

IN THE SUPREME COURT OF OHIO

11-1737

STATE OF OHIO,

Plaintiff-Appellee,

-VS-

Thomas J. Lampley,

Defendant-Appellant,

On appeal from the Richland  
County Court of Appeals, 5th,  
Appellate District

Court of Appeals  
Case Number 2010-CA-0030

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT

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Thomas J. Lampley

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Trumbull Corr. Inst.

DEFENDANT-APPELLANT, PRO SE

James Mayer Prosecutor

38 S. Park St.

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COUNSEL FOR APPELLEE, STATE OF OHIO

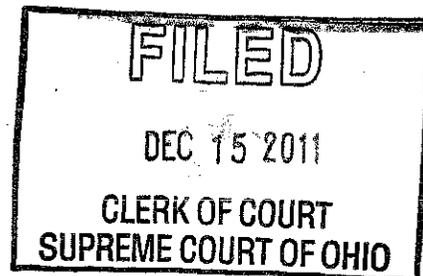


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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL  
INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTION QUESTION.**

**EXPLANATION:**

This court has always upheld the principal that a defendant in a criminal case has a right to challenge his conviction via the appellate court and is entitled to be represented by competent counsel during the appeals process. This case raises several substantial constitutional questions about how the court determines if counsels performance met a reasonable standard during the appellate process. Also in question is whether a defendant who raises a claim of ineffective assistance of counsel during the appeals process has been afforded a proper appeal of right in accordance with the standards set forth in the U.S. Constitution when counsel who has exhibited prior deficient performance that causes the defendants appeal to be dismissed, is reinstated and allowed to continue in the appeal process.

**QUESTIONS:**

**First:** When a defendant is not informed by his appointed counsel that his appeal has been dismissed, but discovers evidence that his right to a direct-appeal has been dismissed due to counsels deficient performance, and the defendant files multiple motions citing the deficient performance, and requesting that his appeal be reinstated, and new counsel be appointed - does the court neglect it's constitutional obligation to grant the defendant a proper appeal by reopening the appeal and allowing deficient counsel to further represent defendant when a colorable claim of ineffectiveness has been raised?

**Second:** When an appeal has been dismissed by the court for failure to file a brief, can the court rescind it's ruling under any other criteria except that which is prescribed in App. Rule 26(B), and can the courts decision deny both the defendant and the State an opportunity to respond to the filing of a motion by the appointed counsel, when that motion misrepresents both the defendants and the States position?

**Third:** When counsels deficiency prevents counsel from preparing an adequate brief within the timelines set by the court, after the request and exhaustion of three extensions, is it reasonable for the court to presume that counsel would be able to produce an adequate brief instanter and properly raise all the issues necessary to satisfy the defendants constitutional guarantee to a properly adjudicated appeal of right?

**Fourth:** When the sole Assignment of Error raised in the appeal is contrary to the affirmative defense raised at trial, and offers an admission of guilt; has the defendant received a proper appeal of right when the Assignment of Error argues for a jury instruction that is not warranted in itself, because of the affirmative defense of self-defense?

**Fifth:** When a defendant's trial counsel fails to establish a claim of self-defense does that automatically warrant a conviction of purposeful and intentional murder when elements of a lesser culpability can be adduced from the evidence presented at trial?

**CONCLUSION:** Finally this defendant humbly request that this court resolve the question of whether a proven deficiency in appellate counsel's performance undermines the confidence of the appeals process as defined by the U.S. Constitution, and whether prejudice has occurred as a result of the ineffective assistance of counsel.

The ruling in this case will have a profound effect on other cases because it will clarify the Ohio Supreme Court's position on whether or not the guidelines for following Appellate Rules extend to appointed counsel in the instance of applications under App. Rule 26(B). It will clarify at what point a counsel's deficient performance defaults his position as appointed counsel. It will determine if it is lawful for an attorney to file motions beyond the scope of his duty without conferring with his client. Finally it will address the self-defense statute, and determine if a failure to establish a self-defense claim automatically warrants a conviction on purposeful and intentional murder, or if the Prosecution must still prove those elements beyond a reasonable doubt.

## STATEMENT OF THE CASE

On August 28th, 2009 the defendant was engaged in a heated conversation with Lashonna Bronson, (the decedants spouse) in the parking area of the Mary Mcleod Bethune Center, regarding an allegation that the defendant "almost hit" Ms. bronson with the side mirror of the vehicle he was operating while leaving the parking area. The discussion became heated as the defendant denied the allegations. As words we're exchanged the defendant admits he became angry and called Ms. Bronson a "bitch". Testimony was given during trial by Ms. Bronson, and the defendant, that the defendant collected himself and offered apologies to Ms. Bronson for calling her a "bitch", however; he continued to deny the allegation. At that point Ms. Bronson testified during trial that she was not accepting any apologies and stated to the defendant, "I got something for you". At that point the defendant got into his vehicle and left the area in an effort to locate his wife, (the business owner), to ask her to come to the office and intervene in the situation. Being unable to locate his wife in a short amount of time, the defendant returned to the office to pick up payroll checks. He had intended to reoffer his apology to Ms. Bronson and attempt to resolve the situation. Upon his return, (approx. 5 minutes later) Ms. Bronson had placed a phonecall to her husband (the decedant), who had arrived at the office with another male accomplice, with the expressed intent of stated, "whooping the defendants ass". The decedant came out into the middle of the street and hailed the defendants vehicle by using his body to block the road. Upon verbal confrontation, the defendant again attempted to apologize for calling Ms. Bronson a "bitch". The decedant who was now at the defendants drivers side window, stated; "It's too late for all that, you done crossed the line". At that point the decedant reached into the defendants vehicle and began to physically assault him by striking him in the face. The decedant was then notified by Ms. Bronson that his actions we're causing traffic to back up in the street, taking notice of a U.P.S. truck immediately behind the defendants vehicle, he backed off. At that point the defendant noticed that the decedants accomplice had circled his vehicle and was attempting to gain access from the passengers side. The defendant took that opportunity to pull away from his attackers. He turned his vehicle around in the parking lot at the end of the street and parked on the opposite side of the street in front of his office. At that point the decedants accomplice testified

that they had a discussion about what their intentions were regarding the defendant and approached the defendant's vehicle again. Upon this second approach the decedant was on the passenger's side and the accomplice was on the driver's side. The confrontation resumed and at that time the decedant placed the upper portion of his body inside the vehicle's window. (stated) The defendant tried again to apologize and told the decedant he did not want to fight. The decedant then stated, "If you don't get out and fight, then I'm going to blow your head off right here". At that point the decedant reached behind his back as if to produce a weapon. The defendant reacted to the decedant's actions, reached between his seat, produced a weapon and fired one shot in the decedant's direction. He then turned his weapon on the accomplice who had started to retreat towards the decedant's vehicle where the hatchback stood ajar. Fearing that the accomplice was attempting to retrieve a weapon from that vehicle the defendant trained his weapon on the accomplice who then stopped and took cover behind another vehicle, yelling out; "I don't have anything cuz, I don't have a gun". Seeing that the accomplice was unarmed the defendant returned to his vehicle and left the scene. The defendant drove to his other place of business, exchanged vehicles and retrieved his phone. He immediately called an attorney who told him to call her back in ten minutes and she would assist him in turning himself in to the police. The defendant approached his home and found that law enforcement was already there, defendant approached and was taken into custody without incident. At the arrest site defendant was given a gunshot residue test and was swabbed for blood evidence that was on his person. The firearm was not retrieved and the defendant was escorted back to the scene to point out to law enforcement where he allegedly had discarded the weapon. After that the defendant was taken to the police station where he was read his rights and requested to call his lawyer. Being unable to contact his lawyer, the defendant was again requested by detectives to give a statement. At that point the defendant was informed that the party in which he had shot was deceased and the detective's original statement reflects the defendant's response to the fact that Mr. Bronson had died, it is a statement of both shock and remorse, and was not introduced at trial. The defendant was convicted of both premeditated and intentional murder, and felonious assault with an approximate cause of death and challenges the weight of those convictions based on the evidence adduced at trial.

**STATEMENT OF THE FACTS**

**PROCEDURAL HISTORY:**

On Feb. 23, 2010 a jury trial was held naming the defendant, Thomas J. Lampley as the accused perpetrator of four felony charges:

Count 1: Purpose and Intentional Murder; with a gun spec.

Count 2: Felonious Assault w/ approx. cause of death; with a gun spec.

Count 3: Weapons under disability

Count 4: Tampering w/ evidence.

Wherein and throughout the trial the affirmative defense of self-defense was raised on behalf of the defendant.

On Feb. 26, 2010 the jury returned a verdict of guilty on all four counts of the indictment, and on Mar. 02, 2010 the defendant was sentenced to:

Count 1: 15 years to life, plus a mandatory gun spec. of 3 years.

Count 2: Was merged.

Count 3: Max term of 5 years.

Count 4: Term of 2 years.

All to be served consecutively to reach an accumulated total of 25 years to life. On Mar. 10, 2010 the defendant appealed his conviction and on Mar. 25, 2010 Attorney R. Joshua Brown was appointed by the court to represent defendant in that appeal.

Between the date of appointment, (3-25-10 and 9-07-10) the attorney requested and was granted three extensions to file a brief on the defendants behalf. Finally on Sept. 07, 2010 the attorney was notified by the court that no further extensions would be granted and that the merit brief must be filed by Sep. 20, 2010. By this date the merit brief still was not filed and as a result of counsels performance the court dismissed the defendants appeal on Oct. 29, 2010.

At that point the attorney had made no effort to respond to numerous attempts to contact him. In mid November the defendant was transferred to his parent institution and made several more attempts to contact counsel. Finally on Jan. 24, 2011 the defendant asked his case manager to allow him to review his docket and discovered that his appeal had been dismissed. The defendant immediately filed (2) Pro-se motions requesting that his appeal be reinstated and that new counsel be appointed, citing counsels ineffectiveness under the guide lines of App. Rule26(B).....

Those motions were filed on Jan. 28, 2011. Only after counsel became aware of those motions did he file a motion to reopen the defendants appeal and request that he submit a brief instant, however; in this motion counsel misinformed the Court, and misrepresented the States position of objection to the reopening of the defendants appeal.

On Feb. 16, 2011 the Court granted the attorneys motion without allowing the State the thirty days required under rule 26(B) to respond. As a result on Mar. 01, 2011 the state filed an application for reconsideration, and subsequently on Mar. 14, 2011 the defendant also filed an application for reconsideration and registered a notice of griveance against counsel.

On Mar. 14, 2011 the Court denied the States application and as of this time still has not ruled on the defendants Pro-se motion for reconsideration.

In spite of the griveances filed and the vigorous objections by both the State and the defendant, the attorney was allowed to further represent defendant and was scheduled to conduct oral arguments on Jun. 09, 2011.

On Aug. 02, 2011 the Courts opinion affirmed the defendants conviction, citing that the defendant was not entitled to a jury instruction on manslaughter, which was the sole error of assignment raised in the brief by counsel.

It is that opinion, and the Courts judgement and application of Law that the defendant now raises on appeal.

## PROPOSITION OF LAW : #1

### DID APPELLATE COURT EXHIBIT AN ABUSE OF DISCRETION:

#### **By reinstating deficient counsel;**

1. If State chooses to dismiss an appeal because an incompetent attorney has violated local rules it may do so if such action does not intrude upon clients Due Process rights. The State acted upon that right on 10-29-2010 when it dismissed clients appeal because appointed counsel had failed to submit a merit brief on the clients behalf. The local Appellate rule in itself can not be implemented unless the Court exercises a significant discretionary element and finds grounds to support its action. In this case it cited counsels incompetency in failing to file the required brief as the primary cause for the dismissal of the appeal.

The Ohio Constitution requires that at least one appeal as of right be allowed in all cases, civil or criminal and the criminal defendant had not previously had an adequate opportunity to present his claims fairly in the context of the States appellate process. It follows that for purposes of analysis under the Due Process clause that the appeal was an appeal of right and the dismissal did in fact intrude upon the clients Due Process rights. The client then sought as a remedy the opportunity to file an application for re-opening under Appellate Rule 26(B), which stipulates the criteria set forth for granting an application to reopen; one of those criteria is raising a colorable claim of ineffective assistance of counsel. On 01-28-11 the appellant in Pro-Se capacity filed such an application and requested that new competent counsel be appointed. Understanding that the right to appellate counsel is limited to the first appeal of right, and that the attorney need not advance every argument, regardless of merit urged by the appellant, but that it is a necessity that the attorney be available to assist in preparing and submitting adequate breifs to the Appellate Court, and that attorney must play the role of an active advocate rather than a mere appointee of the Court assisting in a detached evaluation of the appellants claims. The Constitutional guarantee to effective assistance of counsel applies to every criminal prosecution regardless of whether counsel is retained or appointed, and a State may not extinguish an appeal of right because another right, the right to effective counsel has been violated. The Constitution holds that an appeal of right has not been

adjudicated in accordance with Due Process of Law if the appellant does not have effective assistance. U.S.C.A. 6,14,

LAW:

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant effective assistance of counsel on his first appeal of right. Nominal representation does not suffice to render the proceedings constitutionally adequate; a person whose counsel is unable to provide effective representation is in no better position than a person who has no counsel at all. The promise of *Douglas V. California*, 372 U.S. 335 that a criminal defendant has the right to counsel on his first appeal of right would be a futile gesture unless it comprehended the right to effective assistance of counsel.

The question then is whether the Appellate Court was unreasonable, arbitrary, and unconscionable when it executed a futile gesture in reinstating counsel who had already proven to be incompetent in his actions to further represent client in his appeal?

## PROPOSITION OF LAW #2

### DOES APPELLATE COUNSELS DEFICIENT PERFORMANCE RENDER HIM INEFFECTIVE:

When that performance falls below an objective standard;

1. In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal the appellant must face an adversary proceeding that-like a trial-is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant-like an unrepresented defendant at trial, is unable to protect the vital interest at stake. To be sure, respondent did have nonminal representation when he brought the appeal. But nonminal representation on an appeal as of right-like nominal representation at trial does not suffice to render the proceedings constitutionally adequate. A first appeal as of right therefore, is not adjudicated in accord with Due Process of Law if the appellant does not have the **effective assistance** of counsel. This result is hardly novel - the petitioners in both **Anders v. California** 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed 2d 493(1967) and **Entsminger v. Iowa** 386 U.S. 738,S.Ct. 1402, claimed that although represented in name by counsel, they had not received the type of assistance constitutionally required to render the proceedings fair. In this case the appellant never received any assistance from counsel, the only action taken on his behalf was the filing of three extension, which in effect was done to continue to postpone the preparation of the necessary brief. This merely postponed the appellant from raising his claims in appellate court. The attorney never responded to the appellants phone calls or letters during that time and upon exhaustion of the final extension, the attorney neglected his responsibility altogether and did not attempt to contact appellant and inform him of the dismissal of his appeal at all. Four months later the attorney unlawfully filed motions without once conferring with the appellant. All attorneys are bound by a code of ethics, and rules of conduct. They are also bound to perform within the appellate rules established by the Court. To allow counsel to disobey these rules with a total disdain for his client and the rules of the Court, allows counsel to operate with impunity and disregard for the credibility of the justice system as a whole.

The question is whether the accumulative effects of the procedural defaults accredited to counsels performance had a prejudicial effect on the overall confidence in the appeal process?

When the sole assignment of error raised on appeal is meritless because it is contrary to the line of defense.

2. When an attorney does not permit himself adequate time to do a conscientious review of the record, research of the Law, and the marshalling of arguments on the clients behalf, and files a brief instanter as a final requirement of the Court to meet procedural compliance, he has not met the guarantee to effective counsel, and only acted at all because of mere formal appointment to the case. *Avery v. Alabama*, 308 U.S.444,446, 60 S.Ct.321,322, 84 L.Ed.377(1940). Counsel must play the role of a expert professional whose assistance is necessary to the legal system for the defendant to obtain a decision at all. In this situation counsels failures were so egregious that it essentially denied appellant an opportunity to raise a case on the merits of his conviction. In this sense it is diffucult to distinguish appellants situation from that of someone who had no counsel at all. The sole assignment that was raised in the appeal was completely contrary to the defense raised at trial and could not possibly be granted in context of the Law, any expert professional would be able to identify the contradictions and would not raise a frivolous argument. The defendant claimed self-defense throughout his trial and to raise an argument that defendant was not afforded a jury instruction on manslaughter is not an effort to establish innocence or rebut the conviction, but in fact; is an admission of guilt. The attorney never conferred with his client and had no legal or ethical grounds to make that admission.

The question then is whether or not the attorney raised a meritless issue to satisfy the demand of the Court to produce a brief instanter, and whether this hasty attemp to meet that demand diminished the effectiveness of his representation of the appellant?

PROPOSITION OF LAW: #3

DID DEFENDANTS CONVICTION EXCEED THE MANIFEST WEIGHT OF THE EVIDENCE  
AND VIOLATE DUE PROCESS OF LAW:

By placing an unconstitutional burden of proof upon the defendant;

1. The Ohio Supreme Court held in a case involving the affirmative defense of self-defense, the defendant has only the burden of going forward with evidence of a nature and quality sufficient to raise that defense, and does not have the burden of establishing such defense by a preponderance of the evidence. O.R.C.2901.05(A)(B1)&(B2)

A state may not draft its homicide statutes in a manner as to place upon the defendant the burden of proving or disproving an element of the offense. In this case the defendant met the burden of producing evidence that several mitigating factors were present at the time of the offense, and established three of the criteria sufficient to raise the self-defense claim. The evidence in the record supports defendants claims that:

1. The decedent was the aggressor.
2. The decedent had stated that his specific intent was to cause physical bodily harm to the defendant.
3. The decedent had forcibly entered defendants personal vehicle. (via the window)

This alone establishes by the preponderance of the evidence that **provocation** and **emotional stress** were present when the incident occurred. According to O.R.C. 2903.12 the Court must consider the emotional and mental state of a defendant and the conditions and circumstances that surrounded him at the time. According to O.R.C.2901.05(C)(2) an affirmative defense is raised when a defendant does not deny involvement in the incident, but infers that his actions involve an excuse or justification. In so the defendant met the burden of production or persuasion for asserting a self-defense claim. In the cases of *St. v. Robinson* (1976)47 OH.St.2d 103, 351 N.E. 2d 88 and *St. v. Muscatello* (1978) 55 OH. St. 2d 201, 378 N.E. 2d 738, both Courts chose not to place the burden upon a defendant who sets forth a mitigating circumstance. When a self-defense claim is raised the trial judge should evaluate the evidence in the light most favorable to the defendant without weighing the evidence. *St. v. Wilkins*(1980) 64 OH. St. 2d 382,388, 415 N.E. 2d 303,308; The defendant need only to produce

evidence that provocation was occasioned by the decedent, and that he acted under influence of a sudden passion or a sudden fit of rage; either of which was brought on by the provocation of the decedent. **St. v. Rhodes** 590 N.E.2d 261. Placing the burden of production does not require the defendant to disprove any element of the charged offense of murder, it allows him to establish by a preponderance of the evidence that mitigating circumstances were responsible for his criminal culpability during the commission of the offense. Evidence of one or more mitigating circumstances entitles the defendant to an instruction on voluntary manslaughter.

**St. v. Deem** (1988) 40 OH. St.3d 205,.

Requiring the defendant to prove mitigation negates the element that separates murder from manslaughter by the statutes set forth in the Ohio Revised Code and allows the prosecution to avoid the burden of proving the elements necessary to obtain a conviction on murder in violation of Due Process of Law. **St. v. Shane** 590 N.E.2d 272 OH. (1992). By establishing that mitigating circumstances existed, these factors mitigate the defendant's criminal culpability and the jury must be allowed to weigh the evidence in mitigation. **Winship** (1970) 397 U.S.358, 90 S.Ct. 1068, 25 L.E.d 2d 368, In order for a jury to accomplish this the trial court must give them the full and complete instructions relevant and necessary to weigh the evidence and discharge its duty as the fact-finder. If under any reasonable view of the evidence it is possible to find the defendant guilty of a lesser offense an instruction on the offense must be given. Where the evidence would support a verdict of a lesser offense included in the greater offense, it is a prejudicial error to refuse a defendant's request to instruct the jury that it may convict defendant of a lesser offense. **St. v. Neeley** 2006 OH. 418. As a defendant has a right to have all elements of a case subject to explicit findings by a jury. **St. v. Bridgeman** 51 OH. App. 2d 105, 366 N.E. 2d 1378(1977).

First the trial court erred in failing to instruct jury on the manslaughter statute. Generally a requested jury instruction should be given if they are a correct statement of the Law. Despite a specific request from counsel the court rejected counsel's request, thereby; denying the defendant the ability to seek the charge in violation of Due Process of Law. U.S.C.A. Sixth Amend.

Secondly, the trial court deprived the defendant of a proper

self-defense instruction by failing to instruct the jury that the absence of self-defense is not an element of murder, **St. v. Davis**; and that the prosecution must still prove every element of a crime. **Patterson** 432 U.S.L.e 2d at 280. and failure to give a jury instruction is a Plain Error. **St. v. Underwood** (1983) 3 OH. St.3d - 444 N.E. 2d 1332.

In **Patterson** the U.S. Constitution establishes that the prosecution must prove every element of a charged offense. The trial court did not give any instruction to the jury regarding the prosecutors burden of proof because the affirmative defense of self-defense was raised by the defendant. According to the Ohio Revised Code, two elements must be proven beyond a reasonable doubt to warrant a conviction on murder under **O.R.C. 2903.02**

1. **Prior calculation and design**, when seeking a charge of aggravated murder.
2. **Malice aforethought or premeditation**, when seeking a charge of felony murder.

When there is no evidence of these elements a jury instruction must be submitted. Throughout the testimony the prosecution never established any evidence of these elements and the weight of the evidence leans more towards a sudden quarrel or altercation that ended in an unfortunate shooting.

**O.R.C. 2901.22** addresses culpable mental states and defines;  
Purposely as a specific intent to cause a certain result. and also;  
Knowingly as being aware that conduct will probably cause a certain result.

At no time does the prosecutions case establish that the defendant showed a specific intent to kill the decedent, and if the case was before meaningful adversarial testing the prosecutor would have had to rebut the statement of his lead Detective, who in his initial statement quoted the defendant as stating, "I didn't mean to kill that man, he got called down here for something stupid." this statement was not used during trial by trial counsel and shows that the defendant not only did not intend to kill the decedent, but was not even aware that the party was deceased until he was informed by the detective as part of an effort to obtain a statement from the defendant.

The evidence however does establish defendants claims that:

1. He attempted to neutralize the situation by first apologizing to the decedants spouse and then the decedant himself.

Her response was that she was not accepting any apologies and that

she had something for the defendant. The decedants response was that the defendant had crossed the line and initialized the element of physical violence into the scenario.

2. He believed he was immanent danger after being hailed down and assaulted by a 33 year old who was accompanied by a 22 year old with a specific intent to inflict harm on the defendant.
3. He did not violate his duty to retreat as he refused to exit his personal vehicle and decedent entered that personal space. The defendant has also established that he was at his place of business as the owner of the property was his wife.

The question then is whether trial counsels failure to establish the self-defense claim automatically warrants a conviction on purposed and intentional murder, or does the defendants conviction exceed the manifest weight of the evidence adduced at trial, and does trial courts failure to give full and complete proper jury instructions violate Due Process of Law.

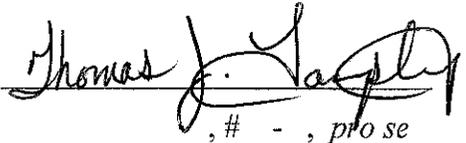
In this case the Appeal Courts ruling stipulates that a defendant who raises the self-defense criteria is bound to a finding of guilt or innocence and there is no allowances in the Law for mitigation.

Does the Ohio Supreme Court hold that same interpretation of the legislative intent on the affirmative defense of self-defense?

**CONCLUSION**

This case raises a substantial constitutional question, involves a felon and is one of great public or general interest. Review should be granted in this case.

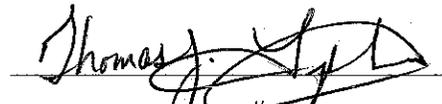
Respectfully Submitted,

  
# - , pro se

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Leavittsburg, OH 44430

**CERTIFICATE OF SERVICE**

I hereby certify a copy of the foregoing Memorandum in Support of Jurisdiction has been sent by U.S. mail to the prosecuting attorney of Richland County on this 9<sup>th</sup> day of September, 2000 11, at the following address 38 S. PARK ST  
Mansfield, OH. 44902

  
# 582-243 , pro se

COURT OF APPEALS  
RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

COURT OF APPEALS  
RICHLAND COUNTY OHIO  
FILED

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STATE OF OHIO

Plaintiff-Appellee

-vs-

THOMAS J. LAMPLEY

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P. CLERK  
Hon. Sheila G. Farmer, J.  
Hon. Julie A. Edwards, J.

LINDA H. FRARY  
CLERK

Case No. 10CA30

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Richland County Common  
Pleas Court, Case No. 09-CR-650D

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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*Hoffman, P.J.*

{¶1} Defendant-appellant Thomas Lampley appeals his conviction entered by the Richland County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

#### STATEMENT OF THE FACTS AND CASE

{¶2} On August 28, 2009, Appellant was employed at the Mary McLeod Bethune Center ("MBCC") owned by his wife. On that day, Appellant and his wife became involved in an argument, during which Appellant operated a vehicle in the MBCC parking lot coming close to and almost hitting LaShona Bronson who was also an employee of MBCC and an acquaintance of Appellant. A dispute then arose between Bronson and Appellant as to how close Appellant was to hitting her, and Appellant called Bronson a "bitch." Bronson telephoned her husband, David Jermain Bronson, aka J.B. Bronson. She then told Appellant "We going to have somebody to take care of you" and "We got something for you." J.B. subsequently came to the parking lot, but Appellant had already left the scene.

{¶3} When Appellant returned to the MBCC parking lot, he encountered LaShona Bronson and her husband, J.B., who approached Appellant at the vehicle Appellant was driving. An altercation ensued. Appellant maintains J.B. approached the vehicle and began striking Appellant through the open window. J.B.'s friend, Danny McClain, had accompanied J.B. to the parking lot, and was outside the vehicle on the driver's side. Appellant accessed a firearm stored in the MBCC's van, and used the firearm to shoot and fatally wound J.B.

{¶4} Appellant was indicted by the Richland County Grand Jury on four counts: murder, in violation of R.C. 2903.02(A), with a firearm specification; murder, in violation

of R.C. 2903.02(B), with a firearm specification; having a weapon under disability, in violation of R.C. 2923.13(A)(2); and tampering with evidence, in violation of R.C. 2921.12(A)(1).

**{¶15}** A jury trial commenced on February 23, 2010, and the jury returned a verdict of guilty on all four counts. The jury also returned a finding of guilt on the firearm specifications.

**{¶16}** The trial court imposed a sentence of fifteen years to life imprisonment on count one, merging counts one and two. The court also imposed a five year sentence on count three and a two year sentence on count four, to be served consecutively. An additional three year mandatory consecutive prison sentence was imposed for the firearm specifications, for a total sentence of twenty-five years to life.

**{¶17}** On March 10, 2010, Appellant filed a notice of appeal with this court in Case No. 10-CA-30. Subsequently, on April 26, 2010, Appellant filed a petition to vacate or set aside his sentence in the trial court.

**{¶18}** On August 10, 2010, the trial court overruled Appellant's petition for post-conviction relief. On October 29, 2010, this Court dismissed Appellant's direct appeal for failure to prosecute because Appellant failed to submit a brief.

**{¶19}** Appellant appealed the trial court's August 10, 2010 denial of his motion for post-conviction relief. Via Judgment Entry of March 9, 2011, this Court affirmed the trial court's denial of the motion for post-conviction relief.

**{¶10}** Appellant now appeals his conviction, assigning as sole error:

**{¶11}** "I. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER."

{¶12} The decision to give a jury instruction is within the trial court's sound discretion. *State v. Wolons* (1989), 44 Ohio St.3d 64, 541 N.E.2d 443. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶13} "A criminal defendant has a right to expect that the trial court will give complete jury instructions on all issues raised by the evidence." *State v. Williford* (1990), 49 Ohio St.3d 247, 251, 551 N.E.2d 1279. In *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph three of the syllabus, the Supreme Court of Ohio explained lesser included offenses as follows:

{¶14} "3. An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense."

{¶15} "Even though an offense may be statutorily defined as a lesser included offense of another, a charge on such lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of the syllabus.

{¶16} Appellant was convicted of murder, in violation of R.C. 2903.02(A) and (B), which read,

{¶17} "(A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

{¶18} "(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code."

{¶19} Appellant argues the jury should have been instructed on the lesser included offense of involuntary manslaughter as defined in R.C. 2903.04,

{¶20} "No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony.

{¶21} "No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a misdemeanor of any degree, a regulatory offense, or a minor misdemeanor other than a violation of any section contained in Title XLV of the Revised Code that is a minor misdemeanor and other than a violation of an ordinance of a municipal corporation that, regardless of the penalty set by ordinance for the violation, is substantially equivalent to any section contained in Title XLV of the Revised Code that is a minor misdemeanor."

{¶22} In *State v. Wilkins* (1980), 64 Ohio St.2d 382, the Supreme Court set forth the test as follows,

{¶23} "If the evidence adduced on behalf of the defense is such that if accepted by the trier of fact it would constitute a complete defense to all substantive elements of

the crime charged, the trier of fact will not be permitted to consider a lesser included offense unless the trier of fact could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which, by themselves, would sustain a conviction upon a lesser included offense.

{¶24} “The persuasiveness of the evidence regarding the lesser included offense is irrelevant. If under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given. The evidence must be considered in the light most favorable to defendant.”

{¶25} In *State v. Fox* (1972), 31 Ohio St.2d 58, the Ohio Supreme Court held,

{¶26} “In *State v. Nolton* (1969), 19 Ohio St.2d 133, 249 N.E.2d 797, this court held that if the evidence adduced on behalf of the defense is such that if accepted by the trier of the facts it would constitute a complete defense to all substantial elements of the crime charged, the trier will not be permitted to consider a lesser included offense.

{¶27} “In this case, the evidence presented by the state showed only that the deceased was sitting in the bar drinking beer with three women, when the defendant came up behind him, asked if the deceased were looking for him, and then shot him as he turned around.

{¶28} “The evidence presented by the defense was that the deceased had a bad reputation, was drunk, and was going to force the defendant to keep drinking with him. When the defendant refused, the deceased became hostile, threatened him, called him

names, and came after him with a knife. The defendant backed up to the door and then shot only in self-defense when the deceased kept coming.

{¶129} "If the prosecution's evidence is believed and the defense evidence disbelieved, there is only an unprovoked attack, which is clearly purposeful and malicious. If the defense is believed and the prosecution disbelieved, then there is clearly self-defense and no crime at all. Thus, the trier of the facts could not reasonably find against the state and for the accused upon any one or more of the elements of the crime charged and against the accused on the remaining elements. Therefore, a charge on the lesser included offense is not warranted, and an instruction on the lesser included offense in such an instance permits the jury to unnecessarily speculate on a compromised verdict. See *State v. Loudermill* (1965), 2 Ohio St.2d 79, 81, 206 N.E.2d 198; *Bandy v. State* (1921), 102 Ohio St. 384, 131 N.E. 499.

{¶130} "As stated in the alternative by the court in *State v. Nolton*, 19 Ohio St.2d at page 135, 249 N.E.2d at page 799:

{¶131} "On the contrary, if the trier could reasonably find against the state and for the accused upon one or more of the elements of the crime charged and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense, then a charge on the lesser included offense is both warranted and required, not only for the benefit of the state but for the benefit of the accused."

{¶132} At the trial herein, Appellant argued the affirmative defense of self defense. Appellant's argument to the jury was he shot J.B. in self defense; therefore, if believed, the evidence would support an acquittal on both the charges of murder and

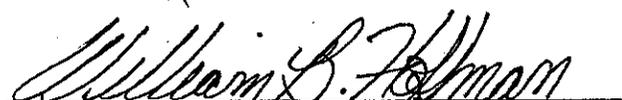
the involuntary manslaughter lesser included offense. Based upon the case law set forth above, we find the trial court did not err in electing not to instruct the jury on the lesser included offense of involuntary manslaughter. Further, upon our review of the record, the evidence at trial was sufficient to sustain a conviction on the offense of murder; therefore, the trial court did not err in its instructions to the jury.

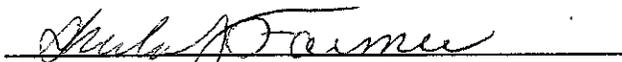
{133} Appellant's conviction in the Richland County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Edwards, J. concur

  
HON. WILLIAM B. HOFFMAN

  
HON. SHEILA G. FARMER

  
HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

COURT OF APPEALS  
RICHLAND COUNTY OHIO  
FILED

2011 AUG -2 AM 9:24

STATE OF OHIO

Plaintiff-Appellee

-vs-

THOMAS J. LAMPLEY

Defendant-Appellant

LINDA H. FRARY  
CLERK

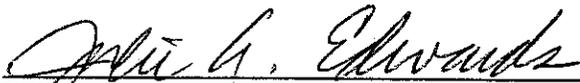
JUDGMENT ENTRY

Case No. 10CA30

For the reason stated in our accompanying Opinion, Appellant's conviction in the Richland County Court of Common Pleas is affirmed. Costs to Appellant.

  
HON. WILLIAM B. HOFFMAN

  
HON. SHEILA G. FARMER

  
HON. JULIE A. EDWARDS

IN THE SUPREME COURT OF OHIO

11-1737

STATE OF OHIO,

Plaintiff-Appellee,

-VS-

Thomas J. Lampley ,

Defendant-Appellant,

On appeal from the Richland  
County Court of Appeals, 5th,  
Appellate District

Court of Appeals  
Case Number 2010 CA 0030

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NOTICE OF APPEAL OF APPELLANT Thomas J. Lampley

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Thomas J. Lampley

P.O. Box 901

Leavittsburg, Oh. 44430

Trumbull Corr. Inst.

DEFENDANT-APPELLANT, PRO SE

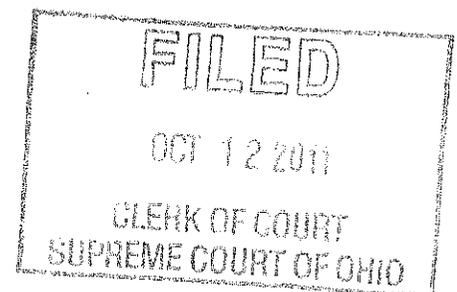
James Meyer Prosecutor

38 S. Park St.

Mansfield, Oh. 44902

Richland County

COUNSEL FOR APPELLEE, STATE OF OHIO

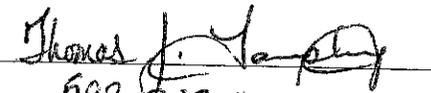


NOTICE OF APPEAL OF APPELLANT Thomas J. Lampley

The appellant hereby gives notice of appeal to the Ohio Supreme Court of Ohio from the judgment of the Richland County Court of Appeals, 5th Appellate District, entered in the Court of Appeals case number 2010 CA 0030n Aug. 2nd, 2000 11

This case raises a substantial constitutional question, involves a felony, and is one of great public or general interest.

Respectfully Submitted,

  
582-243, # - , *pro se*  
T.C.I. P.O. Box 901  
Leavittsburg, OH 44430

**CERTIFICATE OF SERVICE**

I hereby certify a copy of the foregoing Notice of Appeal and Motion for Delayed Appeal has been sent by U.S. mail to the prosecuting attorney of Richland County on this 5th day of October, 2000 11 at the following address 38 S. Park St. Mansfield, Oh. 44902

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582-243 - , *pro se*

## STATEMENT OF PROPOSITIONS OF LAW TO BE ARGUED ON APPEAL

~~If this Court grants the delayed appeal I would raise the following propositions of law in~~  
Memorandum in Support of Jurisdiction.

1. Abuse of Discretion by Appellant Court
2. Ineffective Assistance of Appellant Counsel
3. Self-Defense-Mitigation Argument

IN THE SUPREME COURT OF OHIO

STATE OF OHIO )  
 ) SS: AFFIDAVIT IN SUPPORT OF REASON FOR DELAY  
Richland COUNTY)

I, Thomas J. Lampley, do solemnly swear, after being duly cautioned as required by law, that the following statements are true to the best of my knowledge and beliefs. I was unable to file an appeal to this Court within forty-five (45) days of the Court of Appeals decision for the following reasons: The Appellant did in fact file a timely appeal; which was received by the Clerk of Court on September the 15th, however; the appellant failed to attach a copy of the court decision with the notice of appeal and the memorandum in Support of Jurisdiction. On September 29th, the Appellant received notice from the Clerk that the court decision was not attached.

Thomas J. Lampley  
Affiant-Appellant, *pro se*

Sworn to, or affirmed, and subscribed in my presence this 4<sup>th</sup> day of October, 2011.



MARK S. BURSON  
Notary Public, State of OH  
My Commission Expires 10/06/2013

Mark S. Burson  
Notary Public

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 Plaintiff-Appellee, :  
 vs. : Case No.  
 THOMAS J. LAMPLEY, :  
 Defendant-Appellant. :

**AFFIDAVIT OF INDIGENCY**

I, Thomas J. Lampley, do hereby state that I am without the necessary funds to pay the costs of this action for the following reasons:

I am currently incarcerated at the Trumbull Correctional Institution and I have been incarcerated since March 5, 2010. I work at the prison but receive only 19.00 dollars per month.

Pursuant to Rule 15.3(A), of the Rules of Practice of the Supreme Court of Ohio, I am requesting that the filing fee and security deposit, if applicable, be waived.

*Thomas J. Lampley* #582-243  
 THOMAS J. LAMPLEY - #582-243

Sworn to, or affirmed, and subscribed in my presence this 23<sup>rd</sup> day of August, 2011.



MARK S. BURE  
 Notary Public, State of  
 My Commission Expires 10/06/2013

*Mark S. Bure*  
 Notary Public  
 My Commission Expires: 10/06/2013

[Note: This affidavit must be executed not more than six months prior to being filed in the Supreme Court in order to comply with S. Ct. Prac. R. 15.3(A). Affidavits not in compliance with that section will be rejected for filing by the Clerk.]