

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 Plaintiff-Appellee, :  
 -vs- : Case Nos. 2004-0041  
 : 2007-0475  
 PHILLIP L. ELMORE, : Licking County CP No. 02 CR 275  
 Defendant-Appellant. : DEATH PENALTY CASE

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DEFENDANT-APPELLANT PHILLIP L. ELMORE'S  
 APPLICATION FOR REOPENING

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FILED  
 OCT 26 2008  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

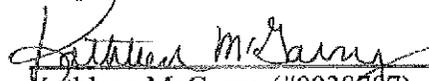
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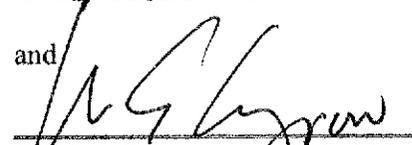
Appellant Phillip L. Elmore asks this Court to grant his Application for Reopening under S.Ct. Prac. R. 11, §6(A). See also *State v. Murnahan*, 63 Ohio St. 3d 60, 583 N.E.2d 1204 (1992). This Court should grant this request based on the ineffective assistance of counsel that Elmore received in his first appeal of right (*State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207), encompassing a remand to the trial court for resentencing and then a return to this Court in *State v. Elmore*, 2009-Ohio-3478, 122 Ohio St. 3d 472. Elmore sets out his Propositions of Law in the attached Memorandum in Support.

Respectfully submitted,

  
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### **Memorandum In Support**

#### ***A. Procedural History***

Appellant Phillip Elmore was sentenced to death in Licking County, Ohio on November 19, 2003. His conviction and death sentence were timely appealed to this Court in Case No. 2004-0041. Mr. Elmore was represented in his direct appeal by W. Joseph Edwards and Keith Yeazel. This Court issued its decision on December 13, 2006. *State v. Elmore*, 2006-Ohio-6207, 111 Ohio St. 3d 515. However the direct appeal was not over. This Court reversed Elmore's sentences for the non-capital convictions and remanded the case to the trial court for resentencing in accordance to *State v. Foster*, 109 Ohio St3d 1, 2006-Ohio-856. Msrs. Edwards and Yeazel remained on the case, and after resentencing, filed a notice of appeal and briefing in this Court.

On July 28, 2009, this Court issued its decision affirming the trial court and starting the 90 day clock for filing a claim of ineffective assistance of appellate counsel. Pursuant to S. Crt Prac. R. XI(B)(2), Appellant Elmore now timely files his Application to Reopen<sup>1</sup>.

#### ***B. Reopening is Required Based on the Following Propositions of Law***

The Due Process Clause of the Fourteenth Amendment guarantees the effective assistance of counsel to an indigent defendant on his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387

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<sup>1</sup> Since there was only one direct appeal, encompassing two case numbers, counsel for Mr. Elmore is filing the same Application under both case numbers.

(1985). Practice Rule 11, §6(A) establishes the procedure for raising claims of the ineffective assistance of appellate counsel in this Court. See also *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992). Elmore asserts that his due process right to counsel was infringed by the omissions of his appointed counsel in his appeal of right to this Court.

Demonstrating ineffective assistance of appellate counsel requires showing that "the issue not presented was clearly stronger than issues that counsel did present." *Franklin v. Anderson*, 434 F.3d 412, 429 (6th Cir. 2006) (quoting *Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003) (quoting *Smith v. Robbins*, 528 U.S. 259,289 (2000) (internal citations omitted))). In determining whether appellate counsel's performance was deficient under *Strickland's* first prong, the Sixth Circuit has set out a non-exhaustive list of eleven factors to be reviewed. *Mapes v. Coyle*, 171 F.3d 408, 427-28 (6th Cir. 1999). The Sixth Circuit recently made clear that the *Mapes* factors are to be considered in addition to the "prevailing norms of practice as reflected in the [ABA Guidelines] and the like." *Franklin*, 434 F.3d at 429. If after a review of these and other factors, it appears to the court that the omitted claims are so "significant and obvious" that a competent capital appellate attorney "would almost certainly present [them] on appeal, "the deficient performance prong under *Strickland* is established, and a review of the merits of the omitted claims to establish prejudice is required." *Greer v. Mitchell*, 264 F.3d 663, 679 (6th Cir. 2001)). See also, *Franklin*, 434 F.3d at 430-31 (finding that appellate "counsel did not meet the ABA standards in their dealings with [defendant] concerning his appeals.").

To demonstrate prejudice under the second *Strickland* prong, a 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." *Strickland*, 466 at 694. Here, Elmore was denied the effective assistance of appellate counsel as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth

Amendments of the federal Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution when his appellate counsel failed to include certain critical claims in Elmore's direct appeal.

Elmore asserts that his appeal should be reopened based on the following Propositions of Law:

*Proposition of Law No. I*

*A Trial Court Cannot Order A Criminal Defendant To Wear A Stun Belt Absent The Conducting Of A Hearing At Which The Prosecution Demonstrates The Need For The Restraint*

Restraints are only to be used as a last resort, absent highly unusual circumstances. *Holbrook vs. Flynn*, 475 U.S. 560, 567 (1986); *Illinois vs. Allen*, 397 U.S. 337, 344 (1970); *State vs. Richey*, 64 Ohio St.3d 353, 358 (1992). The United States Supreme Court has given close scrutiny to the potentially prejudicial practice of stationing additional security personnel in the vicinity of a criminal defendant during trial. *Holbrook*, 475 U.S. at 569.

On February 12, 2002, Defense counsel filed Defendant's Request to Appear at All Future Proceedings Without Restraints in the trial court. The State opposed this Motion and on August 22, 2003, the trial court denied that motion. (See, Appendix, p. 1, hereafter A-1) The Court's Entry denying the motion specifically stated, "**the Court orders the Sheriff's Department shall use electronic security devices which are non-visible and can be worn by the Defendant so as not to be conspicuous to the jury.**" The trial court did not conduct an evidentiary hearing on the need for restraints and instead simply summarily ordered that Mr. Elmore wear a stun belt.

The prosecution had the burden of proof by "a clear necessity" to show the need for restraints. *Kennedy vs. Cardwell*, 487 F.2d 101, 107 (6th Cir., 1973). Since the trial court held no hearing, the prosecution failed to meet its burden of proof.

An appellate court normally applies an abuse of discretion standard in reviewing a trial court's decision to require the use of restraints. *State vs. Franklin*, 97 Ohio St.3d 1, 19 (2002); *State vs. Cassano*, 96 Ohio St.3d 94 (2002). Since the trial court did not conduct the necessary hearing, it did not exercise its discretion and therefore that deferential standard of review is inapplicable.

In *State vs. Adams*, 103 Ohio St.508, 2004-Ohio-5845, the trial court held a hearing prior to ordering the defendant to wear a stun belt, at which it "heard arguments of counsel and statements from security personnel before authorizing the use of a security device." *Id.* at ¶¶ 103-110. The trial court in *Adams* subsequently explained its decision to authorize the "Band-it device in an entry". [*Id.*]. There was no hearing, no evidentiary basis and no reasonable decision regarding the stun belt in the present case. Mr. Elmore's right to a fair trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments were denied.

This issue is also raised in the alternative as ineffective assistance of counsel, for failing to request a hearing on the decision to use a stun belt.

### ***Proposition of Law No. II***

#### ***The Failure To Question Prospective Jurors On Racial Bias In A Case Of A Black Defendant And A White Victim Denies A Capital Defendant The Right To Be Tried By An Impartial Jury.***

Trial counsel rendered ineffective assistance by failing to voir dire the jury on racial bias under the authority of *Turner v. Murray*, 476 U.S. 28 (1986), thereby depriving Appellant of his rights to a fair trial and due process of law and he was prejudiced. U.S. Const. Amend. VI, XIV. Counsel did not provide objectively reasonable assistance and Appellant was prejudiced as a result of this failure. *Strickland v. Washington*, 466 U.S. 668 (1984). Appellant's rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were

violated and he was prejudiced.

Appellant was charged with killing a white female, Ms. Pam Annarino. Ms. Annarino was a former peace officer. The murder took place in a small, rural county with an overwhelmingly white population. Defense counsel did not seek a change of venue to a more racially diverse county. Defense counsel failed to challenge the venire based on a lack of African-Americans in the venire pool. The prospective jurors in the venire from which the seated jury was obtained were all white. It was therefore incumbent upon counsel to engage in a thorough and searching voir dire as to their attitudes toward African-Americans and especially regarding the fact that Appellant—a black man—was charged with murdering a white woman. However, counsel failed to do so.

Defense counsel addressed the venire as a group as to racial bias with a statement that failed to get even one juror to raise their hands. (Tr. 163-164, A-2-3). This single commentary does not suffice as an adequate exploration of potential racial bias in the venire members. It is very unlikely that someone, in a group of their neighbors and fellow citizens, would raise their hand and say that they are racist.

Counsel for the defendant is charged with the responsibility of protecting a defendant's rights and interests in order to ensure that a trial produces a "just result." *Strickland v. Washington*, 466 U.S. 668 (1984). In this case, trial counsel failed "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688. Specifically, trial counsel did not utilize *Turner v. Murray*, 476 U.S. 28, 38 (1986), to question the venire members—all from Licking County, Ohio—as to whether they held any prejudicial beliefs that would impair their ability to decide Appellant's guilt and sentence without the taint of racial prejudice.

One of the basic interests of a defendant in a criminal trial is a fair and unbiased jury, a right subsumed within the Sixth and Fourteenth Amendments' guarantee of trial by jury. *Ristaino v. Ross*, 424 U.S. 589 (1976). In order to assure this right, a defendant is entitled to question a venire to explore whether any member of that panel harbors racial or ethnic bias or prejudice that would prohibit that panel member from rendering an impartial verdict based solely on the evidence presented in the courtroom. *Rosales-Lopez v. United States*, 451 U.S. 182 (1981); *Turner*, 476 U.S. at 38. Trial counsel failed to use these rulings to protect Appellant's right to a fair and impartial jury, thereby prejudicing Appellant in both the penalty and culpability phases of the trial.

***Proposition of Law No. III***

***When The Prosecuting Attorney Engages In Misconduct In The Penalty Phase Closing Argument, A Capital Defendant Is Denied A Fair Trial And Determination Of Sentence.***

During the closing argument in the penalty phase, the prosecuting attorney mischaracterized the facts surrounding the crime as aggravating circumstances. The prosecutor stated:

You heard a number of testimony in the last phase about him gathering the tools that were needed, about him waiting in the garage, about his prying open the door, his putting the screws back in that door and the fact that he had that lock plate that's in evidence in his pocket; that he was waiting on -- for her for at least two hours; that he controlled her with that ligature that you have in evidence, that stretch pants; that he went downstairs after doing all of that to get that lead pipe to go back upstairs. He took the time to do that, the time to reflect on what he was doing when he got that pipe, when he went back upstairs, when he beat her repeatedly with that pipe. Then he stole the tools. He stole the purse, he stole the car when he ran away, so I submit to you, ladies and gentlemen, that those aggravating circumstances have, in fact, been proved beyond a reasonable doubt.

(Tr. 1343, A-37)

"[T]he special role played by the American prosecutor in the search for truth in criminal trials

. . . is 'the representative not of an ordinary party, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' *Berger v. United States*, 295 U.S. 78, 88, (1935)." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). There exists a line of clear precedent from the Supreme Court, starting with *Berger*, supra and running through *Banks v. Dretke*, 540 U.S. 668 (2004), that firmly establishes prohibitions against this type of prosecutorial misconduct. The sentencer's discretion must be guided by requiring examination of specific factors, *Furman v. Georgia* (1972), 408 U.S. 238, and prohibiting consideration of non-statutory aggravating factors, unless the state authorizes them. *Barclay v. Florida* (1993), 463 U.S. 939; *Zant v. Stephens* (1983), 462 U.S. 862. Ohio does not. Ohio Rev. Code §§2929.03, (D) 2929.04(A). Only those specifications charged in the indictment and proven beyond a reasonable doubt in the trial phase can be called aggravating circumstances in the penalty phase. The prosecuting attorney's misstatement of the facts as aggravating circumstances denied Mr. Elmore a fair determination of the appropriate penalty in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

This issue is also presented in the alternative as ineffective assistance of counsel, for failing to object to the erroneous remarks by the prosecuting attorney.

#### *Proposition of Law No. IV*

*Oregon v. Ice* (2009), \_\_\_ U.S. \_\_\_, 129 S.Ct. 711, 714, overrules *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, as to consecutive sentences. A trial court may impose consecutive sentences only if it makes the findings set forth in R.C. 2929.14(E)(4).

This Court remanded Elmore's case to the trial court in light of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 the first time he was here on direct appeal. See, *Elmore* at ¶¶ 130-

140, 169. After Mr. Elmore was resentenced, to exactly the same sentence, Elmore again appealed to this Court on direct appeal. While Elmore's case was awaiting oral argument, the United States Supreme Court issued their decision in *Oregon v. Ice* (2009) 129 S. Ct. 711, 714. In spite of the fact that a United States Supreme Court decision, having a direct impact on the issue presented was released in January, 2009, four months before oral argument, appellate counsel never requested the opportunity to do supplemental briefing on the impact of *Ice* on Elmore's case. See, *State v. Elmore II*, 122 Ohio St. 3d 472, 2009-Ohio-3478, ¶35, fn. 2.

In *Oregon v. Ice*, the United States Supreme Court named this Court's *Foster* decision as an example of one side of the conflict it was resolving:

State high courts have divided over whether the rule of *Apprendi* governs consecutive sentencing decisions. Fn7 [fn 7: Compare, e.g. *People v. Wagener*, 196 Ill. 2d 269, 283-286, 752 N.E.2d 430, 440-442, 256 Ill. Dec. 550 (2001) (holding that *Apprendi* does not apply); *Keene*, 2007 ME 84, 927 A. 2d, 405-408 (same); with *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470 (holding *Apprendi* applicable).] We granted review to resolve the question.

129 S.Ct. at 716. The United States Supreme Court resolved the question against the position this Court took in *Foster*:

[Some s]tates, including Oregon, constrain judges' discretion by requiring them to find certain facts before imposing consecutive, rather than concurrent, sentences. It is undisputed that States may proceed on the first two tracks without transgressing the Sixth Amendment. The sole issue in dispute, then, is whether the Sixth Amendment, as construed in *Apprendi* and *Blakely*, precludes the mode of proceeding chosen by Oregon and several of her sister States. We hold, in light of historical practice and the authority of States over administration of their criminal justice systems, that the Sixth Amendment does not exclude Oregon's choice.

Given the Court's direct reference to *Foster*, appellate counsel should have requested supplemental briefing in this case.

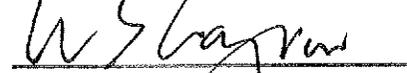
*C. Relief Requested*

Appellant Phillip Elmore has shown that there are genuine issues regarding whether he was deprived the effective assistance of counsel on appeal, in violation of his right to due process. Elmore requests that his appeal be reopened with full briefing on the merits of these issues. Elmore further requests that an evidentiary hearing conducted on these issues under Practice Rule 11§6(F)(1) and (H).

Respectfully submitted,

  
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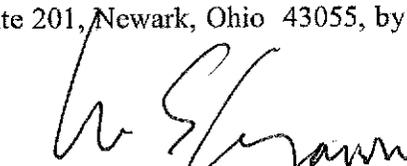
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Counsel for Appellant Elmore

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Application to Reopen and Memorandum in Support was served upon KENNETH W. OSWALT, Licking County Prosecuting Attorney, 20 South Second Street, Suite 201, Newark, Ohio 43055, by regular first class mail on this 26th. day of October, 2009.

  
Counsel for Appellant,

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
Plaintiff-Appellee, :  
-vs- : Case Nos. 2004-0041  
2007-0475  
PHILLIP L. ELMORE :  
Defendant-Appellant. : DEATH PENALTY CASE

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*Exhibit 1*

*Affidavit of Kathleen McGarry*

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STATE OF NEW MEXICO )  
 ) ss:  
COUNTY OF SANTA FE )

Now comes Kathleen McGarry, and being first duly cautioned and sworn states the following to be true to the best of her knowledge and belief:

1. I am an attorney licensed to practice in the states of Ohio and New Mexico. I was an Assistant State Public Defender at the Office of the Ohio Public Defender from 1987 until 1997. The last year and a half of my tenure there I was the supervisor of the direct appeal section of the Death Penalty Division. From 1997-2000 I was employed as a Master Commissioner at the Supreme Court of Ohio. Throughout my legal career over the past 22 years I have represented persons on death row, in the states of Ohio, Tennessee and New Mexico. I am a speaker at the Ohio Judicial College Class on Capital Cases for Judges and have been a lecturer at Criminal Defense Capital Seminar on the topics of Current Issues in Ohio Capital Law, Ohio Jury Instructions and Capital Appeals in Ohio. I have been certified by the Rule 20 committee as Appellate Counsel in capital cases and have been certified since the rule went into effect.
2. I am aware of the standard of practice for appellate counsel in a direct appeal of a capital case.

3. I represent Phillip Elmore in Federal Court on federal habeas corpus proceedings (OH SD Case No. 1:07-cv-776) and in the ongoing lethal injection challenge to Ohio's protocol (OH SD Case No. 2:04-cv-1156). William Lazarow is co-counsel with me in these cases.
4. Magistrate Judge Michael Merz has stayed Mr. Elmore's pending habeas case while his direct appeal was being completed and to allow Mr. Lazarow and I to review his case and raise any claims of ineffective assistance of appellate counsel.
5. My review of this case included reading the trial transcript, reviewing the record of the case, reading the merit briefs filed in both cases on direct appeal filed in this Court and the decisions of this Court under both case numbers, although the second case was a continuation of the first case after the remand to the trial court.
6. Mr. Elmore was entitled to the effective assistance of counsel on his direct appeals as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). Mr. Elmore was denied the effective assistance of appellate counsel as counsel failed to raise meritorious issues. Appellate counsel must act as an advocate and support the cause of his client to the best of his ability. *See for example, Anders v. California*, 386 U.S. 738 (1967); *Penson v. Ohio*, 488 U.S. 75 (1988).
7. Effective counsel in a death penalty case does not “winnow” issues. Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Standard 4-1.2(c) of the ABA Standards for Criminal Justice (3d ed. 1991). Counsel in capital cases clearly have a different responsibility, duty, and standard than counsel in non-capital cases. Winnowing issues is not an option.
8. Even if appellate counsel has no constitutional duty to raise every single non-frivolous issue, counsel must still exercise reasonable professional judgment in presenting the appeal. *See Jones v. Barnes*, 463 U.S. 745, 750 (1983). Appellate counsel may choose which issues to appeal as long as his or her performance is “within the range of competence demanded of attorneys in criminal cases and assures that indigent defendant an adequate opportunity to present his claims fairly in the context of the state’s appellate process.” *Jones*, 463 U.S. at 755 (Blackmun, J., concurring). *See also Alvord v. Wainwright*, 725 F.2d 1282 (11th Cir. 1984); *Sullivan v. Wainwright*, 695 F.2d 1306, 1309 (11th Cir. 1983); *Cunningham v. Henderson*, 725 F.2d 32, 36 (2nd Cir. 1984).
9. The failure to raise meritorious issues, especially when weaker claims are raised, constitutes ineffective assistance of appellate counsel. *Mapes v. Coyle*, 171 F.3d 488, 427-428 (6th Cir. 1999). Furthermore, omitting a “dead-bang winner” from an appeal is not objectively reasonable. *United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995). *See also Matire v. Wainwright*, 811 F.2d 1430 (11th Cir. 1987); *People v. Bowen*, 791 F.2d 861 (11th Cir. 1986); *Ragan v. Dugger*, 544 So. 2d 1052 (Fla. Dist. 1 Ct. App. 1989); *Whitt v. Holland*, 342 S.E.2d 292 (W. Va. 1986).

10. After reviewing the items listed in paragraph 5, and comparing the issues present in the trial transcript and the record of the case with the issues raised by appellate counsel on both appeals to this Court, I have identified the following issues that should have been raised on direct appeal, but were not:

***Proposition of Law No. 1***

***A Trial Court Cannot Order A Criminal Defendant To Wear A Stun Belt Absent The Conducting Of A Hearing At Which The Prosecution Demonstrates The Need For The Restraint***

11. Restraints are only to be used as a last resort, absent highly unusual circumstances. *Holbrook vs. Flynn*, 475 U.S. 560, 567 (1986); *Illinois vs. Allen*, 397 U.S. 337, 344 (1970); *State vs. Richey*, 64 Ohio St.3d 353, 358 (1992). The United States Supreme Court has given close scrutiny to the potentially prejudicial practice of stationing additional security personnel in the vicinity of a criminal defendant during trial. *Holbrook*, 475 U.S. at 569.
12. On February 12, 2002, Defense counsel filed Defendant's Request to Appear at All Future Proceedings Without Restraints with this Court. The State opposed this Motion and on August 22, 2003, the trial court denied that motion. (A-1) The Court's Entry denying the motion specifically stated, "the Court orders the Sheriff's Department shall use electronic security devices which are non-visible and can be worn by the Defendant so as not to be conspicuous to the jury." The trial court did not conduct an evidentiary hearing on the need for restraints and instead simply summarily ordered that Mr. Elmore wear a stun belt.
13. The prosecution had the burden of proof by "a clear necessity" to show the need for restraints. *Kennedy vs. Cardwell*, 487 F.2d 101, 107 (6th Cir., 1973). Since the trial court held no hearing, the prosecution failed to meet its burden of proof.
14. An appellate court normally applies an abuse of discretion standard in reviewing a trial court's decision to require the use of restraints. *State vs. Franklin*, 97 Ohio St.3d 1, 19 (2002); *State vs. Cassano*, 96 Ohio St.3d 94 (2002). Since the trial court did not conduct the necessary hearing, it did not exercise its discretion and therefore that deferential standard of review is inapplicable.
15. In *State vs. Adams*, 103 Ohio St.508, 2004-Ohio-5845, the trial court held a hearing prior to ordering the defendant to wear a stun belt, at which it "heard arguments of counsel and statements from security personnel before authorizing the use of a security device". *Id.* at ¶ 103-110. The trial court in *Adams* subsequently explained its decision to authorize the "Band-it device in an entry". [*Id.*]. There was no hearing, no evidentiary basis and no reasonable decision regarding the stun belt in the present case.
16. This issue was being litigated in other cases at the time of Mr. Elmore's trial and appeal and in my judgment, the issue should have been raised on appeal.

***Proposition of Law No. II***

***The Failure To Question Prospective Jurors On Racial Bias In A Case Of A Black Defendant And A White Victim Denies A Capital Defendant The Right To Be Tried By An Impartial Jury.***

17. Trial counsel rendered ineffective assistance by failing to voir dire the jury on racial bias under the authority of *Turner v. Murray*, 476 U.S. 28 (1986), thereby depriving Appellant of his rights to a fair trial and due process of law and he was prejudiced. U.S. Const. Amend. VI, XIV. Counsel did not provide objectively reasonable assistance and Appellant was prejudiced as a result of this failure. *Strickland v. Washington*, 466 U.S. 668 (1984). Appellant's rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated and he was prejudiced.
18. Appellant was charged with killing a white female, Ms. Pam Annarino. Ms. Annarino was a former peace officer. The murder took place in a small, rural county with an overwhelmingly white population. Defense counsel did not seek a change of venue to a more racially diverse county. Defense counsel failed to challenge the venire based on a lack of African-Americans in the venire pool. The prospective jurors in the venire from which the seated jury was obtained were all white. It was therefore incumbent upon counsel to engage in a thorough and searching voir dire as to their attitudes toward African-Americans and especially regarding the fact that Appellant—a black man—was charged with murdering a white woman. However, counsel failed to do so.
19. Defense counsel addressed the venire as a group as to racial bias with this sole statement/question:

One of the things I think you'll notice if you look around the room and if you look at the people who've been in the courtroom today, other than Miss Byrd, Mr. Elmore looks different than the rest of us here. Different than Mr. Rigg, different than myself, the judge, almost all the witnesses you hear. It's a difficult thing to ask about, and its an unpleasant to even wonder about, but is there anybody here today who can't look into their own heart and see beyond this man's race? Is there anything about his race that's going to give anybody in the courtroom any difficulty hearing this case? Everybody can assure me, and more importantly, again, assure Phillip, that his race won't play a factor in this case? Can you make that same assurance if you know that the alleged victim in this case is white? Can everybody honestly look into their own hearts and say that they can set those two things aside and decide this case based on the evidence they hear? Yes? Thank you. (Tr. 163-164, A-2-3)

20. This single commentary does not suffice as an adequate exploration of potential racial bias in the venire members. It is very unlikely that someone, in a group of their neighbors and fellow citizens, would raise their hand and say that they are racist.

21. Defense counsel was aware of the need to explore this issue. Counsel submitted a jury questionnaire that contained no less than eleven separate questions pertaining to the race and racial attitudes/beliefs of the prospective jurors. (See, A-4-23). These proposed questions were not made a part of the juror questionnaire. Yet counsel asked none of the questions contained in the questionnaire. Moreover, rather than vigorously advocate for their own juror questionnaire—that would have provided some information as to the jurors’ beliefs and attitudes on race—defense counsel simply acquiesced in allowing the state’s proposed questionnaire to be used. (Tr. 50-51, A-24-25) The state’s questionnaire has no questions pertaining to race. (A-26-36, personal information of juror redacted).
22. Counsel for the defendant is charged with the responsibility of protecting a defendant’s rights and interests in order to ensure that a trial produces a “just result.” *Strickland v. Washington*, 466 U.S. 668 (1984). In this case, trial counsel failed “to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” *Id.* at 688. Specifically, trial counsel did not utilize *Turner v. Murray*, 476 U.S. 28, 38 (1986), to question the venire members—all from Licking County, Ohio—as to whether they held any prejudicial beliefs that would impair their ability to decide Appellant’s guilt and sentence without the taint of racial prejudice.
23. One of the basic interests of a defendant in a criminal trial is a fair and unbiased jury, a right subsumed within the Sixth and Fourteenth Amendments’ guarantee of trial by jury. *Ristaino v. Ross*, 424 U.S. 589 (1976). In order to assure this right, a defendant is entitled to question a venire to explore whether any member of that panel harbors racial or ethnic bias or prejudice that would prohibit that panel member from rendering an impartial verdict based solely on the evidence presented in the courtroom. *Rosales-Lopez v. United States*, 451 U.S. 182 (1981); *Turner*, 476 U.S. at 38. Trial counsel failed to use these rulings to protect Appellant’s right to a fair and impartial jury, thereby prejudicing Appellant in both the penalty and culpability phases of the trial.
24. The risk of racial prejudice infecting a guilt proceeding before a jury manifests to a constitutional dimension when “racial issues [are] inextricably bound up with the conduct of the trial.” *Ristaino v. Ross*, 424 at 597; *Turner*, 476 U.S. at 38. Once racial issues become a part of the trial, the defendant is entitled to ask jurors in voir dire whether or not race will be a factor in that juror’s decision-making. *Id.* It is beyond question that the facts of Ms. Annarino’s murder injected racial issues into Appellant’s trial. Not only was Ms. Annarino white, but the state repeatedly emphasized the brutality of the killing and how fearful she was of Appellant.
25. Under *Turner* a capital defendant accused of an interracial crime is entitled to have the jury informed of the victim’s race and to have the venire questioned so as to reveal any racial bias harbored by that group. *Id.* at 37. The reasons for this protection include the discretion given jurors in weighing mitigating factors in capital cases coupled with the inescapable reality that the existence of this discretion increases the possibility that racial intolerance will “operate but remain undetected.” *Id.* at 35. Also, a plurality of the Court delineated a number of ways in which racism can infect the capital sentencing proceedings: a juror who believes blacks are morally inferior or violence prone may be

influenced; by that belief in performing his or her statutory duties; a juror may be less likely to lend credence to mitigating evidence regarding a mental disturbance; "Subtle, less consciously held racial attitudes," such as a fear of blacks, may become unsettled by the violent nature of the crime, and thus influence a juror to impose a death sentence. *Id.* at 35.

26. All of these considerations were paramount in Appellant's case. In the extraordinary circumstances of this trial, the failure to use the *Turner* entitlement to question the jurors on racial bias was an inexplicable breach of the duty to protect the defendant's right to a fair trial. *Strickland*, 466 U.S. at 687. The integrity of this trial is called into question because the death verdict cannot be trusted to have been delivered without improper considerations of race. Counsel, by not questioning potential jurors to draw out any prejudices they may harbor, fell short in their duty to protect their client's right to a fair and impartial jury. In considering prejudice in this case, this Court must assume that the failure to inquire about racial and ethnic bias during voir dire resulted in the loss of Appellant's right to a fair trial. See *Williams v. Taylor*, 529 U.S. 362, 392, fn.17 (2000).
27. Appellant was prejudiced by counsel's failure to engage in voir dire questioning to uncover racial bias and attitudes toward race. Counsel's failure deprived Appellant of his rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, *Strickland v. Washington*, 466 U.S. 668, 690 (1984).
28. This issue was being litigated in other cases at the time of Mr. Elmore's trial and appeal and in my judgment, the issue should have been raised on appeal.

***Proposition of Law No. III***

***When The Prosecuting Attorney Engages In Misconduct In The Penalty Phase Closing Argument, A Capital Defendant Is Denied A Fair Trial And Determination Of Sentence.***

29. During the closing argument in the penalty phase, the prosecuting attorney mischaracterized the facts surrounding the crime as aggravating circumstances. The prosecutor stated:

You heard a number of testimony in the last phase about him gathering the tools that were needed, about him waiting in the garage, about his prying open the door, his putting the screws back in that door and the fact that he had that lock plate that's in evidence in his pocket; that he was waiting on -- for her for at least two hours; that he controlled her with that ligature that you have in evidence, that stretch pants; that he went downstairs after doing all of that to get that lead pipe to go back upstairs. He took the time to do that, the time to reflect on what he was doing when he got that pipe, when he went back upstairs, when he beat her repeatedly with that pipe. Then he stole the tools. He stole the purse, he stole the car when he ran away, so I submit to you, ladies and gentlemen, that those aggravating circumstances have, in fact, been proved beyond a reasonable doubt.

30. "[T]he special role played by the American prosecutor in the search for truth in criminal trials . . . is 'the representative not of an ordinary party, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' *Berger v. United States*, 295 U.S. 78, 88, (1935)." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). There exists a line of clear precedent from the Supreme Court, starting with *Berger*, supra and running through *Banks v. Dretke*, 540 U.S. 668 (2004), that firmly establishes prohibitions against this type of prosecutorial misconduct. The sentencer's discretion must be guided by requiring examination of specific factors, *Furman v. Georgia* (1972), 408 U.S. 238, and prohibiting consideration of non-statutory aggravating factors, unless the state authorizes them. *Barclay v. Florida* (1993), 463 U.S. 939; *Zant v. Stephens* (1983), 462 U.S. 862. Ohio does not. Ohio Rev. Code §§2929.03, (D) 2929.04(A).
31. This issue was being litigated in other cases at the time of Mr. Elmore's trial and appeal and in my judgment, the issue should have been raised on appeal.

***Proposition of Law No. IV***

***Oregon v. Ice* (2009), \_\_\_ U.S. \_\_\_, 129 S.Ct. 711, 714, overrules *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, as to consecutive sentences. A trial court may impose consecutive sentences only if it makes the findings set forth in R.C. 2929.14(E)(4).**

32. This Court remanded Elmore's case to the trial court in light of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 the first time he was here on direct appeal. See, *Elmore* at ¶¶ 130-140, 169. After Mr. Elmore was resentenced, to exactly the same sentence, Elmore again appealed to this Court on direct appeal. While Elmore's case was awaiting oral argument, the United States Supreme Court issued their decision in *Oregon v. Ice* (2009) 129 S. Ct. 711, 714. In spite of the fact that a United States Supreme Court decision, having a direct impact on the issue presented was released in January, 2009, four months before oral argument, appellate counsel never requested the opportunity to do supplemental briefing on the impact of *Ice* on Elmore's case. See, *State v. Elmore II*, 122 Ohio St. 3d 472, 2009-Ohio-3478, ¶35, fn. 2.
33. In *Oregon v. Ice*, the United States Supreme Court named this Court's *Foster* decision as an example of one side of the conflict it was resolving:

State high courts have divided over whether the rule of *Apprendi* governs consecutive sentencing decisions. Fn7

[fn 7: Compare, e.g. *People v. Wagener*, 196 Ill. 2d 269, 283-286, 752 N.E.2d 430, 440-442, 256 Ill. Dec. 550 (2001) (holding that *Apprendi* does not apply); *Keene*, 2007 ME 84, 927 A. 2d, 405-408 (same); with *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470 (holding *Apprendi* applicable).] We granted review to resolve the question.

34. The United States Supreme Court resolved the question against the position this Court took in *Foster*:

Some states, including Oregon, constrain judges' discretion by requiring them to find certain facts before imposing consecutive, rather than concurrent, sentences. It is undisputed that States may proceed on the first two tracks without transgressing the Sixth Amendment. The sole issue in dispute, then, is whether the Sixth Amendment, as construed in *Apprendi* and *Blakely*, precludes the mode of proceeding chosen by Oregon and several of her sister States. We hold, in light of historical practice and the authority of States over administration of their criminal justice systems, that the Sixth Amendment does not exclude Oregon's choice.

35. Given the Court's direct reference to *Foster*, appellate counsel should have requested supplemental briefing in this case.

36. This issue was being litigated in other cases at the time of Mr. Elmore's trial and appeal and in my judgment, the issue should have been raised on appeal.

#### CONCLUSION

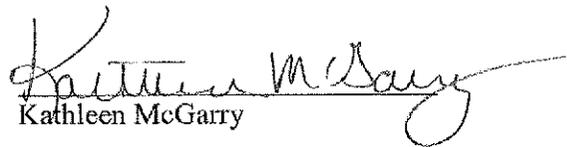
37. Counsel's conduct fell below the acceptable standards of representation as enunciated in *Strickland* and cannot be explained away as sound trial tactics, strategies or reasonable professional judgment. Counsel's errors were so serious that counsel was not functioning as counsel as guaranteed to a defendant by the Sixth and Fourteenth Amendments. Counsel simply failed to properly prepare for the appeal of Mr. Elmore's case.

38. Counsel avers that the issues raised in the Application for Reopening constitute colorable claims of ineffective assistance of counsel.

39. Counsel further avers that Mr. Elmore was prejudiced by the deficient performance of appellate counsel in that he was deprived of proper appellate review of his case, this Court would have reversed his conviction, and/or this Court would have vacated his death sentence.

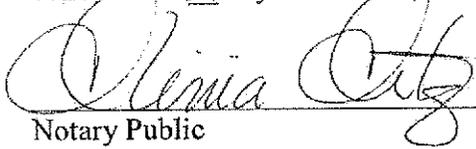
40. Counsel further avers that good cause exists to reopen Mr. Elmore's direct appeal.

Further Affiant Saith Naught

  
Kathleen McGarry

ACKNOWLEDGEMENT

Before me, a notary public, personally appeared the above named Kathleen McGarry, who swore that the facts contained in this affidavit herein are true and correct as she verily believed the 24<sup>th</sup> day of October, 2009.

  
Notary Public

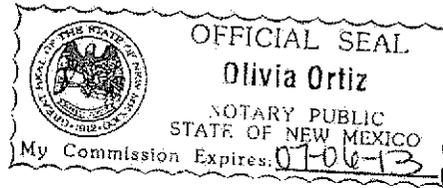


Exhibit 2

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case Nos. 2004-0041
Plaintiff-Appellee,	:	2007-0475
	:	
v.	:	On Appeal from the Court of Common
	:	Pleas of Licking County
PHILLIP L. ELMORE,	:	Case No. 02 CR 275
	:	
Defendant-Appellant.	:	<b>THIS IS A DEATH PENALTY CASE</b>

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AFFIDAVIT OF WILLIAM S. LAZAROW

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STATE OF OHIO            )  
  ) ss:  
COUNTY OF FRANKLIN    )

I, William S. Lazarow, after being duly sworn, hereby state as follows:

- 1) I am an attorney licensed to practice law in the state of Ohio since 1972, and am currently engaged in the private practice of law in Columbus, Ohio. I was an Assistant State Public Defender in Ohio from 1989 to 2001 where I was assigned to the Death Penalty Unit. I was also a Deputy Federal Public Defender in the Capital Habeas Units in the Central District of California and District of Arizona from 2002 to 2006. My primary area of practice is capital litigation. I am certified under Sup. R. 20 as appellate counsel and trial co-counsel in capital cases.
  
- 2) Due to my focused practice of law and my attendance at death-penalty seminars, I am aware of the standards of practice involved in the appeal of a case in which the death sentence was imposed or recommended.
  
- 3) The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on an appeal as of right. *Evitts v. Lucey*, 469 U.S. 587 (1985).
  
- 4) The initial responsibility of appellate counsel, once the transcript is filed, is to ensure that the entire record has been filed with this Court. Appellate counsel has a fundamental duty in every criminal case to ensure that the entire record is before the reviewing courts on appeal. Ohio R. App. P. 9(B); Ohio Rev. Code Ann. § 2929.05

(Anderson 1995); *State ex rel. Spirko v. Judges of the Court of Appeals, Third Appellate District*, 27 Ohio St. 3d 13, 501 N.E. 2d 625 (1986).

5) After ensuring that the transcript is complete, counsel must then review the record for purposes of issue identification. This review of the record not only includes the transcript, but also the pleadings and exhibits.

6) For counsel to properly identify issues, they must have a good knowledge of criminal law in general. Most trial issues in capital cases will be decided by criminal law that is applicable to non-capital cases. As a result, appellate counsel must be informed about the recent developments in criminal law when identifying potential issues to raise on appeal. Counsel must remain knowledgeable about recent developments in the law after the merit brief is filed.

7) Since the reintroduction of capital punishment in response to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the area of capital litigation has become a recognized specialty in the practice of criminal law. Numerous substantive and procedural areas unique to capital litigation have been carved out by the United States Supreme Court. As a result, anyone who litigates in the area of capital punishment must be familiar with these issues in order to raise and preserve them for appellate and post-conviction review.

8) Appellate representation of a death-sentenced client requires recognizing that the case will most likely proceed to the federal courts at least twice: first on petition for Writ of Certiorari in the United States Supreme Court, and again on petition for Writ of Habeas Corpus filed in a federal district court. Appellate counsel must preserve all issues throughout the state court proceedings on the assumption that relief is likely to be sought in federal court. The issues that must be preserved are not only issues unique to capital litigation, but also case-and fact-related issues, unique to the case, that impinge on federal constitutional rights.

9) It is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be exhausted in the state courts. To exhaust an issue, the issue must be presented to the state courts in such a manner that a reasonable jurist would have been alerted to the existence of a violation of the United States Constitution. The better practice to exhaust an issue is to cite directly to the relevant provisions of the United States Constitution in each proposition of law and in each assignment of error to avoid any exhaustion problems in the federal courts.

10) It is important that appellate counsel realize that the capital reversal rate in the state of Ohio is eleven percent on direct appeal and less than one percent in post-conviction. It is my understanding that forty to sixty percent (depending on which of several studies is relied upon) of all habeas corpus petitions are granted. Therefore, appellate counsel must realize that in Ohio, a capital case is very likely to reach federal court and, therefore, the real audience of the direct appeal is the federal court.

11) Based on the foregoing standards, I have identified four propositions of law that should have been presented to this Court by appellate counsel. The propositions of law identified in this application for reopening were either not presented, or not fully presented, to this Court.

***Proposition of Law No. I***

***A Trial Court Cannot Order A Criminal Defendant To Wear A Stun Belt Absent The Conducting Of A Hearing At Which The Prosecution Demonstrates The Need For The Restraint***

12) Restraints are only to be used as a last resort, absent highly unusual circumstances. *Holbrook vs. Flynn*, 475 U.S. 560, 567 (1986); *Illinois vs. Allen*, 397 U.S. 337, 344 (1970); *State vs. Richey*, 64 Ohio St.3d 353, 358 (1992). The United States Supreme Court has given close scrutiny to the potentially prejudicial practice of stationing additional security personnel in the vicinity of a criminal defendant during trial. *Holbrook*, 475 U.S. at 569.

13) On February 12, 2002, Defense counsel filed Defendant's Request to Appear at All Future Proceedings Without Restraints with the trial court. The State opposed this Motion and on August 22, 2003, the trial court denied that motion. (A-1) The Court's Entry denying the motion specifically stated, "the Court orders the Sheriff's Department shall use electronic security devices which are non-visible and can be worn by the Defendant so as not to be conspicuous to the jury." The trial court did not conduct an evidentiary hearing on the need for restraints and instead simply summarily ordered that Mr. Elmore wear a stun belt.

14) The prosecution had the burden of proof by "a clear necessity" to show the need for restraints. *Kennedy vs. Cardwell*, 487 F.2d 101, 107 (6th Cir., 1973). Since the trial court held no hearing, the prosecution failed to meet its burden of proof.

15) An appellate court normally applies an abuse of discretion standard in reviewing a trial court's decision to require the use of restraints. *State vs. Franklin*, 97 Ohio St.3d 1, 19 (2002); *State vs. Cassano*, 96 Ohio St.3d 94 (2002). Since the trial court did not conduct the necessary hearing, it did not exercise its discretion and therefore that deferential standard of review is inapplicable.

16) In *State vs. Adams*, 103 Ohio St.508, 2004-Ohio-5845, the trial court held a hearing prior to ordering the defendant to wear a stun belt, at which it "heard arguments of counsel and statements from security personnel before authorizing the use of a security device." *Id.* at ¶¶ 103-110. The trial court in *Adams* subsequently explained its decision to authorize the "Band-it device in an entry". [*Id.*]. There was no hearing, no evidentiary basis and no reasonable decision regarding the stun belt in the present case.

17) This issue was being litigated in other cases at the time of Mr. Elmore's trial and appeal and, in my judgment, should have been raised in his appeal.

***Proposition of Law No. II***

***The Failure To Question Prospective Jurors On Racial Bias In A Case Of A Black Defendant And A White Victim Denies A Capital Defendant The Right To Be Tried By An Impartial Jury.***

18) Trial counsel rendered ineffective assistance by failing to voir dire the jury on racial bias under the authority of *Turner v. Murray*, 476 U.S. 28 (1986), thereby depriving Appellant of his rights to a fair trial and due process of law and he was prejudiced. U.S. Const. Amend. VI, XIV. Counsel did not provide objectively reasonable assistance and Appellant was prejudiced as a result of this failure. *Strickland v. Washington*, 466 U.S. 668 (1984). Appellant's rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated and he was prejudiced.

19) Appellant was charged with killing a white female, Ms. Pam Annarino. Ms. Annarino was a former peace officer. The murder took place in a small, rural county with an overwhelmingly white population. Defense counsel did not seek a change of venue to a more racially diverse county. Defense counsel failed to challenge the venire based on a lack of African-Americans in the venire pool. The prospective jurors in the venire from which the seated jury was obtained were all white. It was therefore incumbent upon counsel to engage in a thorough and searching voir dire as to their attitudes toward African-Americans and especially regarding the fact that Appellant — a black man — was charged with murdering a white woman. However, counsel failed to do so.

20) Defense counsel addressed the venire as a group as to racial bias with this sole statement/question:

One of the things I think you will notice if you look around the room and if you look at the people who've been in the courtroom today, other than Miss Byrd, Mr. Elmore looks different from the rest of us here. Different than Mr. Rigg, different than myself, the judge, almost all the witnesses you hear. It's a difficult thing to ask about, and its an unpleasant to even wonder about, but is there anybody here today who can't look into their own heart and see beyond this man's race? Is there anything about his race that's going to give anybody in the courtroom any difficulty hearing this case? Everybody can assure me, and more importantly, again, assure Phillip, that his race won't play a factor in this case? Can you make that same assurance if you know that the alleged victim in this case is white? Can everybody honestly look into their own hearts and say that they can set those two things aside and decide this case based on the evidence they hear? Yes? Thank you. (Tr. 163-164, A-2-3).

21) This single commentary does not suffice as an adequate exploration of potential racial bias in the venire members. It is unlikely that someone, in a group of their neighbors and fellow citizens, would raise their hand and say that they are racist.

22) Defense counsel was aware of the need to explore this issue. Counsel submitted a jury questionnaire that contained no less than eleven separate questions pertaining to the race and racial attitudes/beliefs of the prospective jurors. (See, A-4-23). These proposed questions were not made a part of the juror questionnaire. Yet counsel asked none of the questions contained in the questionnaire. Moreover, rather than vigorously advocate for their own juror questionnaire – that would have provided some information as to the juror’s beliefs and attitudes on race – defense counsel simply acquiesced in allowing the state’s proposed questionnaire to be used. (Tr. 50-51, A-24-25). The state’s questionnaire had no questions pertaining to race. (A-26-36, personal information of juror redacted).

23) Counsel for the defendant is charged with the responsibility of protecting a defendant’s rights and interests in order to ensure that a trial produces a “just result.” *Strickland v. Washington*, 466 U.S. 668 (1984). In this case, trial counsel failed “to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” *Id.* at 688. Specifically, trial counsel did not utilize *Turner v. Murray*, 476 U.S. 28, 38 (1986), to question the venire members—all from Licking County, Ohio—as to whether they held any prejudicial beliefs that would impair their ability to decide Appellant’s guilt and sentence without the taint of racial prejudice.

24) One of the basic interests of a defendant in a criminal trial is a fair and unbiased jury, a right subsumed within the Sixth and Fourteenth Amendments’ guarantee of trial by jury. *Ristaino v. Ross*, 424 U.S. 589 (1976). In order to assure this right, a defendant is entitled to question a venire to explore whether any member of that panel harbors racial or ethnic bias or prejudice that would prohibit that panel member from rendering an impartial verdict based solely on the evidence presented in the courtroom. *Rosales-Lopez v. United States*, 451 U.S. 182 (1981); *Turner*, 476 U.S. at 38. Trial counsel failed to use these rulings to protect Appellant’s right to a fair and impartial jury, thereby prejudicing Appellant in both the penalty and culpability phases of the trial.

25) The risk of racial prejudice infecting a guilt proceeding before a jury manifests to a constitutional dimension when “racial issues [are] inextricably bound up with the conduct of the trial.” *Ristaino v. Ross*, 424 at 597; *Turner*, 476 U.S. at 38. Once racial issues become a part of the trial, the defendant is entitled to ask jurors in voir dire whether or not race will be a factor in the juror’s decision-making. *Id.* It is beyond question that the facts of Ms. Annarino’s murder injected racial issues into Appellant’s trial. Not only was Ms. Annarino white, but the state repeatedly emphasized the brutality of the killing and how fearful she was of Appellant.

26) Under *Turner* a capital defendant accused of an interracial crime is entitled to have the jury informed of the victim’s race and to have the venire questioned so as to reveal any racial bias harbored by that group. *Id.* at 37. The reasons for this protection include discretion given jurors in weighing mitigating factors in capital cases coupled with the inescapable reality that the existence of this discretion increase the possibility that racial intolerance will “operate but remain undetected.” *Id.* at 35. Also, a plurality of the Court delineated a number of ways in which racism can infect the capital

sentencing proceedings: a juror who believes blacks are morally inferior or violence prone may be influenced by that belief in performing his or her statutory duties; a juror may be less likely to lend credence to mitigating evidence regarding a mental disturbance; "Subtle, less consciously held racial attitudes," such as a fear of blacks, may become unsettled by the violent nature of the crime, and thus influence a juror to impose a death sentence. *Id.* at 35.

27) All of these considerations were paramount in Appellant's case. In the extraordinary circumstances of this trial, the failure to use the *Turner* entitlement to question the jurors on racial bias was an inexplicable breach of the duty to protect the defendant's right to a fair trial. *Strickland*, 466 U.S. at 687. The integrity of this trial is called into question because the death verdict cannot be trusted to have been delivered without improper considerations of race. Counsel, by not questioning potential jurors to draw out any prejudices which they may harbor, fell short in their duty to protect their client's right to a fair and impartial jury. In considering prejudice in this case, this Court must assume that the failure to inquire about racial and ethnic bias during voir dire resulted in the loss of Appellant's right to a fair trial. *See Williams v. Taylor*, 529 U.S. 362, 392, fn. 17 (2000).

28) Appellant was prejudiced by counsel's failure to engage in voir dire questioning to uncover racial bias and attitudes towards race. Counsel's failure deprived Appellant of his rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

29) This issue was being litigated in other cases at the time of Mr. Elmore's trial and appeal and, in my judgment, should have been raised in his appeal.

### ***Proposition of Law No. III***

#### ***When The Prosecuting Attorney Engages In Misconduct In The Penalty Phase Closing Argument, A Capital Defendant Is Denied A Fair Trial And Determination Of Sentence.***

30) During the closing argument in the penalty phase, the prosecuting attorney mischaracterized the facts surrounding the crime as aggravating circumstances. The prosecutor stated:

You heard a number of testimony in the last phase about him gathering the tools that were needed, about him waiting in the garage, about his prying open the door, his putting the screws back in that door and the fact that he had that lock plate that's in evidence in his pocket; that he was waiting on -- for her for at least two hours; that he controlled her with that ligature that you have in evidence, that stretch pants; that he went downstairs after doing all of that to get that lead pipe to go back upstairs. He took the time to do that, the time to reflect on what he was doing when he got that pipe, when he went back upstairs, when he beat her repeatedly with that

pipe. Then he stole the tools. He stole the purse, he stole the car when he ran away, so I submit to you, ladies and gentlemen, that those aggravating circumstances have, in fact, been proved beyond a reasonable doubt.

(Tr. 1343, A-37).

31) “[T]he special role played by the American prosecutor in the search for truth in criminal trials . . . is ‘the representative not of an ordinary party, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.’ *Berger v. United States*, 295 U.S. 78, 88, (1935).” *Strickler v. Greene*, 527 U.S. 263, 281 (1999). There exists a line of clear precedent from the Supreme Court, starting with *Berger, supra* and running through *Banks v. Dretke*, 540 U.S. 668 (2004), that firmly establishes prohibitions against this type of prosecutorial misconduct. The sentencer’s discretion must be guided by requiring examination of specific factors, *Furman v. Georgia* (1972), 408 U.S. 238, and prohibiting consideration of non-statutory aggravating factors, unless the state authorizes them. *Barclay v. Florida* (1993), 463 U.S. 939; *Zant v. Stephens* (1983), 462 U.S. 862. Ohio does not. Ohio Rev. Code §§2929.03, (D) 2929.04(A).

32) Only those specifications charged in the indictment and proven beyond a reasonable doubt in the trial phase can be called aggravating circumstances in the penalty phase. The prosecuting attorney’s misstatement of the facts as aggravating circumstances denied Mr. Elmore a fair determination of the appropriate penalty in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

33) This issue was being litigated in other cases at the time of Mr. Elmore’s trial and appeal and, in my judgment, should have been raised in his appeal.

#### ***Proposition of Law No. IV***

***Oregon v. Ice (2009), \_\_\_ U.S. \_\_\_, 129 S.Ct. 711, 714, overrules State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856, as to consecutive sentences. A trial court may impose consecutive sentences only if it makes the findings set forth in R.C. 2929.14(E)(4).***

34) This Court remanded Elmore’s case to the trial court in light of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 the first time he was here on direct appeal. See, *Elmore* at ¶¶ 130-140, 169. After Mr. Elmore was resentenced, to exactly the same sentence, Elmore again appealed to this Court on direct appeal. While Elmore’s case was awaiting oral argument, the United States Supreme Court issued their decision in *Oregon v. Ice* (2009) 129 S. Ct. 711, 714. In spite of the fact that a United States Supreme Court decision, having a direct impact on the issue presented was released in January, 2009, four months before oral argument, appellate counsel never requested the opportunity to do supplemental briefing on the impact of *Ice* on Elmore’s case. See, *State v. Elmore II*, 122 Ohio St. 3d 472, 2009-Ohio-3478, ¶35, fn. 2.

35) In *Oregon v. Ice*, the United States Supreme Court named this Court's *Foster* decision as an example of one side of the conflict it was resolving:

State high courts have divided over whether the rule of *Apprendi* governs consecutive sentencing decisions. Fn7

[fn 7: Compare, e.g. *People v. Wagener*, 196 Ill. 2d 269, 283-286, 752 N.E.2d 430, 440-442, 256 Ill. Dec. 550 (2001) (holding that *Apprendi* does not apply); *Keene*, 2007 ME 84, 927 A. 2d, 405-408 (same); with *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470 (holding *Apprendi* applicable).] We granted review to resolve the question.

129 S.Ct. at 716.

36) The United States Supreme Court resolved the question against the position this Court took in *Foster*:

[Some s]tates, including Oregon, constrain judges' discretion by requiring them to find certain facts before imposing consecutive, rather than concurrent, sentences. It is undisputed that States may proceed on the first two tracks without transgressing the Sixth Amendment. The sole issue in dispute, then, is whether the Sixth Amendment, as construed in *Apprendi* and *Blakely*, precludes the mode of proceeding chosen by Oregon and several of her sister States. We hold, in light of historical practice and the authority of States over administration of their criminal justice systems, that the Sixth Amendment does not exclude Oregon's choice.

37) Given the Court's direct reference to *Foster*, appellate counsel should have requested supplemental briefing in this case.

38) This issue was being litigated in other cases at the time of Mr. Elmore's trial and appeal and, in my judgment, should have been raised in his appeal.

## CONCLUSION

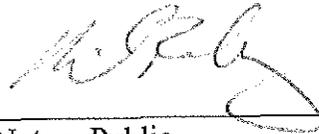
39) Based on my evaluation of the record and understanding of the law, I believe that if these propositions of law had been properly presented for review, this Court would have granted relief. Also, those errors would have been preserved for federal review.

40) Therefore, Philip L. Elmore was prejudiced as a direct result of the deficient performance of her appellate counsel on her direct appeal to this Court.

Further Affiant sayeth naught.

  
\_\_\_\_\_  
WILLIAM S. LAZAROW  
Counsel for Appellant,  
Phillip Elmore

Sworn to and subscribed before me  
this 26<sup>th</sup> day of October, 2009.

  
\_\_\_\_\_  
Notary Public

Neil Rosenberg, Attorney at Law  
Notary Public, State of Ohio  
My Commission Has No Expiration Date  
Section 147.03 Revised Code

In the Court of Common Pleas, Licking County, Ohio

CLERK OF COMMON PLEAS CT.  
LICKING COUNTY, OHIO  
STATE OF OHIO

State of Ohio,

2003 AUG 22 P 2:48

Plaintiff,

FILED

vs.

Case No. 02 CR 00275

Phillip L. Elmore,

Defendant.

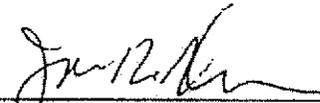
JUDGMENT ENTRY

.....

The Motion of the Defendant to appear at all court proceedings without restraints is denied.

The Defendant is facing serious charges and is, therefore, a flight risk. Further, the Defendant has threatened the deputies, which threats resulted in convictions against the Defendant while incarcerated.

However, the Court orders that the Sheriff's Department shall use electronic security devices which are non-visible and can be worn by the Defendant so as not to be conspicuous to the jury.

  
\_\_\_\_\_  
Jon R. Spahr, Judge

Copies to:

Kenneth Oswald, Esq., and Glenn Rossi, Esq., Assistant Prosecuting Attorneys  
20 South Second Street, 4th Floor, Newark, OH 43055

David Almos, Probation Officer  
Adult Court Services Department, Court House, Newark, OH 43055

Andrew T. Sanderson, Esq., Attorney for Defendant  
21 West Church Street, Suite 201, Newark, OH 43055

Brian J. Rigg, Esq., Attorney for Defendant  
755 South High Street, Columbus, OH 43206

Judge  
Jon R. Spahr  
740-349-6181

Judge  
Ms. Marcelain  
740-349-6186

Courthouse  
Newark, OH 43055

1 story or finish the book before you form any opinions  
2 whatsoever about Mr. Elmore's guilt in this case? Can  
3 you all make us that promise? Good.

4 One of the things you've already heard  
5 mentioned is the presumption of innocence, and that  
6 phrase, I know it's going to sound weird, but as a  
7 criminal defense attorney, that phrase drives me nuts,  
8 because there's never been a defendant in any criminal  
9 case found innocent. And the reason for that is that  
10 we don't have to prove Mr. Elmore innocent of  
11 anything. Does everybody recognize that distinction?  
12 The question you're going to be asked to decide is not  
13 whether or not we proved him innocent but whether or  
14 not the State of Ohio proved him guilty. It's a  
15 subtle but important difference. Is that a difference  
16 everybody can sort out in their own minds? What that  
17 means is Mr. Elmore has no obligation to prove  
18 anything in this case; that the obligation is on the  
19 State of Ohio to establish his guilt. Can everybody  
20 promise me and promise Mr. Elmore you will not hold  
21 him to a burden to prove his own innocence? Can you  
22 all make me that promise? Good.

23 One of the things I think you'll notice if  
24 you look around the room and if you look at the people  
25 who've been in the courtroom today, other than

1 Miss Byrd, Mr. Elmore looks different than the rest of  
2 us here. Different than Mr. Rigg, different than  
3 myself, the Judge, almost all the witnesses you hear.  
4 It's a difficult thing to ask about, and it's an  
5 unpleasant to even wonder about, but is there anybody  
6 here today who can't look into their own heart and see  
7 this man beyond his race? Is there anything about his  
8 race that's going to give anybody in the courtroom any  
9 difficulty in hearing this case? Everybody can assure  
10 me, and, more importantly, again, assure Phillip, that  
11 his race won't play a factor in this case? Can you  
12 make that same assurance if you know that the alleged  
13 victim in this case is white? Can everybody honestly  
14 look into their own hearts and say that they can set  
15 those two things aside and decide this case based on  
16 the evidence that they hear? Yes? Thank you.

17           One of the things that goes along with  
18 presumptions and that Mr. Elmore does not have to  
19 prove his guilt is that Phillip Elmore does not have  
20 to put on any evidence, and in many criminal cases,  
21 Mr. Becker and Mr. Rigg, myself and Mr. Rossi have  
22 tried, the defense has not put on any evidence because  
23 the defense does not have a burden. A lot of times  
24 questions pop up in people's minds why didn't he  
25 testify. Has everybody heard of the Fifth Amendment?

*Brian J. Rigg*  
*Attorney at Law*

755 South High Street  
Columbus, Ohio 43206  
(614) 444-3900  
Fax: (614) 444-9086

FAX TRANSMISSION COVER SHEET

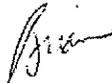
*Date:* September 10, 2003  
*To:* Judge Spahr Att: Krista  
*Fax:* 1-740-349-1414  
*Re:* State of Ohio v. Phillip Elmore Jury Questionnaire  
*Sender:* Brian J. Rigg

---

*Dear Krista: attached is the questionnaire I sent to Mr. Sanderson and Mr. Rossi.*

*Thank you,*

*Brian J. Rigg*



---

NOTICE

THE INFORMATION CONTAINED IN THIS FACSIMILE IS ATTORNEY-CLIENT PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE.

TRANSMISSION VERIFICATION REPORT

TIME : 09/10/2003 16:49

DATE, TIME	09/10 16:48
FAX NO. /NAME	17403491414
DURATION	00:00:16
PAGE(S)	00
RESULT	NG
MODE	STANDARD

NG : POOR LINE CONDITION

Prospective Juror Questionnaire

Please answer each question in the following pages as completely and as accurately as you can. Complete answers will save the Court and all parties involved a great deal of time. If you need more space to sufficiently answer any particular question, please use the blank page at the end of the questionnaire.

There are no right or wrong answers to the questionnaire. The only right answers are complete and honest responses to all questions. The purpose in using this questionnaire is three fold. The first is to gain full and honest responses from you without revealing that information to the entire panel of jurors in open court. This will protect the confidentiality of your responses. Second, the questionnaire will spare you the long wait that usually occurs when the attorneys must repetitiously ask all of you the same questions. Finally, the use of this questionnaire provides each side the opportunity to select a fair and impartial jury. Therefore, your full cooperation is of the greatest significance to the administration of justice in this case.

SOME OF THESE QUESTIONS MAY CALL FOR INFORMATION OF A PERSONAL NATURE THAT YOU MAY NOT WANT TO DISCUSS IN PUBLIC; I.E., IN AN OPEN COURTROOM, WITH THE PRESS AND/OR PUBLIC PRESENT. IN ANY INSTANCE WHERE YOU FEEL PUBLIC DISCUSSION OF YOUR ANSWER MAY INVADE YOUR RIGHT TO PRIVACY OR MIGHT BE EMBARRASSING TO YOU, YOU MAY INDICATE BY PLACING YOUR INITIALS ALONGSIDE THE NUMBER OF THE QUESTION. THE COURT WILL THEN GIVE YOU AN OPPORTUNITY TO EXPLAIN YOUR REQUEST FOR CONFIDENTIALITY IN A CLOSED HEARING.

Prospective Juror Questionnaire

GENERAL BACKGROUND

1. Name: \_\_\_\_\_ 2. Age: \_\_\_\_\_
3. In what part of the county do you live? \_\_\_\_\_
4. Place of Birth: \_\_\_\_\_
5. How long have you lived at your current address? \_\_\_\_\_
6. How long have you lived in Licking County? \_\_\_\_\_
7. Do you own: \_\_\_\_\_ or rent: \_\_\_\_\_ your home? If neither, please explain:
- \_\_\_\_\_

EDUCATION

8. Please check one: \_\_\_\_\_ less than high school  
\_\_\_\_\_ high school  
\_\_\_\_\_ some college  
\_\_\_\_\_ B.A. \_\_\_\_\_ B.S.  
\_\_\_\_\_ M.A. \_\_\_\_\_ M.S.  
\_\_\_\_\_ Other graduate degree, please describe: \_\_\_\_\_
9. Have you received any special training: \_\_\_\_\_ Yes \_\_\_\_\_ No.  
If yes, please describe:
- \_\_\_\_\_
- \_\_\_\_\_

EMPLOYMENT

10. Are you currently employed, unemployed, retired, disabled, a homemaker, or a student? (Circle One)

If retired, presently unemployed, or disabled, please answer the questions above for your last job(s).

If employed, where? \_\_\_\_\_

How long? \_\_\_\_\_ What do you do? \_\_\_\_\_

Job title, if any? \_\_\_\_\_

11. Have you had other employment in the past ten years? \_\_\_\_ Yes  
\_\_\_\_ No. If yes, list prior places of employment, length of time at each, and job description for each prior employment:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

MARITAL STATUS

12. Please check one:    \_\_\_\_\_ married    \_\_\_\_\_ separated  
                                 \_\_\_\_\_ single    \_\_\_\_\_ widowed  
                                 \_\_\_\_\_ divorced    \_\_\_\_\_ living w/non-marital mate

13. If employed, please describe what type of work your spouse/mate does, including name and location of employer, and length of time at the position:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If your spouse/mate is retired, presently unemployed or disabled, please answer the question above for the last job.

20. What is the educational background of your spouse/mate?

\_\_\_\_\_

21. Does any adult, other than yourself (and your spouse), reside in your household? \_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, what is his/her relationship to you?

\_\_\_\_\_

22. What is his/her occupation and place of employment?

\_\_\_\_\_

\_\_\_\_\_

CHILDREN

23. Do you have children? \_\_\_\_\_ Yes \_\_\_\_\_ No. How many? \_\_\_\_\_  
Ages, sex, and last grade completed?

\_\_\_\_\_

\_\_\_\_\_

24. Their occupations, locations of employment, and marital status, if adults:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

25. Do your children presently live with you or, if now adults, did they live with you while growing up? \_\_\_\_\_ Yes \_\_\_\_\_ No. If no, please explain:

\_\_\_\_\_

26. What factors do you think are most likely to have a positive influence on a child's development?

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

27. What factors do you think are most likely to have a negative influence on a child's development?

---

---

---

RELIGION

28. What is your religious affiliation/denomination, if any?

---

29. Do you attend a church/temple now? \_\_\_\_ Yes \_\_\_\_ No. If yes, how frequently?

---

30. What church/temple attended? \_\_\_\_\_

31. Do you participate in other activities in your church/temple?

\_\_\_\_ Yes \_\_\_\_ No. If yes, please describe them:

---

---

FAMILY BACKGROUND

32. Where did you grow up? \_\_\_\_\_

Do you have sibling? \_\_\_\_ Yes \_\_\_\_ No. If yes, please list age, sex, occupation and whether full, half or step-sibling:

---

---

---

33. Were you raised by a single parent or by someone other than a natural parent? \_\_\_\_ Yes \_\_\_\_ No. If yes, please explain the circumstances:

---

---

34. What are/were your parent's occupations?

---

---

MILITARY SERVICE

35. Have you ever served in the military? \_\_\_\_ Yes \_\_\_\_ No. If yes:

When: \_\_\_\_\_ Where: \_\_\_\_\_

How long: \_\_\_\_\_ Branch: \_\_\_\_\_

Highest rank: \_\_\_\_\_ Your job: \_\_\_\_\_

36. Were you engaged in combat? \_\_\_\_\_

37. Were you ever involved in a military court martial? \_\_\_\_ Yes  
\_\_\_\_ No. If yes, please describe your role:

---

---

FIREARMS

38. Do you own or have you ever owned a firearm? \_\_\_\_ Yes  
\_\_\_\_ No. If yes, what type of firearm and for what purpose  
did you own it?

---

---

39. Have you ever fired a handgun or rifle? \_\_\_\_ Yes \_\_\_\_ No. If  
yes, please explain the type of gun and the circumstances  
under which you fired it?

---

---

40. Have you had any bad experiences with guns, such as having one  
pointed at you? \_\_\_\_ Yes \_\_\_\_ No. If yes, please explain.

---

---

HEALTH

41. Do you have any specific health problems of a serious nature that might make it difficult or uncomfortable for you to sit as a juror in this case? \_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, please describe:

---

---

42. Are you taking any medication regularly that might make it difficult for you to pay attention or concentrate for long periods of time? \_\_\_\_\_ Yes \_\_\_\_\_ No.

If yes, describe: \_\_\_\_\_

---

43. Is there any pressing business or personal matter that might interfere with the time it may take to render a decision in this case? \_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, please describe:

---

---

AFFILIATIONS

44. Do you belong to any social, fraternal, recreational, athletic groups? \_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, please describe:

---

---

45. Do you belong to any civic or political clubs or organizations? \_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, please describe:

---

---

46. Have you or your immediate family belonged to any social, fraternal, recreational, civic or political organizations in the past? \_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, please describe:

---

---

---

---

---

SPARE TIME

47. What are your hobbies and interests?

---

---

48. What television programs do you watch?

---

---

49. What type of books do you enjoy reading?

---

---

50. Which magazines do you read?

---

---

MEDIA

51. Which newspapers/news magazines do you read regularly?

---

---

52. Do you follow criminal cases or crime stories in the news?

\_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, which cases have you followed?

---

---

JURY EXPERIENCE

53. Have you served as a juror before? \_\_\_\_ Yes \_\_\_\_ No. If yes,  
When: \_\_\_\_\_ Where: \_\_\_\_\_

54. Criminal or civil? \_\_\_\_\_ If civil cases(s), what  
was the issue?

---

If criminal case(s), what type of charge? \_\_\_\_\_

55. Were you the foreperson? \_\_\_\_ Yes \_\_\_\_ No.

56. Without disclosing the result, did the jury reach a verdict in  
all cases? \_\_\_\_ Yes \_\_\_\_ No. If no, describe type of case:

---

---

WITNESS EXPERIENCE

57. Have you ever testified as a witness in a criminal or civil  
case? \_\_\_\_ Yes \_\_\_\_ No. If yes, what type of case? \_\_\_\_\_

---

In what capacity did you testify?

---

58. Have you ever witnessed a crime? \_\_\_\_ Yes \_\_\_\_ No. If yes,  
please describe when and under what circumstances:

---

---

CRIMINAL RECORD

59. Have you, or a member(s) of your family, or someone close to  
you ever been arrested for or charged with a criminal offense?

\_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, please describe:

---

---

How was this person related to you? \_\_\_\_\_

Were you (they) convicted? \_\_\_\_\_ Yes \_\_\_\_\_ No.

#### VICTIM EXPERIENCE

60. Have you, or any member of your family, or close friend ever been a victim of crime?

\_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, who, when, and what happened?

---

---

61. How has that experience affected your feelings about the criminal justice system?

---

---

#### LITIGATION EXPERIENCE

62. Have you ever been a party to a lawsuit or filed a claim against a government agency?

\_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, please explain.

---

---

#### ADMINISTRATION

63. Have you, or any member of your family, or close friend, ever taken a course in the administration of justice, or studied law?

\_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, please give details:

---

---

64. Have you, or any member of your family, or close friend ever been affiliated with any of the following: (If yes, please check)

\_\_\_\_\_ Law enforcement (police officer, sheriff, F.B.I. agent, etc.)

\_\_\_\_\_ Corrections (prison guard, jailer, prison staff, jail staff)

\_\_\_\_\_ Mental institution

\_\_\_\_\_ Juvenile facilities

\_\_\_\_\_ Probation and parole

\_\_\_\_\_ Prosecuting Attorney or United States Attorney

\_\_\_\_\_ Public Defender

\_\_\_\_\_ Law school

\_\_\_\_\_ Investigative work

\_\_\_\_\_ Immigration services

\_\_\_\_\_ Drug enforcement administration

65. If you checked any of the above, please indicate who was affiliated, the nature of the affiliation, and when:

---

---

66. Do you have acquaintances who are attorneys or judges?

\_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, please state the names of those persons and the relations that you have with them:

---

---

67. Have you ever visited or been inside a prison/jail?

\_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, please explain the circumstances and describe how it made you feel.

---

---

68. Have you ever spoken with someone who works at a prison/jail or an inmate in a prison/jail about their experiences?

\_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, please explain the circumstances:

---

---

69. Do you feel that people convicted of crimes are treated too leniently?

\_\_\_\_\_ Yes \_\_\_\_\_ No.

69a. If answer to number 69 is yes, please explain.

---

---

---

70. What do you believe are the major causes of crime?

---

---

71. Is there a crime prevention group in your neighborhood and, if so, do you participate in it?

---

72. What are the two most important problems in the current operation of the criminal justice system?

---

---

73. What is your race? Please check:

- White/Caucasian                       Black/African American  
 Hispanic/Latino                       Asian/Pacific Islander  
 Other (please state) \_\_\_\_\_

74. When you were growing up, what was the racial and ethnic make up of your neighborhood?

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

75. Is there any racial or ethnic group that you do not feel comfortable being around?  Yes  No. If yes, please describe:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

76. With respect to the issue of racial discrimination against African-Americans in our society, do you think it is:

- Very serious problem                       Somewhat serious problem  
 Not too serious                       Not at all serious  
 Not a problem at all

77. Have you ever had a negative or frightening experience with a person of another race?  Yes  No. If yes, please explain the circumstances:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

78. Have you ever been exposed to persons who exhibited racial, sexual, religious and/or ethnic prejudice? \_\_\_\_ Yes \_\_\_\_ No.  
If yes, please describe the experience:

---

---

---

79. "Some races and/or ethnic groups tend to be more violent than others."

\_\_\_\_ Strongly agree                      \_\_\_\_ Agree  
\_\_\_\_ Strongly disagree                  \_\_\_\_ Disagree  
\_\_\_\_ No opinion

If you wish to do so, please explain your answer:

---

---

---

80. "Some races and/or ethnic groups tend to be responsible for committing more crimes than others."

\_\_\_\_ Strongly agree                      \_\_\_\_ Agree  
\_\_\_\_ Strongly disagree                  \_\_\_\_ Disagree  
\_\_\_\_ No opinion

If you wish to do so, please explain your answer:

---

---

---

81. Are you a member of any group or organization which is concerned with racial or ethnic issues? \_\_\_\_ Yes \_\_\_\_ No.  
If yes, please identify the groups:

---

---

---

82. Are you a member of any private club, civic, professional or fraternal organization which limits its membership on the basis of race, ethnic origin, gender or religion? \_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, please identify the group(s) or organization(s):

---

---

---

83. Do you feel that people are overly sensitive about racial and ethnic jokes? \_\_\_\_\_ Yes \_\_\_\_\_ No.

84. What are your views regarding interracial relationships? Please explain.

---

---

---

PSYCHIATRY/PSYCHOLOGY

85. How do you feel about psychiatrists and/or psychologists testifying as experts in court cases?

---

---

86. Are you familiar with psychological testing? \_\_\_\_\_ Yes \_\_\_\_\_ No  
If yes, how do you feel about the validity of these tests?

---

---

87. Have you ever studied psychiatry, psychology, or any related subjects?

\_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, please explain:

---

---

88. Have you, or any member of your family, or close relative ever consulted a psychiatrist or psychologist for professional services?

\_\_\_\_\_ Yes \_\_\_\_\_ No.

89. Did this consultation affect your opinion about the value of psychiatry or psychology? \_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, please explain:

---

SELF-DESCRIPTION

90. What descriptive words or adjectives would you use to describe yourself?

---

---

91. If you were asked to describe why you would be a qualified and fair person to serve on this job as a juror, what would you say?

---

---

92. Would you characterize yourself as a leader or a follower?

Please explain: \_\_\_\_\_

---

93. What is your position on the death penalty?

Approve \_\_\_\_\_

Disapprove \_\_\_\_\_

Undecided \_\_\_\_\_

94. What are your feelings regarding the death penalty in general?

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

95. Who do you think is the greatest American of this century?

Please explain: \_\_\_\_\_

\_\_\_\_\_

96. Is there anything else you would like to bring to the Court's attention about your ability to be fair and impartial?

\_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, please explain:

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
SIGNATURE

EXPLANATION SHEET

1 They will probably only have the initial jury  
2 questionnaires and probably not the second one, but I  
3 figured it's better to be safe. If we don't need  
4 them, we'll just make the announcement on the Sunday  
5 night that they don't have to come in. But if we do  
6 need them, we don't have to worry about whether or not  
7 we're going to have some additional jurors coming in.  
8 So I -- as a matter of fact, up in Fayette County, in  
9 talking to lead counsel, he indicated they ran out of  
10 jurors in their case. At least you'll have the  
11 initial questionnaires, and if we need to have them  
12 fill out the second questionnaire, you can have them  
13 do that on site.

14 MR. BECKER: What about their excuse for the  
15 media coverage on the 20th?

16 THE COURT: We'll just have to cover that in  
17 voir dire. They won't know what jury they're being  
18 summoned for.

19 I can't remember whether I covered the  
20 second questionnaire. I believe we talked about it  
21 earlier, but did we put it on the record?

22 MR. BECKER: Not in here, Judge.

23 MR. SANDERSON: That was just in chambers.

24 THE COURT: That it was agreed that the  
25 questionnaire that was submitted by the State that had

1 been indicated was acceptable in the Robinson case, we  
2 would hitchhike on that and use that in this case, and  
3 that would be sent out the first of the week, and the  
4 State indicated that that was fine. Defense also  
5 indicated that that was acceptable as well; is that  
6 correct?

7 MR. SANDERSON: Based on my conversation  
8 with Mr. Rigg, yes, that's acceptable to us as well,  
9 Your Honor.

10 THE COURT: Okay. We will take care of  
11 that.

12 And the procedure for the ones that come  
13 back not deliverable as addressed, I -- I don't know  
14 that we have any way to follow those up. We don't  
15 have phone -- we don't have phone numbers or anything.  
16 I assume we just have to accept those returns. If  
17 anybody does not show up that's sent a questionnaire,  
18 we do have the ability to follow those up, and we  
19 will, but the others, I don't know that there's  
20 anything that we can do about that.

21 State have anything to add to that?

22 MR. BECKER: I believe you just have to  
23 accept what's on the envelope and move forward with  
24 the panel we have. Seems to me we have sufficient  
25 numbers, at least to begin with, anyway.



JUROR QUESTIONNAIRE

10-20-01  
30-E

JUROR NAME DAVID

General Background

1. Age: 56

2. If you have children, please list (include children not living with you):

<u>Sex</u>	<u>Age</u>	<u>Does child live with you</u>	<u>Level of education</u>	<u>Occupation</u>
<u>F</u>	<u>25</u>	<u>NO</u>	<u>HS</u>	<u>CASHIER</u>
<u>F</u>	<u>23</u>	<u>Y</u>	<u>HS</u>	

3. Do you have any medical or physical condition that might make it difficult for you to serve as a juror? (Please include any hearing or eyesight problem.) Yes \_\_\_\_\_ No X. If yes, please describe:

4. Are you taking any medications that might make it difficult for you to serve as a juror? Yes \_\_\_\_\_ No X. If yes, please explain:

5. Do you have any problems or areas of concern at home or at work that might interfere with your duties as a juror during trial if the trial is to last two weeks? Yes \_\_\_\_\_ No X. If yes, please describe:

6. How long have you lived at your present residence? 6 YRS

7. Where were you born?  
CLEVELAND OH

8. Where were you raised?  
CENTRAL OH

9. Do you have any difficulty:  
Reading English? Yes  Sometimes  No   
Understanding spoken English? Yes  Sometimes  No

Employment Information

10. Are you currently employed outside the home? Yes  No

If yes, name of employer?

BOEING

11. What are your specific duties and responsibilities on the job? \_\_\_\_\_

INSTRUMENT REPAIR

12. If not currently employed outside the home, please check the category that applies to your employment status:

- |  |                                   |
|--|-----------------------------------|
| <input type="checkbox"/> Homemaker                       | <input type="checkbox"/> Student  |
| <input type="checkbox"/> Unemployed-looking for work     | <input type="checkbox"/> Retired  |
| <input type="checkbox"/> Unemployed-not looking for work | <input type="checkbox"/> Disabled |
| <input type="checkbox"/> Other (please explain)          |                                   |

13. If you are not currently employed outside the home, but were previously so employed, please describe your most recent form of employment, stating the name of your employer, and your specific duties and responsibilities while employed:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

14. Have you ever worked in journalism or the news industry? Yes \_\_\_\_\_ No

If yes, please give name of employer and give a brief description of your job duties:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

15. Do you have any close friends or relatives who either have worked or are currently working in journalism or news industry in any capacity? Yes \_\_\_\_\_ No

If yes, state name of their employer and give a brief description of their job duties:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Educational Background

16. What is the highest grade in school that you completed? \_\_\_\_\_ 12 \_\_\_\_\_

17. If you attended any schools or colleges after high school, please name the schools and colleges you attended, your major areas of study, and the field in which you obtained your degree(s):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

18. Are you currently in school? Yes \_\_\_\_\_ No

If yes, which school and what are you studying? \_\_\_\_\_

\_\_\_\_\_

Military Background

19. Have you ever served in the military? Yes  No \_\_\_\_\_

If yes, when 10, 1966 - 10 1973

where GERMANY W. TEXAS OH

how long \_\_\_\_\_

branch US ARMY

highest rank E 5

your job \_\_\_\_\_

20. Do you have combat experience? Yes \_\_\_\_\_ No

If yes, please explain: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

21. Were you ever involved in any way with military law enforcement, court martial or investigations? Yes \_\_\_\_\_ No  If yes, please explain:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Prior Courtroom Experience

22. Have you ever been in a courtroom before? Yes \_\_\_\_\_ No

If yes, how many times and for what purpose(s)? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

23. Have you ever served on a trial jury before? Yes \_\_\_\_\_ No

For each time you have sat on a trial jury, please indicate whether it was a criminal case or a civil case:

<u>Type of case</u>	<u>Year</u>	<u>Was a verdict reached?</u> <u>(DO NOT state the verdict)</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____

24. Have you ever served on a grand jury? Yes \_\_\_\_\_ No

If yes, when and in what County? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Experts

25. Have you ever consulted with a scientific expert other than a medical doctor?

Yes \_\_\_\_\_ No

If yes, please specify the type of expert and the purpose for which you consulted them:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

26. Have you ever studied psychiatry or psychology? Yes \_\_\_\_\_ No

If yes, please explain: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

27. If not answered elsewhere, have you, or any member of your family, or a close friend ever received treatment for drug or alcohol use? Yes \_\_\_\_\_ No

28. There is a wide range of opinions about psychologists, psychiatrists, counselors and therapists. Generally, how do you regard these professions?

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Criminal Justice System

29. Do you have any legal training or have you taken any law course(s)? Yes \_\_\_\_\_

No  If yes, please explain:

\_\_\_\_\_  
\_\_\_\_\_

30. Do you have a family member or close friend who works in the Legal System (e.g., lawyers, police officers, probation officers, federal agents, prison or jail guards or other institutional employees)?

Yes  No \_\_\_\_\_

If yes, what are their names and please describe how you know them:

My DAUGHTER  
MICHELLE L

31. Do you now work or have you ever worked in law enforcement or the security field (including federal, military, state, county, corrections, city, auxiliary, volunteer, etc.)? Yes \_\_\_\_\_ No

If yes, please describe the position(s) and dates of service:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

32. Have any of your relatives and/or close friends ever worked in law enforcement or the security field (including federal, military, state, county, corrections, city, auxiliary, volunteer, etc.)? Yes \_\_\_\_\_ No

If yes, please describe in detail:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

33. Do you belong to any group or organization concerned with crime prevention or victims' rights? Yes \_\_\_\_\_ No  If yes, please describe:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

34. Have you ever been a victim of a crime? Yes \_\_\_\_\_ No   
If yes, how many times? \_\_\_\_\_  
What type of crime(s)? \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

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

\_\_\_\_\_  
\_\_\_\_\_

36. Other than answers you may have already given, have you had any good or bad experiences with any police officers? Yes \_\_\_\_\_ No

Please explain and indicate the police agency involved: \_\_\_\_\_

37. Have you, or a member(s) of your family, or someone close to you ever been accused of or charged with a criminal offense? Yes \_\_\_\_\_ No

If yes, how was this person related to you? \_\_\_\_\_

Were you (they) convicted? Yes \_\_\_\_\_ No \_\_\_\_\_

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

38. Have you ever spoken with someone who works at a prison/jail or an inmate in a prison/jail about their experiences? Yes \_\_\_\_\_ No

If yes, please explain the circumstances: \_\_\_\_\_

### Media Exposure

39. Do you get more of your news from: (Circle one)

a. newspapers

b. magazines

c. radio/television

40. Which newspapers/news magazines do you read regularly?

USA TODAY

41. What news programs do you listen to or watch most often?  
YARD BALL, ABRAHAM'S REPORT,

42. Do you follow criminal cases or crime stories in the news? Yes  No   
If yes, which cases have you followed: NOTHING IN PARTICULAR  
COMES TO MIND, I JUST SEE OR HEAR ONE THAT SEEMS  
INTERESTING AND FOLLOW IT UP A LITTLE.

43. Do you follow stories about the functioning of the criminal justice system?  
Yes  No  If yes, which stories and how do these stories make  
you feel about the criminal justice system? SAME

Miscellaneous

44. If selected to serve as a juror, the Court would order you not to read, listen to or  
watch any accounts of the case reported by television, radio or other news media.  
Will you have any difficulty following this order?  
Yes  No  Do not know

45. If you are selected as a juror, the Court would Order you not to discuss this case  
with anyone unless and until permitted to do so by the Court. Will you have any  
difficulty in following this order?  
Yes  No  Do not know

46. Would you characterize yourself as a leader or follower? NEITHER  
Please explain: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

47. Is there any matter not covered by this questionnaire that you think the attorneys or Court might want to know about when considering you as a juror in this case?

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1 committed while the defendant was committing,  
2 attempting to commit or fleeing while committing or  
3 attempting to commit aggravated robbery and/or  
4 aggravated burglary, and that he was the principal  
5 offender in the aggravated murder. You heard a number  
6 of testimony in the last phase about him gathering the  
7 tools that were needed, about him waiting in the  
8 garage, about his prying open the door, his putting  
9 the screws back in that door and the fact that he had  
10 that lock plate that's in evidence in his pocket; that  
11 he was waiting on -- for her for at least two hours;  
12 that he controlled her with that ligature that you  
13 have in evidence, that stretch pants; that he went  
14 downstairs after doing all of that to get that lead  
15 pipe to go back upstairs. He took the time to do  
16 that, the time to reflect on what he was doing when he  
17 got that pipe, when he went back upstairs, when he  
18 beat her repeatedly with that pipe. Then he stole the  
19 tools. He stole the purse, he stole the car when he  
20 ran away, so I submit to you, ladies and gentlemen,  
21 that those aggravating circumstances have, in fact,  
22 been proved beyond a reasonable doubt. You've found  
23 that by your verdict that that occurred.

24 And so the question that's left now is do  
25 those aggravating circumstances outweigh any