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DS: I don't...Stan, I don't think so. I, I don't...no, I knew Stan since I was...what uh, like fourteen. I don't think Stan would..Stan got no kind of heart to do something like that.

MM: Do you got a heart to kill someone?

DS: Nope, I don't.

MM: Even somebody that pissed you off that bad?

DS: Not at all.

MM: You had nothing to do with Danny Smith? I mean with uh, involved in his death?

DS: Nothing at all.

MM: You just made these idol threats to people and you really didn't follow through on it?

DS: Correct.

MM: But you did threaten to kill him is that correct?

DS: No.

MM: Remember we told you...

AL: But back up a step...

MM: Back up now..

AL: Besides talking to his girlfriend and telling her...beside talking to Sandy and telling her that you were going to burn his parent's trailer and that you were going to kill Ron. Let me find out what day it was that you and all your boys went over there to Ron's and threatened him. OK, do I need to look that report up or can we just talk about it without me going through this hassle. Because I got the report here where you guys all went over there and made the threats and Homoki, I think it was. Stopped you and talked to you.

DS: Who?

AL: Officer Homoki.

MM: The policeman.

AL: The police officer that stopped and talked to you the day that you were over at Lally's by Mr. Hero and made threats against him that day and he called us because you were over there saying you were going to kill him that day and making threats.

DS: Well....



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MM: OK Danny for the sake of an argument...if you did, if you told him you was going to kill him...why are you telling me this? What's your motive? What are you trying to do?

DS: OK well, I never told him I was going to kill him. I never said...

MM: Did you make any threats to him?

DS: No. It's...a threat, a threat as in fight and that's it.

MM: Alright well killing?

DS: Killing no and his, his parent's trailer...I don't know where his parent's live, I didn't even know they lived in a trailer. I told..

MM: So you said you was going to beat his ass? Is that...is that..tell me exactly what you said?

DS: I said, I said, if I see him me and him is going to fight. Now as far as killing no, I never said that. And if the police, if the, if the police will uh, whoever wrote the report on that day that I was over there...ask them where they seen me walk out.

MM: So you did have contact with Mr. Lally prior to his death and you was going to have a fight, is that correct? Is that...which way it went down? Just tell me.

DS: No, it happened like this. Stan had told me he lived by Mr. Hero's. So fine, fine and dandy, I knew he lived by Mr. Hero's for the longest...I never, I never did nothing after I...after that on... Because when I first caught the case, I was nervous, I didn't know what was going on because it all hit me at once. I don't know nothing about, you know what I'm saying, as far as getting ready to go to jail. So I was nervous. So then, after I talked to my lawyer you know as the months went by...I didn't think nothing of it. He told me I was going to get probation. So then I went to Mr. Hero's, Stan told me he lived by Mr. Hero's because he seen him walking over there. He didn't, he wasn't even sure if he lived over there. All's he know is that he seen him over by Mr. Hero's a whole bunch of times just walking down the street. So I went to Mr. Hero's one day and I guess Stan was outside. I had a couple of my, couple of my friends with me.

AL: Who was with you?

DS: Um, it was me, um, Vernard, um, ....me, Vernard and Stan...

AL: Had Stan ever been to Ron's room?

DS: Uh, I know he went over there I don't know if he been to his room.

AL: You mean he went over to the building?

DS: That's, I guess....he said he...Stan used to tell me he talked to



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DS: Ron. Him and Ron was friends...if they're friends that's on, that's on him. He ain't going to be friends with me, but I ain't going to get mad at him just because he's friends with him. That's like if I got problems with you and he's friends with you and I'm friends with him. I'm not going not going down on him. That, I can't...if I...just like if I'm your friend. I don't want him to be mad at me. Because I'...I can't, so what if I'm your friend. Between you two is between you two, you know?

AL: You and Vernard and who else was there that day? Who were the girls?

DS: Girls?

AL: Yeah, there was supposed to have been two girls there.

DS: There wasn't no girls with me.

AL: OK.

DS: Not that I, not that I can recall...not no girls with me. But anyways...I'm in...

AL: Any other guys?

DS: I, you know, there was somebody else and I cannot think of who it was. And um, we...I went into Mr. Hero's. Stan is standing outside, because Stan had came in Mr. Hero's and he told me, he said, he said, "Ron, Ron over there looking out the window." I was like so? And then I was like where and he said, "Right there." So I seen him and Ron waved to me. So you know I just shrugged my shoulders like this and then I'm ordering my food and like when the police came, they seen me walk out of Mr. Hero's and I had some food in my hand. And then I, I was walking around the corner and then he called me over there. I said, "What's the problem?" and he said, "Well", he came..he walked over to me and said, "Ron thinks that you was going to beat him up or do something to him." I said, I...

AL: Where did, when you guys got this food at Mr. Hero's, where did you park the cars at?

DS: On the side, right down the street.

AL: Over behind the high school, right?

DS: Yeah. No, not behind it...on the side of it and then uh, and I said uh, just like...

AL: But on the other side of the street from Mr. Hero, right?

DS: Yeah and I told the officer that uh, I told the officer to his face and I told Ron Lally to his face, I said, "Ron", I said, "I ain't going to touch you." I said, "If..." and I still didn't know if he, I still didn't know if he busted me because I never heard the tape.



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DS: I said, "If you...", I said, "I don't know if you busted me." I said, "But I heard...".

AL: You say you never heard the tape?

DS: No, I didn't hear the tape at that time.

AL: OK.

DS: When I was...see this whole time....

MM: So you got busted...now you're trying to find out who did bust you?

DS: Right, that's what I was doing. I'm trying to figure, I'm trying to eliminate people to see who busted me. Knock them down and see who busted me. And so then...

MM: Mr. Smith, how many people is there....can bust you? Put it that way. A lot? There can't be that many...let's face it, you're not that big.

DS: No I, I mean....it could be, it could have been you two. If you're my friends...I'm going to try to see which one of you it was. I'm going to have to say something to you, I'm going to say something to you. So then, I had went over there and uh, we was leaving and then the cops...he um, the dude told me...I can't remember who the officer was...he told me to come here. So I went over there, he said, "Well Ron thinks that you was uh, going to beat him up or something like that because you had a whole bunch of friends with you." And I told him, I said, "You seen where I came out of. I came out of Mr. Hero's...I didn't have no intention to say nothing to him." Then I walked over to there to Ron and I said, "Ron, I ain't got no problem with you." I said, "I don't know if you even busted me." I said, "Did you bust me?" in front of the police. He said, he said, "I don't know what you're talking about." He said, "I did not bust you." I said, "Fine.", I walked away and left it at that.

MM: Did you believe him?

DS: I did, I did....

MM: Straight up, did you believe him?

DS: I ain't going to say I believed him, but I ain't going to say, you know, I didn't believe him because I still didn't know. I didn't know who did it.

MM: Alright, so then you went to your attorney's office and you heard Mr. Lally's golden voice is that correct?

DS: Yeah that was...

MM: So what's your first thought when you heard that?



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DS: I said well...just like I told him, I said, "Well I kind of figured it was him this whole time." I kind of figured it was him.

MM: So after you knew that he was the one who basically busted you, what, what are you thinking then?

DS: When I what now?

MM: Are you mad after you found out it was him? Straight up.

DS: I was mad. I was mad, but I wasn't mad to where I was like....I'm going to kill him, I'm going to kill him. I wasn't mad like that.

MM: How about an ass whipping? Were you that mad?

DS: Mad enough to fight him, yeah, but not, not mad enough to kill him.

MM: OK, if you're mad enough to fight him. So you had, so you...later on after this date you do...did you ever come in contact with Mr. Lally?

DS: No.

MM: After you know? Now think hard on this.

DS: No.

MM: You never had any contact with him?

DS: After I heard the tape?

MM: Right.

DS: I had never seen Ron Lally, never. After I heard that tape, I have never seen him.

MM: Did you go looking for him?

DS: Didn't even go looking...didn't have to.

AL: Had Stan seen him?

DS: Stan, Stan told me he talked to him. He was like, I talked to Ron and I said did you. I said, I asked, I says, "You ever ask him about him busting me?" And he said, "No", he said, "I don't even talk to him about it." And I left it at that.

AL: Stan and Ron drink together do they?

DS: I don't know.

AL: Do you know how tight Stan and Ron were?



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DS: Mmmm...I don't know if they was um, I don't know if they was um.. I don't if they was getting high buddies or drinking buddies or what.

AL: So you don't know what kind of relationship they had?

DS: I....nope. Just like I said after, after um, I heard that tape I did not never see Ron Lally again.

MM: You didn't kill Ron Lally?

DS: I did not kill Ron Lally.

MM: You can look me straight in the eye right now and tell me you never killed Ron Lally?

DS: I never killed Ron Lally.

MM: And you know, you don't know who did kill Ron Lally? Are you sure about that?

AL: You weren't present when he died?

DS: I was not present, was not there, do not know nothing about it.

MM: So if somebody told us that you was there, they're lying...is that correct?

DS: Yeah. If they...if somebody sat here and told you I was there. They straight out lied.

MM: OK, let's back up a little bit. If somebody should tell us this... why would they do that?

DS: Beats me!

MM: Let's face, you know, these ain't my friends. Why would one of your friends tell us that?

DS: My...what...my friends...

MM: Why would one of your friends tell us that you're involved in this murder?

DS: I don't know. Maybe they, maybe they think I am. They don't know.. if they knew then why did they tell you?

MM: That's what I'm trying to find.... I'm trying to find out if anybody has a motive to lie on you. That's what I'm trying to find out.

DS: I don't, I don't know.

MM: Let's face it, you know what motive is? Reason to kill somebody. Do you think you got a reason to kill him?



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DS: Not no reason to kill him...not to take his life.

MM: Do you got a reason to beat his ass?

DS: Mmmm...well I have a reason to fight him.

MM: OK. So you...

AL: It didn't bother you that he was going to put your father in prison for a long time? Maybe forever?

DS: Well let's face it. My dad's been locked up before. I went and uh, my dad was only around until I was like uh....

AL: But he was staying with you when you got busted?

DS: Yeah. Me and my dad, me and my dad is close but I ain't...you do what you got to do. You get locked up, you get locked up..there ain't nothing you can do about that.

AL: But you're sitting here saying it would be easy for you to do the two years and it didn't bother you that Ron Lally was going to put you away for two years.

DS: Didn't...

AL: How much did it bother you that he might put your father in prison for a long, long time because your father has a record...was enough to get him put in for a long, long time....years. That doesn't give you a little more reason? A little more motive?

DS: To kill him?

AL: Yeah.

DS: No, not to kill him.

MM: Mr. Smith, you know, you make very much light of this thing that you're a very nice guy here. You know, he's going to bust you and put you in jail for two years and it doesn't bother you that much. You now, I'll be honest with you....if I was in your business and somebody snitched on me, it would make me very, very angry. You know, if I get angry sometimes, I might loose control and I think that happens to a lot of people sometimes. I've seen people get killed out there for $50, $10, for a pack of cigarettes. Do you understand what I'm saying? Now you're getting to a point here where somebody is going to put you in jail for a period of time or you might be at a jail. You know, you get to the point I'm going to be highly irritated. You know if I get in a fight with somebody, who knows what might happen? I might go there with the intention of just scaring somebody and then it gets out of hand. Maybe the guy gets a little aggressive and then it gets to be a little bigger fight. You understand what I'm saying? If I'm fighting you all of a sudden and we're just....my intentions might be just to hurt you a



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MM: little bit or scare you. Then it gets...then it progresses from there to, to something more than what it is. Those things could happen, do you agree with that? Do you understand what I'm saying?

DS: Mmhmm.

MM: Now what I'm trying to get across to you if there is a possibility of that happening...be straight about it.

DS: What that...I got that mad?

MM: Yeah.

DS: No. I...get...If, my dad...I'm going to tell him, he knows what he's doing.

MM: Did your dad...what did your dad say after you found out Mr. Lally was dead?

DS: Nothing, he was just like...you know...He shouldn't have been running around telling... That was his words.

MM: How many people you think he told on?

DS: I had heard he told on a whole bunch of people. Just like uh, Vernard, as you know Vernard...he used to hang around...you know Julius and Mark and uh, Mike Bodiford and them. And they, I guess he was supposed to try to get them busted before. Like they weren't, he was supposed to have rented out his car for some dope and then he goes and turns around and call the police to say that he was fein'n and ran out of his car then and try to get them busted. And then I had heard, he told on some other people but as true as I know, I don't know because I don't know who he talked....

MM: But for a fact you know he's involved with your case and plus with your dad's case. Is that, is that true?

DS: Yeah.

MM: So you heard this before, before the trial?

DS: But....

MM: Now you know that you was going to go to trial on the 19th don't you? I'm sure your attorney told you.

DS: No my...

MM: Those usually are court records.

DS: My attorney said that I was going to go to trial the 19th and then I asked him could I get it postponed because I want some more time out. So he was like, he'd see what he could do. And then he told me it was postponed. In fact, he told me..I went to court the 19th



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DS: and my dad told me he went the 28th. I asked him why do I have to go to court the 19th and then he...I told him, I said my dad ain't going until the 28th, so he said he'd get postponed until the 28th.

MM: Let me tell you this...what, what day was that?

DS: It was probably....maybe a week, a week and a...maybe between a week and a week and a half before the 19th. Because my dad had told me.. he wasn't going to court until the 28th. And then when I called my lawyer, he said I was going the 19th. I said, "Why am I going", I said, "Why am I going the 19th and my father's going the 28th?". I said, "Can I get mine postponed until the 28th?". He said he'd see what he could do, he said he didn't know my dad was going until the 28th.

MM: OK, so had your court case on the 19th. What did you do prior to your court date? The day before...do you recall what you did? Let's kind of go step by step.

AL: It should make it easy for you to remember that day now that you know that it was the day you were supposed to go to court.

DS: The day...the day before...

AL: The night before.

DS: I was supposed to go to court? Was on a...it was on the 18th, you said?

MM: You was going to go to court on the 19th. What did you do the night before?

AL: You were supposed to go to court on the 19th, we're curious what you did on the 18th and that evening?

DS: On the 18th? The night before I went to court I had went out downtown.

MM: OK, where at downtown? It's a pretty big area.

DS: I was in Power Slam, in fact, I stayed at Power Slam.

MM: OK, what time did you go to Power Slam?

DS: About...um, like around 9-9:30. That's usually....

MM: Around 9:30 at night, P.M.?

DS: Yeah.

MM: OK, prior to going to..to this place called Power Slam, where did you go prior? Where was you at before you went...went downtown?

DS: At home.



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MM: OK and where's that at?

DS: At um, 129 David Drive.

MM: 129 David Drive, so you left 129 David Drive...what time...was you there all day? Half a day? What....

DS: I was there pretty much the whole day and then later on that night I got dressed and I went to Power Slam.

MM: OK, how did you get down from your house to Power Slam?

DS: I drove.

MM: You drove, what kind of car did you drive?

DS: Um, um, a Ford Taurus.

MM: Ford Taurus, what color was it just out of curiosity?

DS: Gray.

AL: Didn't you have your Grand Prix then?

DS: Yeah...mmmm...yeah, I it was in...I had, I had it put up the whole winter getting worked on.

AL: That was a blue one, right?

DS: No. The Grand Prix?

AL: Yeah, what kind of car was it I fixed your trunk on?

DS: That was a burgundy uh, Cutlass Oldsmobile.

AL: OK.

MM: Whose car was that? That's your other car?

DS: That's mine.

MM: So you drove from David Drive down to Power Slam? And what kind of car was it?

DS: Um, Taurus -UNCLEAR-.

MM: Taurus and -UNCLEAR- and it's a gray color you said?

DS: Yeah it was, yeah it was gray.

MM: OK, who did you go down there with?

DS: Uh, me...it was me, my girl.



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MM: Now you say your girl, what's her name?

DS: Tammy.

MM: Tammy what?

DS: Green.

MM: OK, where was Tammy at...was she at your house? Did you go pick her up or what happened?

DS: She was, she stays with me.

MM: She stays at your house?

DS: Yeah, we live together.

MM: Alright, so you and Tammy...anybody else?

DS: Um, I think that was it. That was...it was just me and...no, me, her and my brother.

MM: Which brother?

DS: Mike Smith.

MM: OK, the three of you's then?

DS: Yeah.

MM: Anybody else?

DS: Um, no not....I think that was...that was it. Because uh, my brother is going to go to court with me in the morning.

MM: Mike was.

DS: Yeah. So he, he asked me. He was like, "You want me to stay the night?" So I was like I don't care... So then we went to um, we went to Power Slam.

MM: About what time was that again?

DS: About 9:30.

MM: OK, so you're at Power Slam?

DS: Yeah.

MM: What are you doing there? Did you talk to anybody there? Did you see anybody you knew?

DS: Mike, the owner.



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MM: Mike who? You know his last name?

DS: No.

MM: The owner of Power Slam?

DS: Yeah.

MM: So you talked to him then I take it?

DS: Yeah, I talked to him.

MM: Do you recall what you talked about?

DS: No just...

MM: Did you talk about your court case?

DS: No, no I never brought up my court case. I just talked to him about, probably..probably about getting a job because he was going to hire me as a bouncer and uh, he was going to hire me.

MM: Wait a minute..you're talking about a job...this before you were going to court?

DS: Yeah.

MM: Was you planning on going to jail the next day or getting probation?

DS: No because uh, my lawyer said that he'd probably get it postponed to the 28th. So I asked him, I said uh, I think I had told him, I said uh, that I got...that I needed a job because I'll probably get probation for this thing that I got in trouble for. So he was like well talk to him later about it. Then I shot pool the rest of the night. Then...I never, I never brought it back up to him and went to um, right after that...when that, when that closed. I went to Mom's Kitchen.

MM: OK, before...let's back up a little bit...what happens at Power Slam? Anything out of the ordinary that night?

DS: Mmmm...mm-uh (meaning no).

MM: Any fights in there?

DS: Not that I can recall.

MM: Anybody yelling or screaming that heard or anything?

DS: No.

MM: OK so what time...

DS: When I go in there...when I go in there I go in there and shoot



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MM: Open Kitchen. Got something to eat...do you remember what you ate just out of curiosity?

DS: No um, pancakes, fries and a cheeseburger.

MM: Do you remember the waitress there? Who waited on you by any chance?

DS: Mmm...mm-uh (meaning no), I didn't know my waitress. And then, and then when I left there I had got paged and I had to use the phone right when I was pulling up. And I used uh, I knocked on Becky's door. She knew I was home at 2:30.

MM: Becky who?

DS: Uh, Lesher, Lesher...the police's daughter.

MM: OK.

DS: I used her phone, I had called one of my friends and uh, went back upstairs. And she knew I was there because I had woke her up. I didn't know she was asleep.

MM: So you were back home around 2:30?

DS: Yeah.

MM: Where's Mike? Is he with you still?

DS: Yeah.

MM: And Tammy's still with you?

DS: Yep.

MM: So you went to bed?

DS: Yep.

MM: What time did you get up the next morning?

DS: Uh, uh...

MM: Now wait a minute, you got home at 2:30?

DS: No, no I didn't get home at 2:30. I got home after I got done eating. Which was like about...like quarter, quarter after three. Might have been like quarter after three because the cars close about 2:30, then took about....about the time we got there and ate and everything else...about a good half an hour, forty minutes. So it was about quarter after three. Then I went to Becky's house and she was home and uh, I knocked on her door.

AL: She have anybody there with her?



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DS: No she was there by herself. And I used the phone real quick..I can't remember who I called that day, that night. I called somebody and then...I sat up, I sat down there for like five minutes talking to her and then I went back upstairs.

MM: Where's Tammy and Mike during this?

DS: They was upstairs.

MM: They already went upstairs?

DS: Yeah.

MM: So you stayed at your house the rest of the night then?

DS: Yeah.

MM: Do you remember...do you recall what time you got up in the morning?

DS: Uh, I think my lawyer told me to be at court at 8:30.

MM: Where at? Be where?

DS: Um, at the big court house.

MM: Downtown Elyria?

DS: Yeah. Um....

MM: When you say the big court....you talking about the County Court House? Where the trials are held? Center of the square?

DS: Yeah, yeah.

MM: Alright, so was you there?

DS: Yeah, I was there...I, I can't remember exactly what time I got up but I was there.

MM: And your attorney is Mr. Ross?

DS: Yeah and then uh, I think uh...I looked around for him. Because I was upstairs and downstairs looking around for him and then I seen him. If I recall he didn't even come to court. And I called him from court, I think he had paged me and I called him from court. He did, he paged me, he had paged my brother because my brother was like what's this number. And I had looked at it, it was my lawyers number. And then I called my lawyer..he said that it's postponed until the 28th. So then we left from there.

MM: You say "we", who came to court with you Mike?

DS: Me, Mike and uh, my girlfriend.

MM: OK, so that's on the morning of the 19th is that correct then?



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DS: Mmhmm.

MM: OK, now from that point on, you said you had this talk with this guy named Duane. You don't recall what day that was? Let's work from the 19th then...this is the 19th when you went to court...is it before the 19th or after the 19th when he told you -UNCLEAR-

DS: It was before the 19th.

MM: Well he couldn't tell you before that... He told you before the 19th that Lally, Lally was dead?

DS: Duane....

MM: Yeah, the Duane you described to us.

DS: OK.

MM: Who lives close...who lives by uh, Lally.

DS: Wait a minute, he told me...he came over my house....let me think when did he come over. The 19th of what?

MM: We're talking about November.

AL: November 19th.

DS: November...

AL: November 19th, before your birthday, right?

DS: Right.

AL: Yeah, just before your birthday? Your birthday is five days away.

DS: OK it was about, it was about....I don't know if it was...about five weeks he had came over my house after that.

MM: Five weeks after that point?

DS: It might have been. I can't, I can't remember....

MM: Is that the first time you heard about his death is five weeks later?

DS: Um, no...let me see...I don't know if it was five weeks. First, I know I heard it from him first. I can't remember exactly when he came over.

MM: You mean, from the time you went to trial...what happened on the 28th?

DS: The 28th?



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MM: Yeah.

AL: Yeah, your court date...what happened then?

MM: You had to go to court the 28th and that's...five days after your birthday. Say two weeks after...on the 19th. I'm sorry it's only like nine days.

DS: Wait a minute.

MM: You got your first court date the 19th. Your second court date is the 28th is that correct?

DS: April 28th.

AL: They moved it all the way to April?

DS: I got, I got my months confused.

MM: OK, November is your first court appearance.

DS: OK, it goes October, November.....

AL: December.

DS: December..

AL: January...

DS: January.

AL: February and March, April.

MM: When was your second court date?

DS: After the 19th, I think was December 28th.

MM: OK, December 28th? You went to court...what happened then?

DS: Let me think....mmm...I can't, I can't recall the months. I'm kind of, I'm kind of slow in my mind.

MM: That's OK. You went to, you went...

DS: So when it comes...I can't even answer the months.

MM: Regardless of what month.

DS: I can't, I can't um, I talked to my lawyer like um, maybe like..my last, the last trial that I was supposed to go to after, after they found out he was dead. The last trial I was supposed to go to I called my lawyer and I had asked him did he hear about it. I said because I keep hearing about it. And he told me that he did not hear nothing about it. So then I called him like a week later to



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DS: two weeks....after he picked up a couple of my friends. I had called him like a week after that. Because I said, well, I said, "I think he's dead because Leiby is picking up a couple of my friends and they was...he was questioning them. He said....

AL: Now when I started picking up your friends, how much before that had you been told by Duane that he was dead?

DS: How many days or weeks you mean?

AL: How much before that?

DS: Like about a week.

AL: I mean you remember I....

DS: I don't even think it was a week.

AL: You remember when I picked up Hopkins...how long before that was it that he told you he was dead? How long before I picked up Hopkins did you know he was dead?

DS: Um, I don't even think...I don't know if it was a week for sure. I don't even think it was a week...I'm not sure.

MM: Mmhmm...

AL: That's the date we're talking about there.

MM: Danny, let me ask you this...now if you was a policeman and this situation happened, what would you think?

DS: If I was a policeman?

MM: Mmhmm....straight up.

DS: If I was a policeman and I was...

MM: If you're a policeman and I'm Danny Smith and how's he involved in this homicide?

DS: I'd think he did it for the simple fact, you, you was supposed sold drugs to me. He was supposed to wire it up on you and I think you did it..if you didn't do it then you know who did it and if you don't, then I'm, I'm going to suspect you at all times.

AL: We've, we've kind of established the motive...you'll agree to that?

DS: Mmhmm.

AL: And do we have an opportunity here? Your best friend, Stanley Jalowiec....

DS: Mmhmm.



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AL: Has a rather close, personal relationship...

DS: Mmhmm.

AL: With Ronald Lally...and, and would have no difficulty at all encouraging Ronald to go somewhere with him. Even to go somewhere with him and you. If he told everything was OK, do you concede to that?

DS: Wait, I don't understand what you're talking about.

MM: You understand that it's quite possible.

AL: What, what I'm saying it that he and Ron were tight enough...Stan, who would do anything you told him to do and correct me if I'm wrong there. Stan pretty well followed you like a puppy.

DS: Yeah but...

AL: And would do anything that you told him to do. Tell me if that's wrong if it is but....that's what I've been told by all of your friends. Stan would do whatever you told him to do.

DS: Yeah...I....certain, certain limits now. He wouldn't do everything.

AL: You're saying he wouldn't kill somebody, but he'd do anything shy of that just about?

DS: No, not shy of that....no, I wouldn't say all that.

AL: We're backing back up to opportunity. We've established motive..the opportunity, Stan and Ron have a close, personal relationship. They're friends...they've been friends for a while and Ron will pretty much do what Stan asks of him because of that relationship.

MM: Do you agree with that?

DS: Yeah. See I, I don't...y'all got me confused.

MM: We don't want to confuse you, we're just trying to....

AL: No, and I will repeat it as many times as...

DS: Can you turn that off?

AL: Yeah, I can turn it off just for a minute.

MM: OK, we're going to turn the tape off, the time now is 11:37 P.M..

AL: Restarting the tape, go ahead it's your watch..you start it.

MM: OK the time is...we're going to restart the tape is 11:45, Mr. Smith you went to the bathroom I take it?



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DS: Yes.

MM: And you asked to have the tape turned back on, is that correct?

DS: Yes, yes.

MM: OK just for the record we are back on tape and you still are advised of your rights, is that correct?

DS: Yes.

MM: OK, during the conversation here...let me ask you this...do you want to put something on the record as far as, you could do some information here on this case? What are you looking for? Just so we're on tape here.

DS: Yeah.

MM: You said you might have some information on this case is that correct?

DS: No, I said I could get some probably.

MM: OK.

DS: Maybe...I'm not saying I can, I'm not saying I can't.

MM: So there's a possibility that you could get some information on this case? Is that, that correct?

DS: If I ever get back on the streets.

MM: Now who are you going to get this information from? Who do you think you can get it from?

DS: Uh, I'll ask around.

MM: Let me ask you this...who are you going to ask....to get information on this case?

DS: Well I'll probably sit and talk to um, mmm...I really don't even know. I don't, I don't want to answer that.

AL: You don't think Stan did this?

DS: No. Not that I know of, but maybe...I don't know.

MM: Do you own any handguns?

DS: No, I never have.

MM: Never have...does any of your friends own a handgun?

DS: Mmm...nope.



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MM: Let me ask you this...is being a very top drug dealer, or middle level drug dealer, or street drug dealer....what, what area would you put yourself in?

DS: You mean top to bottom?

MM: Yeah, top to bottom.

DS: Bottom.

MM: I mean are you getting rich off this business?

AL: Were you before somebody went to jail a couple of weeks ago?

DS: No. Who are you referring to?

AL: Who do you think I'm referring to?

DS: I don't know, you tell me.

AL: The man that was driving it up to Elyria for you on a regular basis.

DS: There's nobody driving up to Elyria for me on no regular basis.

AL: The man who was driving that blue pick-up truck.

DS: I don't know.

MM: A ball park...what kind of money are you making in this thing let's say a year? Counting everything.

DS: I don't know because I really don't do it.

AL: Do you work anywhere else?

DS: Um, no I working for Erie Temps in Cleveland. But I just started there. I was supposed to go and start um, Tuesday for construction.

MM: Danny, the bottom line is you're making enough money to live on is that correct? And you're not getting it from a regular job, so you've got to be getting that money somewhere. So I assume you're dabbling a little bit into drugs.

DS: No because when....

MM: Supplement your income.

DS: Well I got my, I got my girl....she works.

MM: She give you all her money? How much money does she make?

DS: Um,

MM: Let me ask....let's cut to...



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AL: Where does Tammy work at? What does she do?

DS: Dance.

AL: Where does she dance at?

DS: In Cleveland.

AL: What's the name of the club?

DS: Sam's.

AL: Sam's, she work as a waitress anywhere or anything or just dance?

DS: Dance.

AL: And what's her name again?

DS: Tammy.

AL: Last name?

DS: Green.

AL: Didn't her name used to be Cruz? Somebody told me her name was Tammy Cruz.

DS: No it was never Cruz.

AL: OK, where's Sam's at?

DS: On uh, West 25th.

AL: Did you ever go up there and drink?

DS: Uh, yeah, I know the owner and he's pretty cool.

AL: What's the owners name?

DS: His name is Nick.

AL: Nick?

DS: Yeah.

AL: Do you know Nick's last name?

DS: You ever taken Stan up there?

DS: No um...

AL: Keep it mind I'm going to get ahold of Nick and talk to Nick an ask him if he's ever met Stan.



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DS: No Stan uh, Stan came up there once but he wasn't with me. He was already out there. Stan....

AL: Stan has been up to Nick's or up to Sam's?

DS: Yeah once....he, I was up there and then he came up there like later on that night and talked to me and then he had left. But uh, if he went up there any other time, I don't know.

AL: Do you know what night that was that you and him were up there together?

DS: Mmmm....no, I couldn't even recall it.

AL: Do you know what month it was in?

DS: It was uh, last month.

AL: So it wasn't before Christmas then?

DS: No.

AL: Last year....you never had Stanley up there last year?

DS: No, she, she wasn't even working then.

AL: Where was she working at? Where was Tammy working in November?

DS: Um, she was working at uh, what's the name of that club? Teaser's, that's down the street.

AL: Teaser's? So November she was working at Teaser's?

DS: I think....I....I don't know if she just started at Sam's or just quit Teaser's or what....I, I don't know.

AL: It was one or the other though...it was either Teaser's or Sam's?

DS: Yeah.

AL: Do you know who owns Teaser's? Do you know that guy?

DS: I know um, his name is uh...she told me his name. I just know his name from her. I, I...him, I don't him.

AL: Had Stan ever been up to Teaser's with you?

DS: Mmmmm...nope.

AL: Not at all? Never been there with you?

DS: No, not, not that I can re....he never been with me not that I can remember.



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AL: OK.

DS: Oh wait a minute...yeah, he has...he went one time, he went one time with me and I can't remember when. It's been a long time ago.

AL: Would that have been like October, November that Stanley was up to Teaser's with you?

DS: No....it was before that.

AL: OK.

DS: See I really don't...I don't...

AL: Yeah, I understand Danny.

DS: I don't know the Cleveland area and I don't...dates and far as stuff like that I don't know.

MM: Danny let me ask you this, how would you feel about going to jail for murdering this guy?

DS: How do I feel?

MM: Yeah.

DS: Huh...fucked up.

MM: Why?

DS: Because I know I didn't do it. So why am I going....

AL: Well how do you feel about taking a polygraph test then?

DS: Take it...I...

MM: That's a lie test.

AL: Lie detector.

DS: I don't know because I heard those run off of, off of your nerves and just like somebody told me before....they pulled them up off the street for a murder case..and I don't think the polygraph is going to be able to tell that.

AL: They, they dial it in OK? They adjust it according to how nervous you are. There's a lot of nervous people take polygraphs. They just dial it down a little bit. You can be totally nervous, that's a fallacy. They will adjust the machine to your state of mine. Just like when you hear about people taking valium and putting a pin under their arms so they can poke themselves when they're not lying and all these other weird things you hear about polygraphs, that's bull. The...B.C.I., Bureau of Criminal Investigation is a state agency in Ohio...



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DS: Mmhmm.

AL: that does our polygraph examinations. If you took a polygraph, you'd have to go up to Richfield...I believe it is.

MM: Mmhmm.

AL: And he's one of the top polygraph operators in the State. If you did it before you left, he would know you did it. If you didn't do it, then when you left he would tell me..."This guy ain't involved in this and this guy don't have any knowledge of it." But understand that if you go up there...if you didn't do it, but you know who did do it and he asks you, "Did you do it?" and you say no, I don't know nothing about. Then it's going to say you're lying. It's going to show deceit.

DS: Mmhmm.

AL: You go in there and tell the truth right down the line and he'll be able to tell that.

MM: I've got one other question for you Dan, also. Do you know what Trace Evidence is? Traces of Evidence is fibers, hairs, skin shavings...stuff like underneath your fingernails. Would you have any problem with giving us some samples of your...of hair?

DS: Sure wouldn't.

MM: Now you understand I'm not doing this because I'm just -UNCLEAR- air..

DS: Yeah.

MM: Because usually when people are involved in a violent type death...

DS: Mmhmm.

MM: Usually it's call the transcript, the body parts....

DS: Mmhmm.

MM: If you and I get in a fight, you're going to have some of my hair on you and vice versa, you understand that? You don't have any problem with it if we do a little comparison on that?

DS: No.

MM: It wouldn't bother you one bit? Do you volunteer to do that?

DS: Yeah.

MM: OK, I'm not....do it now because...

DS: Yeah.



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MM: One of the Evidence Technicians.

DS: Yeah.

MM: Do you understand that?

DS: Whatever...it don't bother..I'll take hair, skin, whatever...

AL: What about a polygraph?

DS: That...I don't know, I heard so much about that. I have to think on that and let you know. But you know....

MM: Danny, let me ask you this...if you did kill this guy, would you tell us?

DS: If I did it?

MM: Yeah.

DS: If I did it I'd probably break down and tell you, but I know I didn't do it.

MM: There's no doubt in your mind you had nothing to do with this murder?

DS: No doubt.

AL: And you have no, as you sit here right now...you absolutely cannot give me any information that might lead to the arrest of the person that did do it? You absolutely have no idea of who may have been involved in this?

DS: Mmmm...not right off hand. Like I, like I told you, you know earlier..

AL: You've got some suspicions, you got somewhere you want to go when you get...if, you keep saying, "If you get back on the street." If you get back on the street, you've got somewhere you want to go to check something.

DS: I just want to go and, and uh, see it's easy for me to go out there and talk to people and see what, what's really. Just like that lady came up to me..well she didn't come up to me we was sitting down there at Nay's. She's sitting up there and telling me stuff and she was like.. She told me, she was like well don't tell nobody but um, I heard that whoever broke in the, in the uh, his apartment is the ones that did it. And I was like who told you that? And she was like, "Well I know the....", I guess she knows the manager there. Whoever owns them apartments or the managers of wherever runs that place. She must know them real good. And that's, and he had told her that. And then she came and told me that.

AL: And what's this girls name that you're talking to?



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DS: I, I do not know her. She was sitting up by Nay's getting her done and I was sitting up there.

AL: Where's Nay's at?

DS: Um, on the corner of Bell and Lake Avenue.

AL: Oh that gas station there?

DS: Yeah, right across the street.

AL: Well how did you get to talking to her about it if you don't even know who she is. How did she know to talk to you about it to start with?

DS: Well see because...like I said, I was reading...I can't remember when it was but I was reading in the newspaper and um, and I seen something about it said in the paper about him. About all I said, "Elyria man found in Cleveland." Then I asked her, I said uh, because she said she knew my brother. So I was talking to her and I said, I said, "Um, by the way...", I said, "Did you hear about that dude that uh, that got murdered?" And then she said who and I said uh, "A white dude named Ron." At first she said no and then she said wait a minute, she said, "He live over there on Middle Avenue?" And I said, "Yeah." And she said, "Yeah, I heard about that." Then I was like....I said, "They tried to pin me for that I heard...uh, because they picked up a couple of my friends." Because he had....

AL: Why was Hopkins telling people you did it?

DS: Who?

AL: Hopkins.

DS: Telling what?

AL: That you did it?

DS: I don't know...I, I couldn't see why we...we're friends, but nothing like that.

AL: Well he stays at your house or used to stay at your house right? He don't now but...for a while he was staying at your house wasn't he?

DS: No, he only stayed for like a couple of weeks. Well then he really, he really wasn't even there because him and his girlfriend was always getting places...like rooms. So he was never -UNCLEAR- and then uh, he went back to his sister's house and he was staying there. So he really didn't stay at my apartment.

AL: OK.

DS: He stayed a couple nights.



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AL: He indicated to me he stayed there a couple of weeks.

DS: Yeah, he didn't, he didn't....me and him wasn't all...but you know..I've known him from school you know. We're friends, but I ain't going to say we're best of buddies in the world...a side kick.

MM: I've got another question. If you was on the jury and you heard the evidence against yourself, what would you think?

DS: If I heard what?

MM: If you heard this story about this case...Ron Lally and yourself, what would you think? Would you just....do you think you'd be guilty?

DS: If I was on the jury chair?

MM: Yeah.

DS: I wouldn't think, I wouldn't think so. If the man didn't do it and didn't know nothing about it...hey.

MM: OK, like, like I told you before...you know the odds of things happening...this man dies the day before your trial. What do you think the odds are -UNCLEAR-

AL: And he snitched on you.

MM: Let's face it...ain't no sense holding back...he snitched on...we all know that, you know that?

DS: Yeah, but see like I said, I didn't know I was even going the 19th...

AL: And he didn't just snitch on you, he snitched on your dad too.

DS: Yeah.

AL: That was going to put you and your father in jail...it was going to do your family pretty good. And you knew you were going on the 19th because the night before the 19th, you guys went out drinking and then that following morning you and your brother went to court. So you knew you were going to court on the 19th, you were there that next morning or at least you've indicated to us on tape that you were there that...in court on the morning of the 19th.

DS: Yeah I was. Yeah, I called my lawyer from court. Because I asked a couple of people around there...who work there...I asked them uh, was Michael Ross in yet...if they seen him around.

MM: OK Danny let's lay this thing out a little bit here. Now if you're going to go to court the next day and you know you're going to be doing some time. All you've got to do is scare this guy off, back him off...wouldn't you do something like that?



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DS: Would I do something like that?

MM: Yeah.

DS: You know if it was me...

MM: Think about this now. We're talking about you're out there going.. you've already told everybody you're going to whip his ass. I mean that's on the street. You know that and I know that.

DS: Mmhmm.

MM: You're going to whip his ass and the reason you're going to whip his ass is why?

DS: Well...

MM: Why are you going to whip his ass...let's break that down a little bit here?

DS: For the fact that he snitched on me.

MM: OK what did you have to gain by whipping his ass?

DS: Nothing really...well it's just like I said at the time I was mad..

MM: Well I understand that.

DS: But after that, then I realize is hey...fuck it...you know, I didn't do nothing to him and then I never seen him again after that.

MM: Alright, for the sake of an argument...say you did see this guy and you're pissed off because he snitched on you and you guys get in some kind of a fight. Do you think there's a possibility that fight got out, out of control?

DS: Mm-uh (meaning no).

MM: You don't think...

DS: Out of control is....

MM: If you and I are getting in a fight. Say I snitched on you. I'm Mr. Ron Lally...Lally...

DS: Mmhmm.

MM: And you and I are fighting. You don't think that fight could get out of hand? Did you ever lose control of your fighting? You never got to the point where you just want to really kill somebody?

DS: Mm-uh, no.

MM: You've never been that mad?



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DS: No.

MM: How mad do you get when you, you get in a fight?

DS: I'm not an easy person to get mad.

MM: Well often do you fight? You ever been in a fight before?

DS: Two times.

MM: What happened during those fights?

DS: Nothing, just a couple of...a couple of a punches was thrown and that was it. It was not no...not no long term fight.

AL: What about when you was in the joint? Did you do any...have to do any fighting then?

DS: Nope. Some dude sucker punched me and I didn't do nothing to him then. I just..I got to get...I've got to....I don't get mad easy and I'm not, I'm not the type of person...it takes a long time to piss me off.

MM: A guy snitch on you and you're about ready to go to prison...isn't that enough to piss you off?

DS: I ain't...you've got to figure. He snitched on me...at first you're going to be mad but....here I'm thinking I'm getting probation so why...

END OF SIDE A

BEGIN SIDE B

AL: -UNCLEAR- the tape at 12:05 hours, 4/29.

MM: OK, let's regroup on this a little bit. You're pissed at him, all of a sudden you've got six more cases down. Let's face it..it ain't Ron Lally snitch on you this time is that correct?

DS: Excuse me?

MM: You've got six cases...just so we understand. I know nothing about your cases....

DS: Mmhmm.

MM: Alright, so don't take anything I say like I know about it. I don't get involved in that drug aspect. Do you understand that?

DS: Mmhmm.

MM: I know absolutely nothing about your drug cases...let's face it. Do you know how you got busted this time?



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DS: Mm-uh.

MM: You have no idea? Somebody had, somebody...something had to happen for you to get caught. You understand that? You had to sell drugs to somebody to get charged with Traffic, you understand that?

DS: Mmhmm.

MM: You have no idea how that happened? You don't know who it was or anything? Are you going to try to find out if you get out?

DS: No, it ain't even worth it....I can't even start thinking who did it.

MM: You have no idea who, who busted you this time? You know it's not Ron Lally, is that true?

DS: Mmhmm.

MM: Let's face it he's not around to be the snitch, is that correct?

DS: Mmhmm.

MM: Well the question I'm trying to get at if you get out again..is there a possibility of somebody else dying over this thing? Does somebody like Mr. Danny Smith a lot to go out to kill somebody, so they don't testify again? You see what I'm saying how? This is what it looks like to me.

DS: No...um, well like I said um, I heard something about him being in the KKK.

MM: Who's in the KKK?

DS: Lally.

AL: That was a rumor that circulated after he died.

DS: Oh see and I heard something about he was going to Lodi and on his way back that's when it was supposed to happen. Now that's what I..you see what I'm saying? That's just what I heard.

MM: Now who told you that? Is this like...is this common chatting going on in the City?

DS: Yeah, yeah...basically.

MM: How many friends do you think Mr. Lally has?

AL: Lally was a fiend. Is it safe to say that?

DS: Fiend?

AL: He get to fiend'n on a regular basis....for crack?



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DS: Mmhmm.

AL: So he got to fiend'n on a regular basis? I mean he'd lose all common sense...pretty regular for cocaine.

MM: Is that true or not...you tell me.

DS: You mean...I don't understand what you're saying.

AL: I mean Ron Lally had a really bad drug habit.

MM: Is that true?

DS: I don't.....not that I...I ain't never seen him fiend out, uh, you know, as far as you say fiend...I never seen him.

AL: Didn't, didn't he carry a microwave oven over to your house and trade it to you. I'm not saying trade it to you for what...but did he...didn't he trade a microwave oven to you?

DS: He asked me did I want to buy one.

AL: Then if he stole that out of his girlfriend's house, that would be a pretty good indication he was fiend'n wouldn't it?

DS: See, I didn't know he did that.

AL: Well I'm not saying that you did, I'm just saying...

DS: Yeah, he....he -UNCLEAR- come over and ask me. He asked did, did I want a microwave. I told him, I said uh, I said yeah...and he said well he has one and he asked me did I want it. He asked me how much would I give. I told him I'd give him $50. So, he brung it over.

MM: OK Mr. Smith if we check out on your whereabouts...are we going to find out that you're telling the truth on this?

DS: Yeah.

MM: No doubt in your mind about it?

DS: No.

MM: There's no doubt in your mind you didn't kill Mr. Lally?

DS: No doubt.

MM: And you didn't tell anybody else to kill him? You didn't know nothing about it?

DS: No.

MM: So help you God? You didn't have nothing to do with this thing?



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DS: Right.

MM: Are you a religious person?

DS: Mmmm...what's you mean as religious?

MM: Do you go to church?

DS: No, I don't go to church.

MM: So you have no, you have no fear that we're going to find out that you're lying to us? Is that correct?

DS: Correct.

MM: So if anybody tells us you killed this man, they're lying to us?

DS: Yeah.

MM: And you're being honest with me right now?

DS: Yeah...damn...

AL: You never did say about the polygraph...would you, would you take the polygraph to back up what you're telling us here that you are telling us the truth?

DS: I'll have to think about that one.

MM: So basically you're telling me...yes, you do sell drugs. This guy did snitch on you, but I wouldn't kill him because he snitched on me?

DS: Right.

MM: You're a different breed type drug dealer, you know? I've been, I've been doing this job a long time. Most drug dealers I know, they'll kill you in a minute if you snitch on them. Isn't that a true statement? Isn't that...usually what's out on the street?

DS: It's true..yeah, true.

AL: Or get some fiend to do it...."Here...here's $50 worth of rock, go take care of my problem for me."

MM: Mr. Smith...off the record...what kind of drug dealer are you? I mean you don't, you don't even fit the mold here. You sell drugs and you're a nice guy?

DS: I don't...I told you I'm not...I'm not like uh, no big time top seller or nothing like that.

MM: Yeah, but you understand drug dealers...people who sell drugs usually are very...let's face it. They get violent if people snitch on them. That's how they try to stay in business...is that true?



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MM: And you're saying you're a nice type drug dealer. Are you like your local business store here or something? I don't understand. You know you don't fit the mold for a drug dealer here is what you're telling me.

DS: You're right, you're right.

MM: So anybody could snitch on you and you're not going to get, you're not going to do anything about it?

DS: Basically no. I think..if you knew that I.....I went through a lot and they never did...just didn't do shit about it.

MM: So the bottom line is you're not going....

DS: Got my..got my...if you uh, if somebody stole your car and you know who did it are you going to do something about it?

MM: Who me?

DS: Yeah.

MM: Yeah, probably.

DS: OK, see... -UNCLEAR- I don't know nothing. I know somebody stole my car. Took everything I had out of it.

AL: Who stole your car?

DS: I...I don't want...I'll just let him go...he, if he want, if he want a radio system that bad he can go ahead and have it.

MM: Mr. Smith be honest with us...what I'm getting from this thing is you make most of your money from selling a little bit of drugs on the street is that correct? You don't work to make your money. But you're saying if somebody cuts off your income, you're not going to get pissed off about it?

DS: No -UNCLEAR- I don't do it that much. I told you my brother has a job, that's how the rent gets paid. I really don't even do nothing.

AL: You doing the pipe at all yourself? You using it?

DS: No.

AL: Is your girlfriend using it at all?

DS: No, she don't even smoke weed, she barely even drinks.

MM: I mean you probably heard me...I've been on the street for a long time and I've arrested a lot of people. I have never heard of a guy with your attitude in drugs. Now why is that?

DS: I told you.



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MM: Are you unique?

DS: Probably.....I don't know. I'm just saying, I'm just saying like everybody else.

MM: And you didn't kill this guy?

DS: No.

MM: You didn't get in a fight with even?

DS: No.

MM: But you told everybody you was going to whip his ass, but you didn't get in a fight with him?

DS: Right.

MM: OK, you got anything else on this?

AL: No.

MM: Do you got any questions you want to ask us about this case?

DS: No.

MM: Nothing? Are you sure? I mean it is...we've been asking you a lot. It's...are you curious about anything?

DS: No.

MM: Do you think you're going to be charged with Aggravated Murder?

DS: No....if I do it will shock the shit out of me. I'd like to know how...just charge anybody with murder I guess.

MM: I'm just asking...I want to know what your frame of mind is at this point in time.

DS: No.

MM: Alright just....have we treated you fairly here?

DS: Yeah.

MM: Did we make you tell us anything you didn't want to tell us?

DS: No.

MM: OK.

AL: And you got the opportunity to use the bathroom, get a drink at the drinking fountain there if you wanted to?



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DS: Yeah.

MM: This is a voluntary statement?

DS: Right.

MM: OK. You want to give me, you want to give me your name again Mr. Smith.

DS: Excuse me?

MM: Just say your name again for the tape?

DS: Danny Smith.

MM: And the time now is 12:10 A.M. on the 29th. You want to take a look at my watch...is that correct?

DS: Yeah. What time?

MM: 12:10, I said is that correct?

DS: Uh...

MM: Can you see my watch?

DS: Yeah.

MM: Is it the right time?

DS: Yeah...it's about nine..ten.

MM: OK, we're going to turn the tape off at this time. Go ahead Al.

STATEMENT CONCLUDED.

Typed and transcribed by
Linda J. Borthwick
Secretary/Investigative Division
Elyria Police Department



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FILED
LORAIN COUNTY
2002 AUG 12 P 3:39
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RON NABAKOWSKI

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AUG 13 2002
JUDGE KOSMA J. GLAVAS

**IN THE COURT OF COMMON PLEAS**
**LORAIN COUNTY, OHIO**

| | | |
|---|---|---|
| **STATE OF OHIO** | ) | **CASE NO. 95CR046840** |
| | ) | |
| **Plaintiff-Respondent,** | ) | **JUDGE KOSMA J. GLAVAS** |
| | ) | |
| **vs.** | ) | **STATE'S RESPONSE TO** |
| | ) | **DEFENDANT'S PETITION** |
| **STANLEY E. JALOWIEC** | ) | **FOR POST CONVICTION** |
| | ) | **RELIEF PURSUANT TO** |
| **Defendant-Petitioner.** | ) | **R.C. 2953.23 AND REQUEST** |
| | ) | **FOR EVIDENTIARY HEARING** |
| | ) | |

Now comes the State of Ohio, by and through the Lorain County Prosecuting Attorney, and hereby responds and objects to Defendant's petition for post conviction relief pursuant to Ohio Revised Code ("R.C.") 2953.23 and request for evidentiary hearing.

**Statement of the Case**

On April 10, 1996, the Defendant, Stanley E. Jalowiec, was convicted of one count of Aggravated Murder, a violation of R.C. 2903.01(A)(1), with firearm and death penalty specifications. On March 17, 1997, the Defendant filed his first post conviction petition for relief. On April 17, 1997, an amended petition for post conviction relief was filed and on August 16, 1997, a second amended petition was filed. On March 30, 1998, the Defendant filed a motion to strike the previously filed petitions for post conviction relief.



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On February 22, 2000, the Defendant filed a pro se third amended petition for post conviction relief. This petition was denied by this Honorable Court on April 12, 2001. On March 7, 2002, the Ninth District Court of Appeals affirmed the trial court's dismissal of Defendant's third amended petition for post conviction relief requesting an evidentiary hearing.

**Memorandum of Law**

In Defendant's fourth successive petition for post conviction relief, the Defendant asserts three claims for relief. In Defendant's first claim for relief, the Defendant asserts that the State failed to provide impeachment evidence of Michael Smith, including mental health records of him. Defendant asserts he was unavoidably prevented from discovery of these materials. In Defendant's second claim for relief, Defendant again asserts ineffective assistance of trial counsel in the guilt/innocence phase, whereby trial counsel failed to challenge Michael Smith's mental competence. Defendant's third claim for relief attacks the constitutionality of Ohio's post conviction process. Defendant further requests an evidentiary hearing.

Pursuant to R.C. 2953.21(A)(2), however, the Defendant's petition for post conviction relief is considered untimely. R.C. 2953.21(A)(2) states in relevant part:

> "A petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication, **or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court.**"
>
> Emphasis Added.

In this case, the record, including the transcript, was filed with the Supreme Court of Ohio on June 17, 1998. As the Defendant has filed his fourth successive petition for post conviction relief on



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July 17, 2002, the State asserts that Defendant's petition is considered untimely.

R.C. 2953.23 governs untimely petitions for post conviction relief. State v. Kahl (April 22, 1998 9th Dist.), Lorain App. No. 97CA006816, unreported. R.C. 2953.23(A) provides in relevant part:

> "***a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section ("R.C. 2953.21") or a second petition or successive petitions for similar relief on behalf of a petitioner unless both of the following apply:
> (1) Either of the following applies:
> (a) The petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief.
> (b) Subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.
> (2) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence."

Pursuant to R.C. 2953.23, the State asserts this Honorable Court is forbidden to consider the Defendant's untimely petition for post conviction relief. Under subsection one, (1), the Defendant has not shown that he was unavoidably prevented from discovery of the facts. In response to Defendant's first claim for relief, the Defendant had the opportunity to confront any witnesses against him, including Michael Smith, and had the opportunity to cross-examine and discredit Michael Smith's testimony through impeachment. Further, the United States Supreme Court has not recognized a new federal or state right that applies retroactively to persons in the Defendant's situation, where the Defendant has asserted a claim based on that right.

Under subsection two (2) of the statute, the Defendant has not shown by clear and convincing



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evidence that but for the constitutional error at trial, no reasonable factfinder would have found the Defendant guilty of the offense of Aggravated Murder, a violation of R.C. 2903.01(A)(1), with firearm and death penalty specifications, of which the Defendant was convicted. Thus, the State asserts that this Honorable Court is forbidden to consider and entertain Defendant's fourth petition for post conviction relief since it is considered untimely and does not meet the criteria pursuant to R.C. 2953.23 regarding untimely petitions for post conviction relief.

As to the Defendant's second claim for relief, *res judicata* bars the Defendant from arguing again that he was denied the effective assistance of counsel during the guilt/innocence phase of his trial. Under State v. Perry (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, *res judicata* is explained in pertinent part:

> "Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who is represented by counsel from raising and litigating in a proceeding except an appeal from that judgment, any evidence or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction, or on an appeal from that judgment."
>
> State v. Perry (1967), 10 Ohio St.2d 175, paragraph nine of syllabus.

The record reflects the Defendant has already argued ineffective assistance on the part of his trial counsel. The Defendant cannot repeatedly assert that his trial counsel was ineffective throughout his entire appeals process.

The Defendant further requests an evidentiary hearing regarding his current post conviction petition for relief. It is settled law that a defendant who files a petition for post conviction relief is not automatically entitled to an evidentiary hearing. State v. Zuern (Dec. 4th, 1991 1st Dist.), Hamilton App. Nos. C-900481, C-910229, unreported. Pursuant to R.C. 2953.21(C), before an evidentiary



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hearing is granted, a trial court has a statutory duty to determine whether there are any substantive grounds for relief, by looking at the petition, any supporting affidavits and the record. State v. Byrd (Feb. 26, 1992 1st Dist.), Hamilton App. No. C-910340, unreported.

Upon a review of the untimely petition, the affidavits and the record itself, it is clear that Defendant's request for an evidentiary hearing should be denied. No substantive grounds for relief exist in regard to Defendant's claims for relief as put forth in his untimely petition.

As to Defendant's remaining claim for relief, the Defendant asserts that Ohio's post conviction process fails to provide an adequate and corrective process. The Defendant specifically asserts that R.C. 2953.23(A)(2) violates the Supremacy Clause, that the same statute section usurps the judicial power by violating the Doctrine of Separation of Powers, and that the statute in whole denies successive post conviction petitioners their right to "due course of law" and the "open courts" provision of Section 16, Article I of the Ohio Constitution.

Defendant's assertions that R.C. 2953.23(A)(2) is constitutionally infirm has previously been considered by other appellate courts and has been found to be constitutional. "A post-conviction relief proceeding is a collateral *civil* attack on a judgment and is not imbued with the same federal constitutional protections as are *all* of the criminal proceedings which precede it." State v. Davie (Dec. 21, 2001 11th Dist.), Trumbull App. No. 2000-T-0104, unreported. Further, in Pennsylvania v. Finley (1987), 481 U.S. 551, it was explained that a defendant in a post-conviction relief proceeding is in a 'fundamentally different legal position' than a defendant is on trial and a defendant asserting his appeal as of right. Id. at 559. The United States Supreme Court stated:

"Postconviction relief is***not part of the criminal proceeding itself, and it is in fact considered



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to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. **States have no obligation to provide this avenue of relief.**" (Citations omitted.) Id. at 557. Emphasis Added.

"States remain free to impose proper procedural bars to restrict repeated returns to state court for post conviction proceedings." Slack v. McDaniel (2000), 529 U.S. 473, 489, 146 L.Ed.2d 542, 120 S.Ct. 1595. In State v. Davie (Dec. 21, 2001 11th Dist.), Trumbull App. No. 2000-T-0104, unreported, the defendant, who has been sentenced to death, has also argued that R.C. 2953.23(A)(2) violates the Supremacy Clause, the Doctrine of Separation of Powers, the 'due course of law' or 'open courts' provisions of the Ohio Constitution and is unconstitutional as applied to him. The trial court found and the appellate court affirmed that R.C. 2953.23(A)(2) "is a reasonable and proper procedural limitation on post conviction proceedings." Id. The appellate court considered the civil nature of a 2953.23 proceeding, that a defendant's higher burden (clear and convincing evidence) is only applicable in second, successive petitions for post conviction relief and the extensive process of review made available to a defendant prior to applying R.C. 2953.23. Id.

As in Davie, the Defendant in this case puts forth virtually the same arguments as Davie did regarding the constitutionality of R.C. 2953.23. R.C. 2953.23 has been found constitutional and the Defendant in this case cannot claim that the post-conviction statute is unconstitutional as applied to him.

**Conclusion**

WHEREFORE, for the foregoing reasons, the State respectfully requests this Honorable Court to deny Defendant's fourth successive petition for post conviction relief. The Defendant's petition is considered untimely pursuant to R.C. 2953.21. Further, the Defendant is barred by the doctrine of *res judicata* in arguing ineffective assistance of counsel. Finally, Ohio's post conviction process is



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constitutional as applied to the Defendant.

Respectfully Submitted,

GREGORY A. WHITE, #0019528
Prosecuting Attorney
Lorain County, Ohio

By:

J. ANTHONY RICH, #0066295
Assistant Prosecuting Attorney
Criminal Division
226 Middle Avenue, 4th Floor
Elyria, Ohio 44035
(440) 329-5421

**Proof of Service**

A copy of the foregoing ***STATE'S RESPONSE TO DEFENDANT'S POST CONVICTION PETITION FOR RELIEF*** was mailed by regular U.S. Mail on this 12th day of August, 2002, to: Stanley E. Jalowiec, Mansfield C.I., #321-712, Post Office Box 788, Mansfield, Ohio 44901.

J. ANTHONY RICH
Assistant Prosecuting Attorney



Case No. 08-3249
Jalowiec v. Bradshaw
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FILED
LORAIN COUNTY

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

2002 AUG 15 P 3:40

CLERK OF COMMON PLEAS
RON NAHRAINSKY

STATE OF OHIO,

Plaintiff-Respondent,

-vs-

STANLEY E. JALOWIEC,

Defendant-Petitioner.

Case No. 95CR046840
JUDGE KOSMA J. GLAVAS

JUDGMENT ENTRY

ENTERED

Defendant-Petitioner's Motion for Discovery is hereby denied. The Court having denied Petitioner's Fourth Post Conviction Petition.

IT IS SO ORDERED.

Dated: August 15, 2002

KOSMA J. GLAVAS, JUDGE

Copy to:
Lorain County Prosecutor
Defendant

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Case No. 08-3249
Jalowiec v. Bradshaw
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CLERK OF COMMON PLEAS
RON NABAKOWSKI

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

| | | |
|---|---|---|
| STATE OF OHIO, Plaintiff-Respondent, | ) | Case No. 95CR046840 |
| | ) | JUDGE KOSMA J. GLAVAS |
| -vs- | ) | JUDGMENT ENTRY |
| STANLEY E. JALOWIEC, Defendant-Petitioner. | ) | |

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:

> "On April 10, 1996, the Defendant, Stanley E. Jalowiec, was convicted of one count of Aggravated Murder, a violation of R.C. 2903.01(A)(1), with firearm and death penalty specifications. On March 17, 1997, the Defendant filed his first post conviction petition for relief. On April 17, 1997, an amended petition for post conviction relief was filed and on August 16, 1997, a second amended petition was filed. On March 30, 1998, the Defendant filed a motion to strike the previously filed petitions for post conviction relief.
>
> On February 22, 2000, the Defendant filed a pro se third amended petition for post conviction relief. This petition was denied by this Honorable Court on April 12, 2001. On March 7, 2002, the Ninth District Court of Appeals affirmed the trial court's dismissal of Defendant's third amended petition for post conviction relief requesting an evidentiary hearing."

The present Petition for Post Conviction Relief, pursuant to R.C. 2953.23 is the fourth one filed by the Defendant. In said Petition, the Defendant sets forth three claims for relief:

1. The State failed to provide impeachment evidence of Michael Smith, including mental health records;

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2. Ineffective assistance of trial counsel in the guilt/innocence phase,

3. The constitutionality of Ohio's post conviction process.

In addition to the above three, the Defendant requests an evidentiary hearing. Section 2953.23 seems to control whether an evidentiary hearing is permitted and says, in part:

> "2953.23 Time for filing petition; appeals.
> (A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless both of the following apply:
> (1) Either of the following applies:
> (a) The petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief.
> (b) Subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.
> (2) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence...."

Section 2953.21 in part states:

> "2953.21 Petition for post conviction relief.
>
> (A)(1) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution



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of the United States may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(2) A petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person upon whom a sentence of death has been imposed may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived...."

Before the Defendant went to trial, the trial of Raymond Smith (Co-Defendant) was already history. The Defendant requested and was granted a complete transcript of Raymond Smith's trial. He had the opportunity to review said transcript that contained the testimony of many witnesses that would testify in his case. The Defendant has not shown that he was unavoidably prevented from discovery of the facts. Indeed every piece of discovery that the Defendant requested was provided. In response to Defendant's first claim for relief, the Defendant had the opportunity to confront any witnesses against him, including Michael Smith, and had the opportunity to cross – examine and discredit Michael Smith's testimony through impeachment.



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Under subsection two (2) of the statute (2953.23) the Defendant has not shown by clear and convincing evidence that evidence that but for the constitutional error at trial, no reasonable factfinder would have found the Defendant guilty of the offense of Aggravated Murder, a violation of R.C. 2903.01(A)(1), with firearm and death penalty specifications, of which the Defendant was convicted.

The Defendant's fourth petition is considered to be untimely and does not meet the requirements of O.R.C. 2953.23.

As to the Defendant's second claim for relief, *res judicata* bars the Defendant from arguing again that he was denied the effective assistance of counsel during the guilty/innocence phase of his trial. Under *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, *res judicata* is explained in pertinent part:

> "Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who is represented by counsel from raising and litigating in a proceeding except an appeal from that judgment, any evidence or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction, or on an appeal from that judgment."

The record reflects the Defendant has already argued ineffective assistance on the part of his trial counsel. The Defendant cannot repeatedly revisit that his trial counsel was ineffective throughout his entire appeals process.

As to the Defendant's remaining claim for relief, the Defendant asserts that Ohio's post conviction process fails to provide an adequate and corrective process. This argument has previously been considered by several appellate courts and with the statute having been declared to be constitutional.



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Therefore, for the above reasons, the Defendant's fourth post conviction petition is hereby denied.

IT IS SO ORDERED.

Dated: August 15, 2002

KOSMA J. GLAVAS, JUDGE

Copy to:
Lorain County Prosecutor
Defendant



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