ORIGINAL

IN THE SUPREME COURT OF OHIO

ISLAM AL-DIN ALLAH (FKA ODRAYE JONES) / APPELLANT, /	DEATH PENALTY CASE, DIRECT APPEAL NO. 98-1483
v. /	
STATE OF OHIO, / APPELLEE /	

MOTION FOR RELIEF FROM JUDGMENT, 60 (B)(5)

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MEMORANDUM IN SUPPORT

1. It is clear that there is no signature on exhibit #1 to indicate this complaint's filing. There is no court's authorization of any cause of action for aggravated robbery. The Ashtabula Municipal Court's jurisdiction is/ was non-existent. **Ohio Crim. R. 3; Ohio Crim. R. 4 (A)(1); Ohio Crim. R. 12 (B); COLUMUS v. JACKSON (1952), 93 Ohio App. 516.**

2. There's no signature of any deponent. This complaint is invalid under Ohio and Federal law. Any criminal proceedings based upon such documents is violative of Due Process and Fourth Amendment jurisprudence. Petitioner's "conviction" was based upon these complaints and is void, a nullity. The complaint is the jurisdictional instrument in a criminal case. The lack of a valid complaint precluded Ashtabula Municipal Court from exercising jurisdiction over the subject-matter.

3. There was no crime. There was no probable cause for a warrant to issue. **Crim. R. 3, Crim R. 4 (A) (1); GIORDENELLO v. UNITED STATES, 357 U.S. 480; WHITELY v. WARDEN, 401 U.S. 560 (1971).** Warrant did not exist and William D. Glover Jr. did not have authority to arrest the Petitioner and was acting outside of statutory and constitutional authority. **Crim. R. 2 (J).**

4. The Petitioner was denied counsel at critical stages of the proceedings. **VAN v. JONES, 475 F.3d 292; AVERY v. ALABAMA, 308 U.S. 444, 446; GIDEON v. WAINWRIGHT, 372 U.S. 335.** Any evidence recovered pursuant to the void process was subject to automatic exclusion upon challenge. **WONG SUN v. UNITED STATES**

(1963), 371 U.S. 471; SEGURA v. UNITED STATES, 468 U.S. 796.

5. Aggravated robbery was not properly charged in the indictment, submitted to a jury and proven beyond a reasonable doubt, in violation of **APPRENDI v. NEW JERSEY, 530 U.S. 466, 490 (2000).** Nor was a reasonable doubt instruction given on aggravated robbery, in violation of **SULLIVAN v. LOUISIANA, 508 U.S. 275, 278, 113 S.Ct. 2078 (1993)**, a structural error.

6. Absent these errors, and others, Petitioner would not have been "convicted" of the charge. **SCHLUP v. DELO, 513 U.S. 298.** There would have been no evidence to consider.

CLAIM FOR RELIEF I.

THE ASHTABULA MUNICIPAL COURT LACKED SUBJECT-MATTER JURISDICTION TO ISSUE A WARRANT FOR THE PETITIONER'S ARREST WITHOUT A CRIMINAL COMPLAINT BEING FILED, RESULTING IN AN UNREASONABLE SEARCH AND SEIZURE AND CONVICTION BY INCOMPETENT, INADMISSIBLE EVIDENCE AND PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHO FAILED TO OBJECT TO UNCONSTITUTIONAL PROCESS.

7. Defendant incorporates, by reference, paragraphs 1-6 and 22-56. There is no cause of action absent a valid complaint being filed. There is no probable cause without it. There is no offense against the laws of the United States. Where the state is precluded by the United States Constitution from haling a defendant into court on a "charge," federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty. **BLACKLEDGE v. PERRY, 417 U.S.**

21, 94 S.Ct. 2098. (quotation marks added); **JOURNIGAN v. DUFFY, 552 F.2d 283**

8. The state's theory of aggravated murder with prior calculation and design begins with (1.) a supposed aggravated robbery; (2.) William D. Glover was supposedly attempting to arrest Petitioner on a warrant for aggravated robbery; (3.) Petitioner supposedly killed Glover ***for the purpose*** escape detection, apprehension, trial, or punishment of aggravated robbery, (Ex.#2). Aggravated robbery was the ***causa sine qua non*** of the state theory of aggravated murder with prior calculation and design.

9. The Ashtabula Municipal Court never had jurisdiction of the aggravated robbery. That court could not issue a warrant, nor bind the case over (transfer jurisdiction) to the Common Pleas Court. The logical extension is: the elements of the charge pertaining to it are void, including the charged theory aggravated murder with prior calculation and design. Guilt is a legal impossibility. The invalidity of the element of aggravated robbery is fatal to the state theory of aggravated murder. **STATE v. LIBERATORE (1983), 4 OHIO ST. 3d 13; WATSON v. JAGO, 558 F.2d 330.** A new trial on that charge is barred. **LIBERATORE.** The predicate/precedent for prior calculation and design/aggravated murder has been dismissed, (Ex.#3, Ex.#4). The state had a constitutional burden to convict the Petitioner on those elements and did not.

10. The indictment for aggravated robbery was separate from the indictment for aggravated murder. Trial was scheduled after the murder trial, in a different court (Judge Mackey's) and dismissed (Ex.#4). The trial court of judge Vettel did not have jurisdiction over the aggravated robbery "charges" for that reason, as well. The Rule 29 motion

should have been granted (Tr. 2863, 2964, 2965, 2980).

11. The defendant has discovered that the complaint was not sworn to, i.e. there is no deponent/officer's signature at the proper place on the form. (Ex.#1). There is no signature of anyone authorized by law to administer oaths, such as clerk, deputy clerk, or judge. (Ex.#1). **CRIM. R. 3.** This "complaint" was not filed according to **CRIM. R. 12 (B)**.

12. There is no indication the documents were intended to be filed or presented to anyone for authorization of cause of action, given the alleged dates of the robberies (Oct. 18th and Nov. 9th 1997) and when defendant was approached on Nov. 17, 1997. There was plenty of time to file/submit "complaints." Failure to comply with **CRIM. R. 3** precluded the possibility of a valid warrant issuing under **CRIM. R. 4 (A) (1), SECTION 14 ARTICLE 1, OHIO CONSTITUTION,** Fourth, and Fourteenth Amendment jurisprudence as established by the United States Supreme Court. **WHITELY v. WARDEN, 401 U.S. 560 (1971); GIORDENELLO v. UNITED STATES, 357 U.S. 480; OVERTON v. OHIO, 534 U.S. 982.**

13. In the absence of a valid criminal complaint, there could be no probable cause that a crime had been committed or that the defendant committed it. Such determination violates Due Process. Warrants can only be issued by a neutral and detached magistrate, who is not a rubber-stamp for police, to survive a Fourth Amendment challenge. **JOHNSON v. UNITED STATES (1948), 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436; UNITED STATES v. LEON, 468 U.S. 897 (1984); STATE v. JONES, 2012 Ohio**

App. 1301. The complaint is the jurisdictional instrument in Ohio. It is clearly established Federal law that a court without jurisdiction cannot invoke criminal process, including issuing of arrest warrants.

14. The defense of subject-matter jurisdiction can never be waived. **TIME WARNER AxS v. PUB. UTIL. COMM., 75 Ohio St. 3d 229.** The absence of a criminal complaint cannot be waived by a plea of no contest or even guilt, since any conviction resulting from an invalid complaint is a nullity. **COLUMBUS v. JACKSON (1952), 93 Ohio App. 516.** The question of subject-matter jurisdiction is so basic that it can be raised at any stage before the trial court or any appellate court, or even collaterally in subsequent and separate proceedings. **STATE v. SHARP, Slip Copy 2009 WL 1040299.**

15. The defendant was deprived of the right to due process and to be free of unreasonable searches and seizures due to the invalid complaint, unconstitutional probable cause determination, and invalid warrant. The Petitioner was denied counsel whatsoever at arraignment Nov. 18th 1997, (Ex.#5). At Dec. 3rd, 1997 arraignment, counsel was physically present but were either prevented from assisting Petitioner or incompetent at attempting to do so. (Ex.#6). Prejudice is presumed. Reversal is automatic. At the least, the robbery portion would have been dismissed. Which would have led to dismissal of the aggravated murder charge. No evidence would have survived a competent "fruits of prior illegality" challenge. Defendant could not, would not have been convicted. **SCHLUP.** Thus, he was prejudiced.

16. At a pre-trial hearing, appointed counsel, after the court raised the question of an illegal arrest, and that a proper motion might call for a dismissal, told the court that they would only be filing "the basic constitutional [motions] ***to protect [them]selves.***" (Tr. 33-34). These acts and omissions fall below an objective level of reasonableness, and reflect the lack of investigation as opposed to strategic choice. **STRICKLAND v. WASHINGTON 466 U.S. 688.**

17. **STRICKLAND** stands for the principle that no one should be found guilty of criminal misconduct without being afforded the right to effective assistance of counsel. preserving and defending both the critically important rights against unlawful search and seizure and to effective assistance of counsel. The defendant pursues this procedural vehicle to make the rights afforded defendants in criminal cases more than paper guarantees, to preserve and defend both the critically important rights against unlawful search and seizure and to effective assistance of counsel. **KIMMELMAN v. MORRISON, 477 U.S. 365.** A search conducted pursuant to an invalid warrant is the equivalent of a warrantless search which is per se unreasonable and therefore illegal. **KATZ v. UNITED STATES (1967), 389 U.S. 347, 88 S.Ct. 507.** The fruits of an illegal search are subject to suppression by the court in which criminal charges arising from the search and seizure are filed. **WEEKS v. UNITED STATES (1914), 232 U.S. 383, 393, 34 S.Ct. 341.** Whenever counsel's conduct falls below an objective standard of reasonableness, and where there is a reasonable probability that the failings of counsel undermine confidence in the outcome, a defendant is entitled to relief (either on appeal

or on federal habeas corpus) on the ground that his Sixth Amendment right to effective assistance of counsel has been infringed. **STRICKLAND v. WASHINGTON, 80 L.Ed.2d 674 (1984).**

18. Indeed, if items "can thus be seized and held against and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." **WEEKS.**

19. The charge of aggravated murder was filed because of the search and seizure process. The charge alleged Mr. Glover was engaged in his duties as an officer. Mr. Glover, and Ashtabula Police Department, violated Federal and state law in attempting a false arrest. Mr. Glover's superiors, Capt. DiAngelo and Det. Pouska, knew a valid warrant did not exist. They knew they failed to file a criminal complaint. (Ex.#1). **CRIM. R. 2 (J)** states that "...the power to arrest violators is conferred, when the officer, agent, or employee is acting within the statutory limits of authority." The decedent was not a law enforcement officer, engaged in his duties. He was acting outside of Constitutional and statutory authority.

20. Searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment. **JOSHUA v. DeWITT, 341 F.3d 430 (6th Cir. 2003); UNITED STATES v. HENSLEY, 469 U.S. 221 (1985).**

21. If police conduct an unreasonable search and seizure in violation of the Fourth

Amendment all evidence discovered as a result of prior illegalities is incompetent to serve as a basis for conviction and is subject to automatic exclusion. **WONG SUN v. UNITED STATES (1963), 371 U.S. 471; SEGURA v. UNITED STATES, 468 U.S. 804, 104 S.Ct. 3380; STATE v. ROGERS, 198 N.E. 2d 796, 1963 Ohio Misc. LEXIS.** A defendant necessarily has good cause for not properly submitting his claim to a state court where his trial and appellate counsel were constitutionally ineffective in not doing so; for the very meaning of a determination that there was ineffective assistance of counsel is that a defendant is relieved from responsibility for his counsel's errors. The defendant has not had an opportunity to fully and fairly litigate his Fourth Amendment claim due to counsel's failures.

CLAIM FOR RELIEF II.

PETITIONER WAS DENIED COUNSEL AT CRITICAL STAGES OF THE PROCEEDINGS IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION RESULTING IN A CONVICTION THAT IS VOID, AND/OR OTHERWISE UNCONSTITUTIONAL.

22. Included herein, by reference, are paragraphs 1-21. The Petitioner was denied counsel whatsoever at arraignment Nov. 18th 1997, (Ex.#5). The Petitioner was carried from the courtroom by deputies before the arraignment began. The Petitioner refused to walk because the shackles were cutting into his ankles and the deputies refused to loosen

them. One of those deputies, John Bernardo, (Ex.#8; Tr. 2699-2701) testified that Petitioner made a statement, while waiting in the jury room for the judge, which may have been interpreted as something like an admission. No such statement was made. Petitioner had no counsel whatsoever that day, in violation of the Sixth Amendment and a statement was attributed to him without him being advised of his rights embodied in **MIRANDA v. ARIZONA**. Who can say the entire circumstance was not a ruse contrived to accomplish such a purpose? Appointed trial counsel were ineffective for not properly objecting on the basis of denial of counsel and ***Miranda***.

23. At Dec. 3rd, 1997 arraignment, counsel was physically present but were either prevented from assisting Petitioner or incompetent at attempting to do so. (Ex.#6; Dec. 3rd Transcript, pg 9-10) Counsel stated "Your Honor, we're in no position to say yes or disagree or agree with the Court with the position of the prosecutor for this county. The fact is that we have no evidence, documentation, or anything that would support an otherwise position. So I suppose based on that, we can't say anything except that he should be entitled to bond ...." The guarantee to assistance of counsel cannot be satisfied by mere formal appointment. **AVERY v. ALABAMA, 308 U.S. 444, 60 S.Ct. 321, 322.**

24. Apparently, the state did not provide counsel with the blank complaints, the purported basis for the purported warrant. **BRADY v. MARYLAND, 373 U.S. 83 (1963); STRICKLER v. GREENE, 119 S.Ct. 1936 (1999).** Counsel were ineffective for failing to make sure the state had complied with the Fourth and Fourteenth Amendments to the Constitution in the arrest process. **STRICKLAND v.**

WASHINGTON, 466 U.S. 668.

25. The defenses of subject-matter and *in personam* jurisdiction were not asserted or preserved for review. The Petitioner suffered prejudice of being put to trial upon incompetent evidence and an improper indictment. Petitioner was denied counsel of choice at trial (Ex.# 9; Tr.2072-2110), in violation of **UNITED STATES v. GONZALEZ-LOPEZ, 2006 U.S. LEXIS 5165;** See also **STATE v. CHAMBLISS, 128 Ohio St. 3d 507** where the 'Supreme' Court of Ohio recently recognized this Constitutional principle.

26. After the court raised the question of an illegal arrest, and that a proper motion might call for a dismissal, appointed counsel told the court that they would only be filing "the basic constitutional [motions] ***to protect [them]selves.***" (Ex.#7; Tr. 33-34). This was a critical stage. Petitioner/defendant was deprived of counsel at that point. Counsel also stipulated to the existence/legitimacy of an invalid warrant, essentially conceding the defendant's guilt to elements of the offense.

27. Counsel did this right before opening arguments without prior notice and consent of the defendant. The decision to plead "guilty" or "not guilty" is a decision reserved solely for the accused based on his intelligent and voluntary choice. **BOYKIN v. ALABAMA, 395 U.S. 238, 89 S.Ct. 1709; WILEY v. SOWDERS, 647 F.2d 642 (1981). NORTHRUP v. TRIPPETT, 265 U.S. F.3d 384, 384**

28. In **VAN v. JONES, 475 F.3d 292,** this court held: "Common law teaches that the **Sixth Amendment** views "critical stages" of a defendant's pre-trial and trial differently

from other parts. The Supreme Court began developing a nationwide critical stage doctrine in earnest in **HAMILTON v. ALABAMA, 368 Ue.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961)**, in which the Court unanimously reversed the Alabama Supreme Court's denial of a criminal defendant's writ of error *coram nobis* in a capital case where the defendant's counsel had been absent at his arraignment.

29. "The Court wrote that "[w]hatever may be the function and importance of arraignment in other jurisdictions, we have said enough to show that in Alabama it is a critical stage in a criminal proceeding." *Id.* **at 54** (footnote omitted). It was unnecessary to make a showing that the defendant suffered a disadvantage through absence of counsel. *Id.* **at 53**. Under Alabama law,"[w]hat happens [at an arraignment] may affect the whole trial. Available defenses may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes." *Id.* **at 53** (citations omitted).

30. "The possibility that something might have been "irretrievably lost" in this way sufficed to warrant reversal: "[w]hen one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." *Id.* **at 55** (citations omitted). In such a case, the Court concluded, "the degree of prejudice can never be known. Only the presence of counsel could have enabled the accused to know all the defenses available to him and to plead intelligently." *Ibid.*

31. "In ***WHITE v. MARYLAND*, 373 U.S. 59, 83 S. Ct. 1050, 10 L. Ed. 2d 193 (1963)**, another capital case, the Supreme Court, per curiam, applied its *Hamilton* ruling

to a Maryland pre-trial procedure that had functioned similarly to an arraignment: the defendant, unrepresented by counsel, pleaded guilty even though he was not obligated to enter any plea at the hearing, and the prosecution later used evidence of that plea against him in a trial that followed a subsequent not-guilty plea. Although the Supreme Court did not offer an explicit definition of a "critical stage," it declined to follow the Maryland appellate court's reasoning that *Hamilton* had functionally defined a "critical stage" as one "where rights are preserved or lost." *Id.* **At 60**.

32. "In the last four decades, the Supreme Court and our court have determined that a number of components of a criminal defendant's proceeding qualify as critical stages, and both courts have extended the doctrine to noncapital cases. In **UNITED STATES v. WADE, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)**, the Supreme Court held that a post-indictment, pre-trial lineup is a critical stage.

33. "The Court rejected Texas's argument that a lineup was a mere "preparatory step in the gathering of the prosecution's evidence," to be bucketed alongside "systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like." *Id.* **at 227**. These analytical steps differ from a lineup because they present "minimal risk that . . . counsel's absence . . . might derogate from [a defendant's] right to a fair trial." *Id.* **at 228**. The purpose of a lineup is to "elicit identification evidence," and such a procedure is "peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial," including the "vagaries of eyewitness identification." *Ibid.*

34. "Defense counsel can serve to counteract an eyewitness's suggestibility, and the prosecutor's suggestion in the "manner in which [he] presents the suspect to witnesses for pretrial identification." *Ibid.* In vacating the conviction in the case, the Court offered further outlines of a definition of a critical stage in the context of the **Sixth Amendment** guarantee of assistance of counsel: "The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'" *Id.* **at 225**.

35. "We ruled in **UNITED STATES v. SMITH, 411 F.2d 733 (6h Cir. 1969),** that the moment when a jury returns its verdict is a critical stage such that absence of counsel due to illness requires a new trial.

> Even this precaution does not negate the possibility of prejudice to the defendant in not having the aid of his attorney. From a reading of the record it is impossible to determine the tone of voice of the jurors when they individually announced their decision, the hesitancy of their responses, and other possibilities that could have taken place and had significant meaning. Had counsel been present and something of this nature occurred, the defendant would have had the benefit of his legal advice. We must presume that the defendant himself was ignorant of the legal significance of any such incident, and, without the aid of counsel, it would have passed unnoticed.
>
> It is not for this Court to speculate as to the extent of prejudice that may have resulted from the absence of counsel. In *Glasser v. United States*, 315 U.S. 60, 76, 62 S. Ct. 457, 467, 86 L. Ed. 680 (1942), the Supreme Court was concerned with the prejudicial consequences of one co-defendant's retained attorney being appointed to represent the other co-defendant. In discussing the Sixth Amendment, the Court said:
>
> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

SMITH, 411 F.3d at 736-37.

36. "The Supreme Court in **COLEMAN v. ALABAMA, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970)**, held that an Alabama pretrial hearing was a critical stage... Quoting *Wade*, the Court offered a further half-step toward cementing a definition of "critical stage," writing that the "determination whether the hearing is a 'critical stage' requiring the provision of counsel depends . . . upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice.'" *Ibid* (quoting *Wade*, **388 U.S. at 227**).

37. "Justice Brennan's opinion for a plurality of four Justices gave four examples of what counsel might do at such a pretrial hearing. He might 1) "expose," through examination and cross-examination, "fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over" (underline added); 2) "fashion a vital impeachment tool," through examination and cross-examination, "for use in the cross-examination of the State's witnesses at the trial"; 3) "more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial"; or 4) "mak[e] effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." *Ibid.*

38. "Because the defendants did not have counsel present at this pretrial haring, the Court vacated their convictions. As usual in this line of doctrine, the Court did not engage in an analysis of whether, or how much, prejudice was visited upon the accused through absence of counsel at the critical stage.

39. "The Supreme Court's decision in **HOLLOWAY v. ARKANSAS, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978)**, marked a slight shift in emphasis in the critical stage doctrine... The defendants in the case, accused robbers and rapists, were denied their motion to appoint separate counsel... Hall was unable to cross-examine each of his clients while on the stand in the interest of protecting the rights of his other two clients. Though Hall was by his clients' side throughout the criminal proceeding, Chief Justice Burger's opinion for the majority analogized the terms of his presence in the courtroom during the trial to absence during a critical stage. *Id.* at 489-90.

40. "It bears noting that, even though *Holloway* was a non-capital case, the Court cited its own precedents **GIDEON v. WAINWRIGHT, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963)**, *Hamilton*, and *White*, for the proposition that "when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic." *Id.* at 489. This statement might be viewed as dictum. But it does reflect what appears to be the usual, if not perfectly consistent, tenor and vector of the Supreme Court's exposition of critical stage doctrine.

41. "An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail," "Of all the rights that an accused person has, the right to be represented by

counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."

42. "That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." **GIDEON v. WAINWRIGHT, 372 U.S. 335, 344 (1963).**

43. Time has not eroded the force of Justice Sutherland's opinion for the Court in **POWELL v. ALABAMA, 287 U.S. 45 (1932):**

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Id.*, at 68-

69. (underline added).

44. Absent these errors, the Petitioner would not have been convicted of the charge. **SCHLUP v. DELO, 513 U.S. 298.** Nor eligible for the death penalty **SAWYER v. WHITLEY, 505 U.S. 333.** The defendant is entitled to relief. The conviction should be reversed and the warrant quashed. Otherwise, the Court would facilitate a manifest miscarriage of justice.

CLAIM FOR RELIEF III.

THE AGGRAVATED ROBBERY SPECIFICATION WAS NOT PROPERLY CHARGED IN THE INDICTMENT FOR AGGRAVATED MURDER, I.E., IT FAILED TO GIVE THE PETITIONER NOTICE HE HAD TO DEFEND AGAINST AGGRAVATED ROBBERY IN HIS AGGRAVATED MURDER TRIAL: THE SPECIFICATION WAS STATED AS A CONCLUSIVE PRESUMPTION, DENYING PETITONER HIS RIGHT TO TRIAL BY JURY AND DUE PROCESS; AND THE TRIAL COURT COMMITTED STRUCTURAL ERROR IN FAILING TO INSTRUCT ON THAT ELEMENT OF THE OFFENSE; COUNSEL'S FAILURE TO OBJECT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF SIXTH AMENDMENT.

45. Included herein, by reference are paragraphs 1-44. Failure to instruct the jury on reasonable doubt regarding the element of aggravated robbery is structural error. This error deprived the defendant of his right to trial by jury and Due Process right to be acquitted unless all of the elements of an offense are charged in the indictment, submitted to a jury and proven beyond a reasonable doubt. **JACKSON v. VIRGINIA, 443 U.S. 197, 99 S.Ct. 2781 (1979); MULLANEY v. WILBUR, 421 U.S. at 701-702; IN RE WINSHIP, 397 U.S. 358, 25 L.Ed. 2d 368; APPRENDI.** The prejudice suffered

as a result of the invalid warrant/unlawful arrest was compounded.

46. Aggravated robbery, in order to support a guilt verdict and death sentence, was meant by the legislature to be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. **APPRENDI v. NEW JERSEY, 530 U.S. 466 490; STATE v. JONES, 744 N.E. 2d 1177-1178.** Proving aggravated robbery was predicate to proving aggravated murder. Together, with a constitutionally deficient reasonable doubt instruction, structural error occurred.

47. The indictment language omitted the entire offense of aggravated robbery by way of a conclusive presumption. It does not charge the predicate elements of the offense of aggravated murder. This language invades the fact-finding function which in a criminal case the law assigns solely to the jury and manipulates/relieves the state's burden of proof beyond a reasonable of every element of the crime charged.

48. As early as 1855, Chief Justice Ranney stated the importance of including all the essential elements in an indictment: " 'The nature and cause of the accusation' are not sufficiently stated to enable the accused to know what he might expect to meet upon the trial; and it is neither consistent with general principles nor constitutional safeguards, to allow a man to be thus put to trial upon a criminal charge in the dark." **DILLINGHAM v. STATE (1855), 5 Ohio St. 280, 285.**

49. The Ohio Constitution provides that no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury." **Section 10, Article I, Ohio Constitution.** "The material and essential facts

constituting an offense are found by the presentment of the grand jury; and if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment such defective indictment is insufficient to charge an offense, and cannot be cured by the court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the court to convict him on an indictment essentially different from that found by the grand jury." **STATE v. HARRIS (1932), 125 Ohio St. 257, 264, 181 N.E. 104**.

50. This error was structural, as it violated the Petitioner's right to the presumption of innocence; right to compulsory process; confrontation clause (the state did not present any evidence/victim/witnesses to any robbery); right to have the jury find, beyond a reasonable doubt whether he, in fact, committed any aggravated robbery; and murdered Glover to escape detection, apprehension, trial punishment, right to notice that that was at issue, in order to plead acquittal or conviction in subsequent proceeding. The state intended to try him for aggravated robbery after the murder trial. And there was a constitutionally defective (non-existent) reasonable doubt instruction on that element. (Ex.#10; Tr. 3087-3122). The Rule 29 motion should have been granted (Tr. 2863, 2964, 2965, 2980). Only by conjecture can one say that this instruction did not direct the verdict on essential elements of aggravated murder.

51. "The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." In **DUNCAN v. LOUISIANA**, 391 U.S. 145, 149, 20 L. Ed. 2d 491, 88 S. Ct. 1444

(1968), we found this right to trial by jury in serious criminal cases to be "fundamental to the American scheme of justice," and therefore applicable in state proceedings. The right includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." See **SPARF v. UNITED STATES**, 156 U.S. 51, 105-106, 39 L. Ed. 343, 15 S. Ct. 273 (1895). Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence. *Ibid.* See also ***United States*** v. ***Martin Linen Supply Co.***, 430 U.S. 564, 572-573, 51 L. Ed. 2d 642, 97 S. Ct. 1349 (1977); ***Carpenters*** v. ***United States***, 330 U.S. 395, 410, 91 L. Ed. 973, 67 S. Ct. 775 (1947).

52. "What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, see, *e.* g., **PATTERSON v. NEW YORK, 432 U.S. 197, 210, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977); LELAND v. OREGON, 343 U.S. 790, 795, 96 L.Ed. 1302, 72 S.Ct. 1002 (1952),** and must persuade the fact-finder "beyond a reasonable doubt" of the facts necessary to establish each of those elements, see, *e.* g., **IN RE WINSHIP, 397 U.S. 358, 364 (1970); COOL v. UNITED STATES, 409 U.S. 100, 104, 34 L. Ed. 2d 335, 93 S. Ct. 354 (1972)** *(per curiam)*. This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common-law jurisdictions, applies in state as well as federal proceedings. ***Winship, supra.***

53. "It is self-evident, we think, that the Fifth Amendment requirement of proof

beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." Petitioner's Sixth Amendment right to jury trial was therefore denied.

54. "At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," **Amendment 14,** and the guarantee that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," **Amendment 6.** Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." **UNITED STATES v. GAUDIN, 515 U.S. 506, 510, 132 L.Ed. 2D 444, 115 S. Ct. 2310 (1995); SULLIVAN v. LOUISIANA, 508 U.S. 275, 278, 113 S. Ct. 2078 (1993).** ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). The language used in this indictment allowed the state to manipulate the prosecutor's burden of proof by relying on a presumption rather than evidence to establish an element of an offense, **MULLANEY v. WILBUR, 421 U.S. 684, 95 S. Ct. 1881 (1975).**

55. "The giving of a constitutionally deficient reasonable-doubt instruction is among

those constitutional errors that require reversal of a conviction, rather than those that are amenable to harmless-error analysis. See *Chapman* v. *California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824. Consistent with the jurytrial guarantee, *Chapman* instructs a reviewing court to consider the actual effect of the error on the guilty verdict in the case at hand. Since in petitioner's case there has been no jury verdict within the meaning of the Sixth Amendment, the premise for harmless-error analysis is absent. Unlike an erroneous presumption regarding an element of the offense, see *Sandstrom* v. *Montana*, 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450, a deficient reasonable-doubt instruction vitiates all the jury's factual findings. A reviewing court in such a case can only engage in pure speculation -- its view of what a reasonable jury would have done. When it does that, the wrong entity judges the defendant guilty. Moreover, denial of the right to a jury verdict of guilt beyond a reasonable doubt, the consequences of which are necessarily unquantifiable and indeterminate, is certainly a "structural defect in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards" under **ARIZONA v. FULMINANTE**, 499 U.S. 279, 309, 113 L. Ed. 2d 302, 111 S. Ct. 1246 **SULLIVAN v. LOUISIANA, 508 U.S. 278-282**.

56. Where a court has no jurisdiction, a trial and conviction are a nullity. 'Structural error' affects the entire conduct of the trial from beginning to end as well as the framework within which the trial proceeds. Such errors defy analysis by "harmless error" standards. **ARIZONA v. FULMINANTE (1991), 499 U.S. 279, 307-308, 111**

S.Ct. 1246. If police conduct an unreasonable search and seizure in violation of the Fourth Amendment all evidence discovered as a result of prior illegalities is incompetent to serve as a basis for conviction and is subject to automatic exclusion. **WONG SUN v. UNITED STATES (1963), 371 U.S. 471; SEGURA v. UNITED STATES, 468 U.S. 804, 104 S.Ct. 3380.** The defendant has been unlawfully imprisoned. The trial was essentially a sham and a farce. Defendant was denied effective assistance of counsel which denied him a hearing on his Fourth Amendment violation. Defendant was also denied counsel at several critical stages of the proceedings. Appointed counsel sold him out in a multitude of ways. It was objectively unreasonable not to object to the specifications failure to give notice, or motion for a directed verdict due to the state's failure to meet its burden of proving aggravated robbery beyond a reasonable doubt, thus failing to prove its theory of prior calculation and design; and failing to object to the lack of a reasonable doubt instruction on the element of robbery. **STRICKLAND v. WASHINGTON, 466 U.S. 668.** The relief sought and warranted is declaration that conviction is void. Or reversal of the conviction and remand to the municipal court with instructions to quash the warrant. In the absence of these errors, the Petitioner would not and could not have been convicted. **SCHLUP.**

CLAIM FOR RELIEF IV.

OHIO'S AGGRAVATED MURDER STATUTE, R.C. 2903.01 (A) IS UNCONSTITUTIONALLY VAGUE ON ITS FACE AND AS APPLIED TO THE DEFENDANT' CASE RESULTING IN A CONVICTION THAT VIOLATE HIS EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT (ARBITRARY DEATH SENTENCE), FOURTEENTH AMENDMENT DUE PROCESS RIGHTS (NOT TO BE CONVICTED EXCEPT

EACH ELEMENT BE PROVEN BEYOND A REASONABLE DOUBT), SIXTH AMENDMENT RIGHT TO TRIAL BY JURY, AND IS VOID.

57. The aggravated murder statute defendant was allegedly indicted (Ex. #2) under is unconstitutionally vague. It is indefinite. It does not define. "Those words 'prior calculation and design' of the [new] aggravated murder statute (R.C. 2903.01) are not defined by statute." **STATE v. COTTON, 1977 Ohio App. LEXIS 9541.** In **CONALLY *v.* GENERAL CONSTRUCTION CO. *(1926), 269 U.S. 385 at 391***, the Supreme Court stated, that a vague statute is one 'which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' Semantics aside, there is no meaningful way to distinguish aggravated murder from manslaughter, murder, or even self defense.

58. Prior calculation and design could mean anywhere from year(s), month(s), day(s), hour(s), or any period less than that. Three minutes? Two? One? Thirty seconds? Fifteen? Ten? Five? There is no explicit line for a trier of fact to find between studied consideration and momentary consideration; which they say is not enough. But they are explicitly told 'no particular amount of consideration must be given' Is studied consideration a particular amount of consideration? If so, what exactly does that mean? It is not defined. What is "momentary consideration"? What is "spur of the moment"? It is wide open for anyone to say anything is prior calculation and design, which violates the narrowing criteria of clearly established federal law and due process.

59. Four (4) terms employed in instructions (Ex. #10; Tr. 3087-3122) to the jury directly contradict or negate each other and render the "definition" indefinite: Studied consideration; no particular amount of consideration. Sufficient time; no definite period of time. The word "must" is used before both studied consideration and sufficient time. The instructions, therefore, mandate studied consideration and sufficient time, and then prevaricate on, or nullify, what they just "mandated" in order for guilt to be established.

60. Basic to any criminal statute is the requirement that it be sufficiently clear in defining the prohibited activity and that it contain ascertainable standards of guilt. **WINTERS v. NEW YORK (1948), 333 U.S. 507.** In ***Connally***, at page 329, the Supreme Court cited with approval the decision in **United States** v. ***Capital Traction Co.***, 34 App. D. C. 592, in the course of which opinion the appellate court said: "The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will admit of different construction. A criminal statute cannot rest upon an uncertain foundation. The crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon one conception and the courts another."

61. The statute is unconstitutionally vague in violation of the **Fourteenth Amendment's Due Process Clause** because it authorizes juries to convict defendants without prescribing definite standards to govern the jury's determination, 2903.01 (A) is invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory imposition.

62. There is no doubt that it provides the State with a procedure for depriving [redacted] defendant of his liberty and his property. Both liberty and property are specifically protected by the **Fourteenth Amendment** against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute.

63. It violates the legislative function of government for judges, juries, and police to make or interpret law. **Section 1, Article II, Ohio Constitution**, declares: "The legislative power of the state shall be vested in a general assembly * * *." "The legislative power of the state is vested in the General Assembly by Section 1, Article II of the constitution and that body may not abdicate or transfer to others the essential legislative functions with which it is vested." **Belden v. Union Central Life Ins. Co. (1944), 143 Ohio St. 329**, paragraph one of the syllabus.

64. The General Assembly has no control over the subjective application by juries, judges, police, and prosecutors. Therefore, those parties are authorized and encouraged

to, de facto, make the law on a subjective and ad hoc basis. Such authority is incompatible with the Eighth and Fourteenth Amendments of the United States Constitution. Erratic and unequal application or enforcement naturally, and necessarily, violate the Equal Protection clause. Such circumstances violate the Due Process including meaningful appellate review because no one can ascertain whether and upon what actual basis a person was convicted; whether each element was found beyond a reasonable doubt or merely concluded for convenience, or some other unconstitutional basis, such as race. It also violates the right to trial by jury. A jury is left to guess in order to reach a verdict. And if they do guess, a trial has not been had, one has not been found guilty beyond a reasonable doubt.

65. The Statute R.C. 2903.01 (A) for Aggravated murder reads: No person shall purposely, and with prior calculation and design, cause the death of another....

The Legislative Service Commission Commentary 1973, says: The first part of this section restates the former crime of premeditated murder so as to embody the classic concept of the planned, cold-blooded killing while discarding the notion that only an instant's prior deliberation is necessary. By judicial interpretation of the former Ohio law, murder could be premeditated even though the fatal plan was conceived and executed on the spur of the moment. See, **STATE v. SCHAFFER, 113 OHIO APP. 125 (LAWRENCE CO.) APP. 1960.** The section employs the phrase, "prior calculation and design," to indicate studied care in planning or analyzing the means of the crime, as well as a scheme compassing the death of the victim. Neither the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves but they must amount to more than momentary deliberation

66. All of the so-called court-created conditions and standards still leave to the jury

such broad and unlimited power in finding guilt that the jurors must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is. Those instructions are not in the statute. And "leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." **GIACCIO v. PENNSYLVANIA (1966),** 382 U.S. 399, 402. See ***State ex rel. Lorain v. Stewart***, 119 Ohio St.3d 222, 2008 Ohio 4062, 893 N.E.2d 184, P 36 (court cannot add language to statute); ***State v. Hughes*** (1999), 86 Ohio St.3d 424, 427, 1999 Ohio 118, 715 N.E.2d 540 ("In construing a statute, we may not add or delete words"). "[In] determining the legislative intent of a statute it is the duty of this court to give effect to the words used [in a statute], not to delete words used *or to insert words not used.*' (Emphasis in original.)" ***Wheeling Steel Corp.*** v. ***Porterfield*** (1970), 24 Ohio St. 2d 24, 28, 53 O.O. 2d 13, 15, 263 N.E. 2d 249, 251, quoting ***Columbus-Suburban Coach Lines*** v. ***Pub. Util. Comm.*** (1969), 20 Ohio St. 2d 125, 127, 49 O.O. 2d 445, 446, 254 N.E. 2d 8, 9. The legislature had the perfect opportunity to include this language when it created R.C. 2903.01 (A), but chose not to do so.

67. Then, it goes on to say momentary consideration is not enough. This could describe any just about any murder, manslaughter, or self defense. Acting on the spur of the moment or after momentary consideration of the purpose to cause the death is not sufficient. Momentary consideration is not enough. Must involve studied consideration. No particular amount of consideration. It does not 'embody the concept of cold-blooded

killing' and is no better or more narrowing than the former statute mentioned above.

68. This kind of instruction obscures the *mens rea* element and the time requirement for prior calculation and design. A person who is defending themselves could be charged and convicted under this statute; **Section 1, Article 1 of the Ohio Constitution.** "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and ***defending life*** and liberty, acquiring, possessing, and protecting property, and ***seeking*** and obtaining happiness and ***safety***". (emphasis added).

69. Such (statute and) instruction vitiates all of a juries findings and is structural error. **SULLIVAN v. LOUISIANA.** In ***MULLANEY v. WILBUR 421 U.S. 684, 691, (1975)***, The United States Supreme Court held that the proof of an element that distinguishes between murder and manslaughter implicates ***WINSHIP*** as much as an element that distinguishes guilt from innocence. See, Ex. #11, at 19-20.

70. The Plaintiff has been imprisoned on "death row" due to the unconstitutionally vague aggravated murder statute R.C. 2903.01 (A) which was arbitrarily and discriminatorily applied to him. The only evidence of prior calculation and design offered by the state was a statement by Jimmie Ruth that if a cop tried to arrest him, he would ***shoot at*** them, approximately three (3) weeks earlier. **STATE v. JONES, 744 N.E.2d 1176-1178.** (emphasis added) ***Shoot at*** is not a stated ***intent to kill.***

71. "In **State v. Reed (1981), 65 Ohio St. 2d 117, 120-121, 19 Ohio Op. 3d 311,**

313-314, 418 N.E.2d 1359, 1362-1363, we held that a defendant's isolated statement that "if a cop got in his way [during a robbery] he would blow him away" did not, by itself, establish prior calculation and design when the totality of the facts and circumstances indicated that the killing resulted from an instantaneous deliberation. The only evidence offered by the prosecution of prior calculation and design, excepting evidence regarding the shooting itself, was a statement Reed made to a person who had been in an auto body repair class with him approximately a month before Burdsall's death that "if a cop got in his way [during a robbery] he would blow him away.'" ***STATE v. REED (1981), 65 Ohio St. 2d 117.***

72. This court interpreted the phrase "prior calculation and design" in ***State v. Cotton*** (1978), 56 Ohio St. 2d 8, stating, at page 11, that: "* * * The ***apparent intention*** of the General Assembly in employing this phrase was to require more than the few moments of deliberation permitted in common law interpretations of the former murder statute, and to require a scheme designed to implement the calculated decision to kill. Thus, instantaneous deliberation is not sufficient to constitute 'prior calculation and design.'"...

"In the case at bar, the evidence regarding the killing at most indicates the presence of instantaneous deliberation. The statements appellant made to a classmate that he would kill any police officer who got in the way of a crime he might commit do not show that appellant designed a scheme in order to implement a calculated decision to kill. Not only were the remarks significantly removed from the killing in terms of a time frame but they were very general in nature and thus were not relevant to the killing of Officer Burdsall."

First of all, the phrase "apparent intention", in ***Cotton*** means the court had to guess at the meaning of the statute themselves. Second, the case of ***Reed*** is materially indistinguishable from the facts alleged in defendant's case, yet the Ohio Supreme Court decided his case was not prior calculation and design, yet upheld the defendant's. This is because the statute authorizes and encourages subjective arbitrary applications.

73. There is eyewitness evidence that the shooting of Glover was not committed by the defendant. Besides that, there is evidence that the decedent was shot in response to him reaching for his gun (Ex. #11, pg 19-20). That is or indicates self defense. This evidence was not elicited at trial due to denial of counsel of choice and ineffective assistance of appointed counsel. Is the defendant convicted for doing something that, even if he was the shooter, is not a crime? The statute authorized and encouraged arbitrary and discriminatory application/enforcement.

18. The Supreme Court has stated very general standards for evaluating whether a statute is **unconstitutionally vague:**

*... **if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.***

74. 2903.01 (A) is so unclear as to be left to the subjective whim of prosecutors, police, judges, and juries without any means for a meaningful challenge except a void-for-vagueness challenge. It is vague; it could be construed or applied anytime someone is shot (or is punched) and expires. Indeed, that is what has happened in this state for years under this statute. It therefore violates Due Process of law. **Fourteenth**

Amendment to the United States Constitution. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

75. Laws must give clear and explicit standards for those who would apply them. If a law does not, it is unconstitutionally vague because it authorizes and encourages arbitrary and discriminatory enforcement and de facto law-making on the part of police, prosecutors, judges, and juries, who do not have that authority under the Federal Constitution. It has authorized rule by whim rather than law.

An enactment is void for vagueness if:

> [I]ts prohibitions are not clearly defined. **Vague** laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. **Vague** laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A **vague** law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a **vague** statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2D 222 (1972).

76. The general "void-for-vagueness doctrine requires that a penal statute define the

criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and act accordingly . . . ." **United States v. Bewig**, 354 F.3d 731, 737 (8th Cir. 2003), quoting **Kolender v. Lawson**, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). Unconstitutionally vague statutes are those which are not subject to reasonable interpretation. See Grayned, 408 U.S. at 112; **Parker v. Levy**, 417 U.S. 733, 756, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.") To that end, an enactment is void for vagueness if its prohibitions are not clearly defined. **Grayned**, 408 U.S. At 108.

77. A statute is not void for vagueness if it does not lend itself to arbitrary, erratic enforcement. **Kolender**, 461 U.S. at 357; **Colautti v. Franklin**, 439 U.S. 379, 390, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979). Criminal statutes are generally subject to greater scrutiny because of the potentially severe consequences of imprecision. **Kolender**, 461 U.S. at 358-59 n.8.

78. According to a recent pronouncement by the Supreme Court, "[w]hat renders a statute **'vague'** is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved, but rather the indeterminacy of precisely what that fact is." ***United States v. Williams***, 553 U.S. 285, 128 S.Ct. 1830, 170 L. Ed. 2d 650 (2008).

79. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is

prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. ***Hill*** v. ***Colorado***, 530 U.S. 703, 732, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000); see also ***Grayned*** v. ***City of Rockford***, 408 U.S. 104, 108-109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

80. Claims of vagueness directed at [] capital punishment statutes are analyzed under the **Eighth Amendment** and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in ***Furman*** **v.** ***Georgia***, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972).

81. *Furman* held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not. *E. g.*, *id.*, at 310 (Stewart, J., concurring); *id.*, at 311 (WHITE, J., concurring). Since *Furman*, cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action. ***Gregg*** **v.** ***Georgia***, 428 U.S. 153, 189, 206-207, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.); *id.*, at 220-222 (WHITE, J., concurring in judgment); ***Spaziano*** **v.** ***Florida***, 468 U.S. 447, 462, 82 L. Ed. 2d 340, 104 S. Ct. 3154 (1984); ***Lowenfield*** **v.** ***Phelps***, 484 U.S. 231, 244, 98 L. Ed. 2d 568, 108 S. Ct. 546 (1988).

Godfrey* v. *Georgia, 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980), which is very relevant here, applied this central tenet of **Eighth Amendment** law. this Court held that such an application of the aggravating circumstance was unconstitutional, saying:

> "...There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed... These [instructions] gave the jury no guidance concerning the meaning of any of [the] terms. In fact, the jury's interpretation of [] can only be the subject of sheer speculation." *Id.*, at 428-429 (footnote omitted).

The affirmance of the death sentence by the Georgia Supreme Court was held to be insufficient to cure the jury's unchanneled discretion because that court failed to apply its previously recognized limiting construction... *Id.*, at 429, 432. This Court concluded that, as a result of the **vague** construction applied, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.*, at 433. Cf. ***Proffitt* v. *Florida***, 428 U.S. 242, 254-256, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976).

82. What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.

83. In ***Lujan v. Defenders of Wildlife***, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992), the United States Supreme Court explained that the "irreducible constitutional minimum of standing" includes three elements:

> (1) the plaintiff must have suffered an injury in fact, an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or

imminent, not conjectural or hypothetical;

(2) a causal connection must exist between the injury and the conduct of which the plaintiff complains; and

(3) the plaintiff must demonstrate the likelihood, and not merely the speculative possibility, that the injury will be redressed by the requested relief.

112 S. Ct. at 2136. "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* (citing ***FW/PBS, Inc. v. Dallas***, 493 U.S. 215, 231, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990)).

84. The Plaintiff has been imprisoned on "death row" due to the unconstitutionally vague aggravated murder statute R.C. 2903.01 (A) which was arbitrarily and discriminatorily applied to him. Plaintiff has been injured by this fifteen year imprisonment. There is no more definite injury than death. The plaintiff certainly would have been killed by the state had he not been diligent in fighting for his rights. The only appropriate remedy is striking of the statute for vagueness and ending the possibility that the defendant will be further harmed by it discriminatory, arbitrary enforcement upon his person.

85. In addition, "the requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values . . . and permits meaningful judicial review," ***Roberts v. United States Jaycees***, 468 U.S. 609, 629, 104 S. Ct. 3244, 3256, 82 L. Ed. 2D 462 (1984).

86. "The degree of vagueness that the Constitution tolerates--as well as the relative

importance of fair notice and fair enforcement--depends in part on the nature of the enactment." ***Hoffman Estates,*** 455 U.S. at 498, 102 S. Ct. at 1193. When criminal penalties are at stake, as they are in the present case, a relatively strict test is warranted. *Id.* at 499, 102 S. Ct. at 1193.

87. The Supreme Court's decisions provide the following guidance: the level of scrutiny applied to a statute challenged for vagueness is heightened when a violation of the statute may result in a criminal penalty and when the statute does not include a scienter requirement. ***Kolender,*** 461 U.S. at 357; ***Hoffman Estates,*** 455 U.S. at 499. *See also Posters ' N' Things, Ltd. v. United States,* 128 L. Ed. 2d 539, 114 S. Ct. 1747, 1754 (1994).

88. In considering an ordinance without a scienter requirement, the Court must recognize that in "the absence of a scienter requirement . . ., the statute is little more than 'a trap for those who act in good faith.'" ***Colautti v. Franklin,*** 439 U.S. 379, 395, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979) (quoting ***United States v. Ragen,*** 314 U.S. 513, 524, 86 L. Ed. 383, 62 S. Ct. 374 (1942)).

89. A capital sentencing scheme, to comport with the **Eighth Amendment**, "must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" ***Lowenfield v. Phelps,*** 484 U.S. 231, 244, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988) (quoting ***Zant v. Stephens,*** 462 U.S. 862, 867, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983)).

90. In federal habeas corpus proceedings, the state court's application of the narrowing construction should be reviewed under the "rational factfinder" standard of ***Jackson* v. *Virginia***, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).

91. It is a constitutional imperative that the dividing line between the lawful (innocence) and criminal (guilt) be clear to all and not subject to conjecture. A person cannot be punished simply because the state believes that he or she is ***probably*** a criminal.

92. An unconstitutional law is as no law; an offense created by it is not a crime and a conviction under it is not merely erroneous, but is illegal and void and cannot be a legal cause of imprisonment. ***EX PARTE SIEBOLD (1879), 100 U.S. 371 376-377, 25 L.Ed. 717.*** An offense created by an unconstitutional law is not a crime and conviction under it is void for purposes of granting writ of habeas corpus. ***BLACKLEDGE v. PERRY (1974), 417 U.S. 21, 30, 94 S.Ct. 2098, 2103, 40 L.Ed. 2D 628.*** ***JOURNIGAN v. DUFFY (C.A. 9 1977), 552 F.2d 28, 289***, (Federal writ allowed after unsuccessful state habeas corpus proceeding under claim that petitioner had been prosecuted under an unconstitutional statute since claim goes to power of state to invoke criminal process.)

When a legislative body enacts a law that fails to provide minimal guidelines, it has in effect authorized police officers, prosecutors, judges, and jurors to limit another's freedoms according to their own personal prejudices and predilections; it has authorized rule by whim rather than law. ***TIMMONS v. MONTGOMERY (M.D. Ala. 1987), 658 F.Supp. 1086, 1089.*** Statute, if unconstitutional, would be void and conviction a nullity

ab initio.

93. Crim. R. 33(A)(4), which has superseded R. C. 2945.79(D), states the same rule as provided in that statute, and reads as follows:

"A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

"(4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified."

94. Defendant requests the statute 2903.01 be declared void and he be released from custody. In the alternative, the defendant requests the evidence from witness Teresa Taylor be given effect and the verdict and sentence be modified to manslaughter under **Crim R. 33 (A) (4)**.

95. The defendant has, heretofore, been saddled with constitutionally inadequate trial, appellate, and habeas counsel; that is why the issues herein have not been presented or preserved for review. The defendant has been fighting with these lawyers from day one to file the strongest issues, the right way. Only now is he able to file these particular ones himself. Not to mention the inmate saboteurs who have repeatedly deleted files from the computer. Absent these errors the defendant would not have been convicted of the charge. ***SCHLUP v. DELO, 513 U.S. 298.***

CLAIM FOR RELIEF V.

THE STATE OF OHIO KNOWINGLY PRESENTED FALSE EYEWITNESS TESTIMONY AND SUPRESSED EXCULPATORY EVIDENCE IN OBTAINING AND MAINTAINING AN UNLAWFUL CONVICTION, IN VIOLATION OF DUE PROCESS.

96. The state knew Teresa Taylor identified Anthony Barksdale in her Nov. 17th 1997 statement to police, (Ex. #11). Taylor unequivocally and repeatedly identifies the shooter as wearing a predominantly tan coat, a.k.a. Anthony Barksdale. See Ex. #12 a,b,c; police photos of coats in question, Ex.#13; Investigative Narrative of Lead Detective Jeff Brown. Taylor also unequivocally exculpates the person wearing the predominantly green coat. Defendant, f.k.a Odraye Jones.

97. The 'Investigative Narrative' describes the coats as Jones: Green Bay jacket with large "G" on back; Ruth: Blue/ white/ gray Dallas jacket; Barksdale: Tan/black full length jacket, (PG. 9).

SUMMARY OF THERESA TAYLOR'S STATEMENT (Ex. #3).

98. I saw three males. They—one was wearing a tan and green jacket {Ex.#12a}, the other was wearing a Dallas Cowboy jacket {Ex. #12b}, and the third one was wearing a green jacket {Ex.#12c}...and the two—the one in the tan and green jacket {Ex.#12a} and the one in the Dallas Cowboy jacket {Ex. #12b} cut through my yard, and th third friend{Ex.#12c}, he just, he left (PG. 3-4).

Q. Did you ever see a third man {Ex.#12c}? A. No... The other one, he just—he

left. I don't know where but he, he left towards West Avenue...Before the shooting. (PG. 18-19)

There's just two; the third man that left before the shooting {Ex.#12c}, um, I don't see him (PG. 43-44).

The shooter and his friend, the ones in the Dallas coat and the tan and green coat {Ex.#12a}, were, um, they were, like about three feet away from the back fence and they were directly across from where the officer was...(PG. 6)

One in the Dallas coat was Jimmie Ruth, and I don't know who the other one in the tan coat {Ex.#12a} was...(PG. 8)

The one in the tan and green coat {Ex.#12a} had the gun in his hands...(PG. 9)

I saw the one man, in the tan coat {Ex.#12a}, pull out a gun. (PG. 13)

The shooter in the tan coat {Ex.#12a}... (PG. 20)

The person in the tan coat {Ex.#12a}, after he shot the police, the officer,... (PG.22).

STATE'S CLOSING ARGUMENT:

99. ***No one, no one has pointed the finger at anybody other than Odraye Jones***, (Tr. 3036). ***One thig she wasn't confused about*** and ***one thing she was consistent about is... the green jacket with the big "G" on the back***. And she saw the person wearing that jacket pull out a gun and fired four times as he walked towards Officer Glover. ***No question in her mind it was a green jacket. She never wavered on that point...her***

recollection with respect to that green jacket is unwavering, (Tr. 3037-3038). What was she ***consistent about from day one, never wavered?*** That the guy in the ***Green Bay Packers jacket*** is the one that killed Officer Glover, is the one that shot Officer Glover and kept walking toward him as he was shooting, that the guy in the ***Green Bay Packers jacket*** is the one that kicked Officer Glover when he was down. Theresa ***never wavered*** on that, (Tr. 3084-3085).

RESPONDENT BRADSHAW'S BRIEF IN OPPOSITION TO JONES' MOTION FOR AN EVIDENTIARY HEARING.

100. Pg 2-3. Respondent is compelled to note that Jones inserts a quote on p. 3 of his sur-reply that does not appear in the trial transcript. The quote is incorrectly attributed to Ms. Taylor and implies that the person in the tan oat shot Officer Glover. A review of Ms. Taylor's trial testimony reveals that no such statement was ever made by Ms. Taylor. This fictitious quote is indicative of the lack of merit in this claim and should be disregarded by this Court.

Pg. 11. Jones continues to mis-characterize the testimony of Theresa Taylor concerning the description of Jones' Green Bay Packers jacket and Green Bay hat as green and tan rather than green and yellow. Jones relies upon this purported discrepancy to conclude that the shooter was wearing a tan coat and not a green coat as described by eyewitness Theresa Taylor and others. Jones hypothesizes further that the shooter must have been Anthony Barksdale since he was wearing a cream-colored winter coat on the day of the shootings. Jones argument is wholly unsupported by the facts and record in this case... Jones continues to ignore the fact that his trial counsel extensively cross-examined Ms. Taylor concerning her statement to the police that the shooter had been wearing a green and tan Green Bay Packers jacket and hat. Jones also ignores the fact that Ms. Taylor was consistent in her description of the shooter as clad in a green coat and another individual present at the scene, Jimmie Lee Ruth, as wearing a dark blue Dallas Cowboy jacket and hat. [Jim Petro, Daniel R. Ranke; 6.30.2004]

RESPONDENT'S REPLY TO PETITIONER JONES' PRO SE RENEWED MOTION TO EXPAND THE RECORD, MOTION TO APPEAR AS CO-COUNSEL ANS MOTION TO AMEND THE PETITION TO INCLUDE A CLAIM OF ACTUAL INNOCENCE.

101. Pg. 3. Jones continues to misconstrue the testimony of Ms. Taylor in an attempt to

bolster his unsupported contention that Anthony Barksdale was the murderer of Officer Glover.

Pg. 6. ..Jones relies upon this purported discrepancy to conclude that the shooter was wearing a tan coat and not a green coat as described by eyewitness Teresa Taylor and others... Clearly, it cannot be disputed that the murderer of Officer Glover was wearing a Green Bay Packers jacket and Green Bay Packers hat at the time of the murder and only Jones fits that description. [Jim Petro, Daniel R. Ranke; 5.20.2004]

MEMORANDUM IN RESPONSE TO JURISDICTION, OHIO SUPREME COURT CASE NO. 03-0205.

Pg. 14. The state submits that the alleged "inconsistencies" between Teresa Taylor's statement to police and her direct testimony were not "inconsistencies" at all. Appellant argues that in her statement to police, Teresa described the shooter as wearing a "tan and green" jacket, yet at trial, testified the shooter was wearing "a green coat that had a 'G' on the back of it." The state submits that Theresa was in fact describing the same coat in both instances. [Thomas Sartini, Ariana Tarighati, Angela M. Scott; 2.26.2003]

102. This fraudulent pattern set by the prosecutors at trial was followed by the state attorney's general office. The defendant's conviction was gained, and maintained, in violation of clearly established federal law. **BRADY v. MARYLAND, 373 U.S. 83 (1963); UNITED STATES v. BAGLEY, 473 U.S. 667, 105 S.Ct. 3375 (1985); KYLES v. WHITLEY, 514 U.S. 419, 115 S.Ct. 1555 (1995); MOONEY v. HOLOHAN, 294 U.S. 103 (1935); NAPUE v. ILLINOIS, 360 U.S. 264 (1959); GIGLIO v. UNITED STATES, 405 U.S. 150, 153 (1972); UNITED STATES v. AGURS, 427 U.S. 97. 103-104 (1976); STRICKLAND v. WASHINGTON, 466 U.S. 668.**

103. Appointed counsel refused, before trial, to acknowledge that Taylor had identified Barksdale (defendant tried to fire them and hire counsel; hired counsel was denied admission to the case) and therefore refused to assert defendant's defense to the false

eyewitness testimony of Taylor and Barksdale. Such a refusal was unreasonable and constituted deficient performance. Such deficiency was prejudicial because the trier of fact was kept blind to exculpatory evidence, which precluded them from rendering a proper verdict.

104. As is evident, appointed counsel **never** mentioned to jurors or Taylor during "cross-examination" that she had identified the killer as wearing a tan coat, Ex#13 (Tr. 2384-2394). The defendant was denied the effective assistance of counsel as guaranteed by clearly established federal law. There can be no strategic choice not to present exculpatory evidence. That logic defies reason.

105. Appointed counsel were ineffective for failing to stipulate to the admission of Barksdale's lie detector results, which show he lied as to whether he shot Mr. Glover.

106. The defendant requests discovery and depositions of the state prosecutors and lead detective Jeff Brown, Jim Oatman, in order to prove his claim that the state suppressed evidence material to his innocence and knowingly put forth false evidence instead. The defendant asserts that the state actors, after November 17th, 1997, knew Taylor identified Barksdale and in their "preparing" her to testify, "arranged" for her identification to change from the tan coat to the green coat with a big 'G' on the back. This fit their theory.

107. The state has only turned over the Nov. 17th statement of Taylor. The statements made after that are missing; as if Taylor made no more statements. Even if the state actors did not document these statements, the fact that they were made, and within their

knowledge, and were not divulged violates **Brady** and **Holohan**.

108. The defendant has been saddled with constitutionally inadequate attorneys from trial through appeals thus these issues have not been presented.

CLAIM FOR RELIEF VI.

APPOINTED COUNSEL FAILED TO FUNCTION AS ADEQUATE COUNSEL GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY FAILING TO PRESENT EXCULPATORY EVIDENCE AND OTHERWISE SUBJECT THE STATE CASE TO MEANINGFUL ADVERSARIAL TESTING, IN VIOLATION OF DEFENDANT'S RIGHTS TO DUE PROCESS AND TRIAL BY JURY.

109. The defendant was prevented by denial of counsel of choice/ineffective assistance of appointed counsel from presenting exculpatory evidence and otherwise presenting a complete defense to the charges. The defendant was prejudiced by these circumstances. Prejudice occurred because the jury had no clue Teresa Taylor had identified Anthony Barksdale as the shooter, (Ex.#11 pgs. 3-4, 6, 8, 9, 13, 18-19, 20, 22) (Ex.#13: Tr. 2384-2394); no clue that Barksdale had failed a lie detector test about shooting the victim. The trier of facts was effectively prevented, thereby, from considering evidence which inspire reasonable doubt. These acts and omissions fall below an objective level of reasonableness, and reflect the lack of investigation as opposed to strategic choice. **STRICKLAND v. WASHINGTON 466 U.S. 688.**

110. The trier of fact was also prevented, due to appointed counsel's deficient performance, from considering another element of Taylor's statement, namely that, she described the shooting as a self-defense or manslaughter, (Ex. #11, pgs. 19-20). Counsel seemed to not know of this evidence. Otherwise, it certainly could not have been a part

of a reasonable "strategy" not to use it. Counsel argued that the shooting was an instantaneous occurrence in its Rule 29 motion and in closing arguments. Had counsel elicited this evidence, the judge would not have let the case go to the jury. If it did go to the jury, no reasonable juror would have voted to find the defendant guilty beyond a reasonable doubt. **SCHLUP v. DELO, 513 U.S. 298**. Counsel's failure to elicit this evidence cost the defendant fifteen years on death row instead of an acquittal or finding of guilt on a lesser-included offense of manslaughter.

111. Proof of an element that distinguishes between murder and manslaughter implicates **WINSHIP** as much as an element that distinguishes between guilt and innocence. **MULLANEY v. WILBUR, 421 U.S. 684, 691, 697-698.** Counsel's performance was also deficient in failing to use the evidence above to seek a plea bargain for manslaughter, elicit the testimony from Taylor during "cross-examination," and request an instruction on manslaughter. Defendant would have accepted such a plea. Or been acquitted. It was objectively unreasonable for counsel not to show the jury the vhs/dvd tape of Taylor identifying Barksdale, (Ex.#11; dvd included ~~currently held by attorneys from the federal habeas unit in Cleveland~~). **STRICKLAND**. Barring these errors, no reasonable juror would have voted to find the defendant guilty beyond a reasonable doubt of aggravated murder. **SCHLUP.**

112. Appointed counsel were also ineffective for failing to object to an invalid specification #1, insufficient evidence of aggravated robbery, lack of an instruction on reasonable doubt on that specification, and the implications that had for the theory of

prior calculation and design. See claim for relief III. In **BROWN v. SANDERS, 546 U.S. 212, 126 S.Ct. 890**, the United States Supreme Court held that "since the eligibility factors identified distinct and particular aggravating features, if one of them was invalid the jury could not consider the *facts and circumstances* relevant to that factor aggravating in some other capacity" in weighing states, of which Ohio is one. (emphasis added. Aggravated robbery is relevant to the theory of prior calculation and design. Therefore, the jury's verdict must be set aside because they considered it as relevant to the state's theory of prior calculation and design. Otherwise, they could not have found prior calculation and design to exist. The evidence of it was already weak at best.

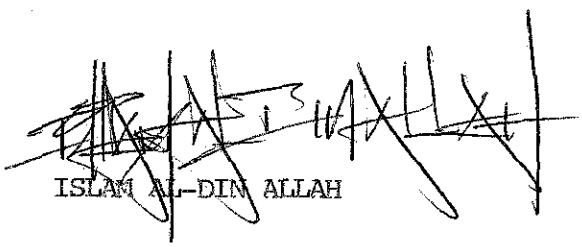
113. Challenges to evidence pertaining to an element of an offense raise constitutional due process concerns under **IN RE WINSHIP** and are thus reviewable on on habeas review.... An alternative way to gain habeas review is to show that a defense raised fully "negates an element" of crime; a state must then disprove that defense as part of its burden of proof. **GALL v. PARKER, 231 F.2d at 307 (6th Cir. 2000).**

114. Not only is the specification invalid for failing to charge an offense, or an element thereof, it was not proven, nor did the jury find it to have existed. **APPRENDI.** The element of prior calculation and design was or would have been fully negated by the evidence of Ex.#11, (pg. 19-20 of transcription) had that vhs/dvd been presented and pointed out to the jury. Moreover, the defendant made no plan to meet Mr. Glover that day and made two attempts to **avoid** Mr. Glover, altogether. Prior calculation and design is disproved. Absent the errors o trial counsel, and appellate counsel for failing to file

ineffective against him, the defendant would not have been convicted of the charge. **SCHLUP.** If the court is predisposed to consider any of these issues procedurally barred or some equivalent of that, the defendant cites **MARTINEZ v. RYAN, 132 S.Ct. 1309 (2012)** as authority to assert that cause and prejudice has been shown by demonstrating that the claims filed now are meritorious and counsel, necessarily, were ineffective for failing to file them at trial and on appeal. And the defendant calls for relief in the interests of justice, lest this court be a party to facilitation of miscarriage of justice.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion For Relief, 60 (B)(5) was sent by regular mail from this institution on August 27 2012, titled as an "Application for Reopening, to Mike Dewine, Attorney General, 30 E. Broad St., Columbus, Ohio 43215. This is the same Motion, merely retitled as a 60 (B)(5).



ISLAM AL-DIN ALLAH

EX#1

COMPLAINT 97CR-01425

THE STATE OF OHIO, ASHTABULA COUNTY
THE CITY OF ASHTABULA } ss. ASHTABULA MUNICIPAL COURT

Before Me, Clerk of the Ashtabula Municipal Court, personally came
Capt. P.F. DiAngelo
who, being sworn according to law deposeth and saith that on or about the 18th day of October A.D., 19 97, in the City of Ashtabula County of Ashtabula, and State of Ohio,

One ODRAYE G. JONES, in attempting or committing a theft offense, as defined in Section 2913.01 of the Ohio Revised Code, or in fleeing immediately after such attempt or offense, did have a deadly weapon or dangerous ordinance, as defined in Section 2923.11 of the Ohio Revised Code, on or about his person or under his control

O.R.C. 2911.01(A)(1)

contrary to the form of the statute of said State in such case made and provided.
And further this deponent saith not. (Deponent) _____

Sworn to and Subscribed Before Me, this _____ day of _____ A.D., 19_____

(SEAL)

_____
Clerk of the Ashtabula Municipal Court

_____
Deputy Clerk of the Ashtabula Municipal Court

97CRAC1446

Ex#1

COMPLAINT

THE STATE OF OHIO, ASHTABULA COUNTY
THE CITY OF ASHTABULA } ss. ASHTABULA MUNICIPAL COURT

Before Me, Clerk of the Ashtabula Municipal Court, personally came

Det. Robert Pouska

who, being sworn according to law deposeth and saith that on or about the 9th day of November A.D., 19 97, in the City of Ashtabula County of Ashtabula, and State of Ohio,

One ODRAYE G. JONES, in attempting or committing a theft offense, as defined in Section 2913.01 of the Ohio Revised Code, or in fleeing immediately after such attempt or offense, did have a deadly weapon or dangerous ordinance, as defined in Section 2923.11 of the Ohio Revised Code, on or about his person or under his control

O.R.C. 2911.01(A)(1)

contrary to the form of the statute of said State in such case made and provided.

And further this deponent saith not. (Deponent) _____

Sworn to and Subscribed Before Me, this _____ day of _____ A.D., 19_____

(SEAL)

_____
Clerk of the Ashtabula Municipal Court

_____
Deputy Clerk of the Ashtabula Municipal Court

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Ex #2

CASE NO. 97-CR-DIRECT

1997 GRAND JURY
SEPTEMBER SESSION, NOVEMBER RECALL, SPECIAL SESSION

COMMON PLEAS COURT
Ashtabula County, Ohio

THE STATE OF OHIO

vs.

ODRAYE G. JONES

Nov 26 9 13 AM '97
CAROL A HEAD
COMMON PLEAS COURT
ASHTABULA, OHIO
FILED

INDICTMENT FOR:

AGGRAVATED MURDER w/specs

A TRUE BILL

Susan E. Golen

SUSAN E. GOLEN
GRAND JURY FOREMAN

THOMAS L. SARTINI
PROSECUTING ATTORNEY

1

MF 1343

INDICTMENT - ONE COUNT

STATE OF OHIO)
) SS.
COUNTY OF ASHTABULA) CASE NO.- DIRECT

STATE OF OHIO VS. ODRAYE G. JONES

Of the September Term, November Recall, Special Session, November 25, 1997:

THE JURORS OF THE ASHTABULA COUNTY GRAND JURY of the State of Ohio on their oaths, in the name and by the authority of the State of Ohio, do find and present that:

COUNT ONE

On or about the 17th day of November, 1997 in the City of Ashtabula, Ashtabula County, Ohio, one **ODRAYE G. JONES** did, purposely and with prior calculation and design, cause the death of another, to wit: William D. Glover, Jr., a peace officer, in violation of Section 2903.01 (A) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

Specification 1 of Count One: The Grand Jury further finds and specifies that the offense was committed for the purpose of escaping detection, apprehension, trial, or punishment of another offense committed by the defendant, to wit; aggravated robbery, an aggravating circumstance as specified in Section 2929.04 (A) (3) of the Ohio Revised Code.

Specification 2 of Count One: The Grand Jury further finds and specifies that the victim of the offense, William D. Glover, Jr., was a peace officer, as defined in Section 2935.01 of the Ohio Revised Code whom the defendant had reasonable cause to know or knew to be such and at the time of the offense the victim, William D. Glover Jr. , was engaged in his duties as a peace officer, an aggravating circumstance as specified in Section 2929.04 (A) (6) of the Ohio Revised Code.

Specification 3 of Count One: The Grand Jury further finds and specifies that **ODRAYE G. JONES** had reasonable cause to know or knew William D. Glover, Jr., was a peace officer as defined in Section 2935.01 of the Ohio Revised Code, and that it was Odraye G. Jones' specific purpose to kill a peace officer at the time of the offense, an aggravating circumstance as specified in Section 2929.04 (A) (6) of the Ohio Revised Code.

Specification 4 of Count One: The Grand Jury further finds and specifies that **ODRAYE G. JONES** had a firearm on or about his person or under his control while committing this offense and displayed the firearm, brandished the firearm, indicated that he possessed the firearm, or used it to facilitate the offense in violation of Section 2941.145 of the Ohio Revised Code.

This offense constitutes the crime of Aggravated Murder with specifications, an offense for which the Death Penalty may be imposed, with a Three Year Firearm Specification, in such case made and provided and against the dignity of the State of Ohio.

RESPECTFULLY SUBMITTED,

THOMAS L. SARTINI, 0001937
PROSECUTING ATTORNEY

Ex #1

220

CASE NO. 97-CR-DIRECT

1997 GRAND JURY
SEPTEMBER SESSION, NOVEMBER RECALL, SPECIAL SESSION

COMMON PLEAS COURT
Ashtabula County, Ohio

Nov 26 9 12 AM '97
CAROL A MEAD
COMMON PLEAS COURT
ASHTABULA CNTY. OH
FILED

THE STATE OF OHIO

vs.

ODRAYE G. JONES

INDICTMENT FOR:

AGGRAVATED ROBBERY (TWO COUNTS) (F-1) (w/spec.)

A TRUE BILL

RECEIVED
97 NOV 26 AM 10 47
JOHN R. JOHNSON, SHERIFF
ASHTABULA COUNTY
JEFFERSON, OHIO

Susan E. Golen

SUSAN E. GOLEN
GRAND JURY FOREMAN

THOMAS L. SARTINI
PROSECUTING ATTORNEY

INDICTMENT - TWO COUNTS

STATE OF OHIO)
) SS.
COUNTY OF ASHTABULA) CASE NO.- DIRECT

STATE OF OHIO VS. ODRAYE G. JONES

Of the September Term, November Recall, Special Session, November 25, 1997:

THE JURORS OF THE ASHTABULA COUNTY GRAND JURY of the State of Ohio on their oaths, in the name and by the authority of the State of Ohio, do find and present that:

COUNT ONE

On or about the 18th day of October, 1997, in the City of Ashtabula, Ashtabula County, Ohio, one **ODRAYE G. JONES** did, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense did have a deadly weapon, as defined in section 2923.11 of the Revised Code, on or about his person or under his control and did display the weapon, brandish it, indicate that he possessed it, or used said weapon.

Specification 1 of Count One: The Grand Jury further finds and specifies that **ODRAYE G. JONES** had a firearm on or about his person or under his control while committing this offense and displayed the firearm, brandished the firearm, indicated that he possessed the firearm, or used it to facilitate the offense in violation of Section 2941.145 of the Ohio Revised Code.

This act, to-wit: Aggravated Robbery, with a three (3) year firearm specification, constitutes a Felony of the First degree, contrary to and in violation of the Ohio Revised Code, Title 29, §2911.01, and against the peace and dignity of the State of Ohio.

COUNT TWO

On or about the 8th day of November, 1997, in the City of Ashtabula, Ashtabula County, Ohio, one **ODRAYE G. JONES** did, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing

immediately after the attempt or offense did have a deadly weapon, as defined in section 2923.11 of the Revised Code, on or about his person or under his control and did display the weapon, brandish it, indicate that he possessed it, or used said weapon.

Specification 1 of Count Two: The Grand Jury further finds and specifies that **ODRAYE G. JONES** had a firearm on or about his person or under his control while committing this offense and displayed the firearm, brandished the firearm, indicated that he possessed the firearm, or used it to facilitate the offense in violation of Section 2941.145 of the Ohio Revised Code.

This act, to-wit: Aggravated Robbery, with a three (3) year firearm specification, constitutes a Felony of the First degree, contrary to and in violation of the Ohio Revised Code, Title 29, §2911.01, and against the peace and dignity of the State of Ohio.

RESPECTFULLY SUBMITTED,

THOMAS L. SARTINI, 0001937
PROSECUTING ATTORNEY

IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

Ex #3

JUN 9 4 33 PM '98

STATE OF OHIO,	)	CASE NO. 97-CR-220
Plaintiff,	)	JUDGE ALFRED W. MACKEY
vs.	)	**JUDGMENT ENTRY**
ODRAYE JONES,	)	
Defendant.	)	

Upon application and for good cause shown, the Court finds Plaintiff's Motion To Dismiss without prejudice is well taken.

IT IS SO ORDERED.

JUDGE ALFRED W. MACKEY

CIV-I-7

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EX #4

IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

STATE OF OHIO,	)	CASE NO. 97-CR-220
Plaintiff,	)	JUDGE ALFRED W. MACKEY
vs.	)	
ODRAYE JONES	)	MOTION TO DISMISS
Defendant.	)	

JUN 9 4 21 PM '98

This day, came the Ashtabula County Prosecuting Attorney, **THOMAS L. SARTINI**, by and through Ariana E. Tarighati, Chief Assistant Prosecutor, on behalf of the State of Ohio, and with leave of Court and for good cause shown, enters a nolle prosequi, without prejudice, in the above captioned case for the reason that the defendant was convicted of Aggravated Murder and sentenced to the death penalty in Case Number 97-CR-221. The prosecutor's office has contacted the Ashtabula City Police Department and the victim in the above captioned matter and they concur in the resolution of this case in this manner. Given that the defendant has received a sentence of death, the interests of justice would not be served by further prosecution herein.

Wherefore, the State of Ohio respectfully requests this Honorable Court to dismiss the above captioned case without prejudice.

Respectfully submitted,

THOMAS L. SARTINI 0001937
PROSECUTING ATTORNEY

By: _____
Ariana E. Tarighati 0039372
Chief Assistant Prosecutor

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Dismiss has been sent by regular U.S. Mail this 10th day of June, 1998, to David Doughten and Robert Tobik, attorneys for Defendant, at 4403 St. Clair Avenue, Cleveland, Ohio 44103.

Ariana E. Tarighati
Chief Assistant Prosecutor

STATE OF OHIO)
) SS.
ASHTABULA COUNTY)

EX #5

IN THE ASHTABULA MUNICIPAL COURT

ASHTABULA, OHIO

THE STATE OF OHIO	)	
	)	ASHTABULA MUNICIPAL COURT
Plaintiff,	)	CASE NO. 97CRA0425
	)	97CRA01448
v.	)	97CRA01449A/B
	)	
ODRAYE G. JONES	)	
	)	
Defendant.	)	

- - -

INITIAL APPEARANCE
Held before
Honorable Albert S. Camplese
~~November 8, 1996~~

NOVEMBER 18, 1997

APPEARANCES:

On behalf of the State of Ohio:

Thomas J. Simon, Esq.; City Solicitor; and Margaret VanDevender, Esq.; Assistant City Solicitor; Justice Center; 110 West 44th Street; Ashtabula, Ohio 44004.

Juanita A. Tittle-Thorpe, RPR
Official Court Reporter
Ashtabula Municipal Court
110 West 44th Street
Ashtabula, Ohio 44004

COPY

1 **NOVEMBER 18, 1997**

2 COURT: Court, at this time, is
3 going to take up State of Ohio v. Odraye Jones. These
4 are several related and unrelated matters.
5 I will make some advance comments. First of all,
6 as most of you are familiar with the court system here
7 in Ashtabula County, are already aware, we are
8 presently in Judge Mackey's courtroom. I am regarding
9 this, basically, to be equivalent in someone else's
10 house. As to those who are in the family, this is a
11 very serious case. As far as this case is concerned,
12 I will not tolerate any disruptions. I am asking that
13 you remain seated in your places where you are at,
14 both until the defendant is brought in and until he is
15 taken out of the room as well.
16 Now, as you are probably aware, in looking around
17 the room, significant security measures are in place.
18 These measures have been taken to ensure the
19 defendant's safety, as well as to ensure the safety of
20 the integrity of these proceedings.
21 Sheriff, are we ready, sir?
22 (DEFENDANT BROUGHT INTO THE COURTROOM).
23 COURT: Court, at this time, is
24 taking up Case Number 97CRA01449 A and B, as well as
25 Case Number 97CRA01425, 97CRA01448.

1 These matters are before the Ashtabula Municipal
2 Court. Present in the courtroom, at this time, is the
3 defendant, Odraye G. Jones. The State, at this
4 hearing, is represented by Ashtabula City Solicitor
5 Thomas J. Simon and Assistant City Solicitor Margaret
6 VanDevender.
7 Mr. Jones, the purpose of this hearing is to make
8 your initial appearance in connection with these
9 felony matters.
10 You are presently charged with two counts of
11 Aggravated Murder. Each of these offenses carry with
12 it the possibility of a death penalty as being a
13 maximum penalty or life imprisonment without the
14 probability of parole with at least thirty years
15 having been served.
16 With respect to the remaining counts, each of
17 those are first degree felonies. In each case, you
18 are exposed to a potential prison term of up to ten
19 years, maximum fine of up to twenty thousand dollars,
20 period of post-release control would be five years, no
21 reduction of that.
22 Do you understand this, sir?
23 DEFENDANT: What was -- how many --
24 I being charged with two murders?
25 COURT: You are charged with,

1 basically, one murder. The State has advised two
2 separate theories; two different methods about which
3 they are indicating they are going to attempt to prove
4 that. You can only be convicted once. They are
5 simply asserting two different means to an end.
6 DEFENDANT: All right. What was
7 that about the fire thing, what charge was that?
8 COURT: You are also charged
9 with--
10 DEFENDANT: Robbery.
11 COURT: Robbery. Aggravated
12 Robbery. Actually, you have two separate counts; one
13 is Case Number 97CRA01425. On that date, it alleges:
14 On October 18, 1997, while in the
City of Ashtabula, one Odraye G.
15 Jones, in attempting or committing
a theft offense, as defined in
16 2913.01 of the Ohio Revised Code,
or in fleeing immediately after such
17 attempt or offense, did have a deadly
or dangerous ordinance as defined in
18 2923.11 of the Ohio Revised Code, on
or about your person or under your
19 control. In degradation of Ohio Revised
Code 2911.01(A)(1).
20
21 This is a felony of the first degree. This is the
22 offense that carries with it the potential ten year
23 jail prison term, potentially twenty thousand dollar
24 fine or both as maximum.
25 Do you understand that?

1 DEFENDANT: So, I'm supposed to
2 have robbed somebody the 17th or 18th?
3 COURT: The 18th of October,
4 that's the alleged date.
5 Then, you have a second offense, which is alleged
6 on November 9, 1997, second charge of robbery,
7 Aggravated Robbery. Again, the allegation is that you
8 violated section 2911.01(A)(1) of the Ohio Revised
9 Code, alleging in that offense:
10 On the 9th day of November, 1997,
while in the City of Ashtabula,
11 County of Ashtabula and State of
Ohio, one Odraye G. Jones, in
12 attempting or committing a theft
offense as defined in 2913.01 of
13 the Ohio Revised Code, or in fleeing
immediately after such attempt or
14 offense, did have a deadly weapon or
dangerous weapon, as defined in
15 2923.11 of the Ohio Revised Code, on
or about your person or under your
16 control, in degradation of 2911.01(A)(1).
17 The same potential penalty would apply in that
18 case.
19 So, do you understand that?
20 DEFENDANT: Yeah.
21 COURT: Now, lastly, we have
22 the two charges, two separate counts of Aggravated
23 Murder. The first being the A case, 97CRA01449A,
24 allegation:
25 That on or about the 17th day of
November, 1997, while in the City

1 of Ashtabula, County of Ashtabula
and State of Ohio, one Odraye G.
2 Jones, did purposely and with prior
calculations and design, cause the
3 death of Ashtabula, Ohio Police Officer
William Glover, when Odraye G. Jones
4 knew or had reasonable cause to know
that William Glover was a peace officer
5 as defined in 2921.01(B) of the Ohio
Revised Code.
6
7 It's further alleged:
8 That the time of the offense, the
victim, William Glover, was engaged in
9 his duties as a police officer and/or
it was the offender's specific purpose
10 to kill the victim, William Glover, a
police officer, in degradation of
11 2903.01(A).
12 Again, that is a charge of Aggravated Murder.
13 The State has also possessed a second theory upon
14 which they are going to attempt to prove this offense
15 occurred and that is present by 97CRA01449B, and that
16 complaint, the State is alleging:
17 On the 17th day of November, 1997,
while in the City of Ashtabula, County
18 of Ashtabula and State of Ohio, one Odraye
G. Jones, did purposely and with prior
19 calculation and design, cause the death of
Ashtabula, Ohio Police Officer William
20 Glover, while Odraye Jones was escaping
apprehension for the felony offense for
21 Aggravated Robbery, in violation of Section
2911.01(A)(1) of the Ohio Revised Code,
22 in degradation of Ohio Revised Code
2903.01(A).
23
24 Do you understand these charges, sir?
25 DEFENDANT: Like, wait while I -- I

1 ain't got no lawyer with me.

2 COURT: I've been advised an

3 Affidavit of Indigency was provided to you and that

4 you expressed a concern that you weren't going to

5 provide any information or sign anything.

6 Now, what I've done is taken the liberty of

7 filling out an affidavit for you, indicating that, at

8 this point and time, you are unable to fill out an

9 affidavit, that way, you won't have to make any

10 representation.

11 What I am considering here is the seriousness of

12 the offense and offenses for which you are charged. I

13 mean, pursuant to authority conferred upon me by the

14 statute, and pursuant to the rules that govern the

15 Ohio Public Defenders guidelines, I am going to

16 appoint the State of Ohio Public Defenders to

17 represent you in this matter.

18 I have appointed an agency, the agency itself will

19 determine which of their staff they will allocate to

20 this case; there will be further hearings as well.

21 As of right now, I am indicating to you, that upon

22 the advisement that you had some difficulty with the

23 affidavit for whatever your reasons are, I am just

24 going to take the conservative approach and appoint

25 counsel for you, and you don't have to make, sign

1 anything until such time that you have an attorney and
2 are able to ask those questions of the attorney.
3 Is that acceptable, sir?
4 DEFENDANT: When will I be able to
5 talk to him?
6 COURT: We are going to make
7 arrangements for that to happen right away.
8 DEFENDANT: The question was, why
9 don't I have one right now? They told me I don't have
10 to sign that if I still have somebody here
11 representing me.
12 COURT: The easiest answer for
13 you is, is that you are also free to hire an attorney.
14 You can hire an attorney if you want to, someone can
15 hire one for you. That apparently didn't happen with
16 you, because there is no attorney sitting next to you.
17 The other thing is possible, if you can't afford an
18 attorney, I can, upon consideration of your financial
19 information, find that you can't afford to hire an
20 attorney and I can appoint one.
21 Now, again, what was conveyed to me is that you
22 did not want to fill that affidavit out. That's the
23 answer why there's no attorney in the chair next to
24 you, because I haven't had the information.
25 I haven't had the information until we've come

1 into this courtroom and I've had a chance to converse
2 with you to make that determination. As I was sitting
3 here in this proceeding, we began talking, I made some
4 notations. I've just indicated, I am appointing the
5 Ohio Public Defenders to represent you in this matter.
6 The purpose of this hearing is to make sure you
7 understand, I am not going to ask for any responses
8 from you, I am going to put down no plea in each of
9 these cases, with your permission, so you don't have
10 to make these decisions without counsel being near
11 you.
12 Do you understand that?
13 DEFENDANT: How do ya'll know I
14 wasn't trying to get my own attorney this morning?
15 COURT: I don't know, and you
16 are still free to do that.
17 DEFENDANT: They wouldn't let me
18 use no phone or nothing.
19 COURT: I've taken care of that
20 issue for the moment.
21 DEFENDANT: So, ya'll got me here,
22 ya'll don't know if I was going to have my own
23 attorney or not. Ya'll just got me in here.
24 COURT: At this point, I want
25 to make sure that you understand what's happening.

1 This is the first chance we've had to talk as you are
2 aware.
3 Now, I've marked you down for no pleas, that's
4 acceptable to you, I will not call upon you to enter a
5 plea at all in this matter.
6 DEFENDANT: I guess -- I don't -- I
7 ain't got no lawyer. I can't even -- I can't have no
8 one consult with me. I ain't making no choices.
9 COURT: I'll indicate that no
10 pleas are being entered.
11 I am going to take up the matter of bond.
12 State wish to be heard concerning bond?
13 MR. SIMON: Yes, your Honor. Thank
14 you, your Honor.
15 Criminal Rule 46 of the Ohio Rules of Procedures,
16 that all persons are entitled to a bond or bail except
17 capital cases, where the presumption is greater or
18 it's evident that the defendant committed the act for
19 which he was charged.
20 This incident, the State has charged the
21 defendant, Jones, with two capital offenses, alleging
22 two separate cause of actions. There's two counts
23 before you in the form of sworn affidavits.
24 Your Honor, I can say, as an officer of the court
25 and prosecutor, I have been involved in this incident

1 from the moment it was reported through today's date
2 and the State has evidence that is evident, that there
3 is a presumption that the defendant did, in fact,
4 commit it. We have eyewitnesses and circumstantial
5 witnesses that will corroborate that.
6 Based upon that, I am asking the Court to do is
7 not permit Mr. Jones to post a bond in Case
8 97CRA01449A and 97CRA01449B and that, that the other
9 cases, the other two cases, the Aggravated Robbery
10 cases, that the maximum amount of bond as permitted by
11 the State, be posted and Mr. Jones be permitted to
12 post.
13 COURT: Mr. Jones, anything you
14 would like to say concerning the matter of bond?
15 DEFENDANT: Can I get a bond?
16 COURT: Well, State is asking
17 that I deny you bond in the two capital offenses.
18 DEFENDANT: Okay. I would like to
19 say this is real fucked up how you got me representing
20 myself.
21 COURT: Mr. Jones--
22 DEFENDANT: That's real nice stuff.
23 COURT: And again, I have been
24 advised--
25 DEFENDANT: You ain't let me call

1 nobody this morning or none of that. Ya'll just got
2 me in court. My people don't even know I'm in
3 Jefferson probably. You know what I am saying.
4 COURT: I will indicate to
5 you--
6 DEFENDANT: Asking me about a bond
7 with no lawyer--
8 COURT: Let me indicate this to
9 you--
10 DEFENDANT: Isn't that against my
11 right or not? Something ain't right.
12 COURT: Before we came into
13 this courtroom, I had discussions with Attorney Joseph
14 Humpolick, who is certified by Rule 65 of the Ohio
15 Criminal Rules, to serve as an attorney in a capital
16 murder case.
17 Mr. Humpolick is present in the courtroom, I had
18 anticipated appointing him so he would be here by your
19 side.
20 Mr. Humpolick advised me that, potentially, he has
21 a conflict in this case. Meaning, he cannot represent
22 you without compromising his role as an attorney in
23 his obligation owing to a different client.
24 Consequently, there is no other person available,
25 presently, in Ashtabula County, to provide this

1 service at this point and time to you, because this is
2 a capital case.
3 Being presented with that, I have a couple of
4 options. I can simply say we are not going to conduct
5 this hearing, therefore, until we can get someone in
6 from the State of Ohio to conduct the hearing, we are
7 not going to conduct it, which means you sit in limbo
8 until such time we can get someone here.
9 I will candidly indicate to you, I opted to do the
10 hearing, so you have an opportunity to express your
11 concerns regarding bond, express your concerns
12 concerning counsel. I am hearing you, and what I am
13 offering to you is a solution.
14 What I'm trying to do here is preserve all of your
15 options. I am not going to ask you to comment on
16 anything. I want to make sure you understand the
17 rights I've indicated to you and you have indicated
18 that you do. And I want you to understand you are not
19 entering any pleas, whatsoever, here today.
20 You are still free to hire counsel if you wish.
21 Your family is free to hire counsel if they wish, but
22 as for the short time, I am going to make sure you
23 have counsel.
24 This is a very serious matter, potentially what is
25 at stake is your life.

1 DEFENDANT: I'm suppose to have
2 counsel from day one, meaning today.
3 COURT: I tried to do that for
4 you, and I can't do it for you. If you don't want to
5 fill out the affidavit--
6 DEFENDANT: Joe said he was going
7 to be representing me anyway, regardless if I fill out
8 the affidavit or not, that's what they told me.
9 COURT: And, that's what I
10 ended up doing, that's--
11 DEFENDANT: He's not representing
12 me right now. That's what I was saying. He said he
13 was going to represent me right now regardless, but he
14 did tell me he was not going to represent me on the
15 case, possibly, because conflict of interest or
16 whatever.
17 COURT: Here's what we are
18 going to do then. I am going to go ahead and accept
19 the State's recommendations. I am going to do deny
20 bond in the two capital matters. The bonds in the two
21 first degree matters will be fifty thousand dollars in
22 each case, and we will continue this proceeding until
23 such time that we have counsel available for and by
24 your side.
25 Be advised, there will be a preliminary hearing

1 scheduled in connection with this matter in each of
2 these four felonies, within the next five to ten days.
3 That hearing, most likely, will take place in this
4 building, if not this courtroom.
5 The proceedings is one that wherein I determine
6 whether it is reasonable and probable to determine
7 that these offenses occurred as the State alleged that
8 they occurred. If I make that finding, then I would
9 prepare a judgment entry that would transfer the case
10 from the Ashtabula Municipal Court, even though we are
11 in Jefferson right now, it would actually be in the
12 Ashtabula Municipal Court. We are only here because
13 it's convenient to conduct this hearing in this
14 building.
15 Once I made that transfer, all proceedings are
16 transferred, are held in this court and before a judge
17 of this court, common pleas court.
18 So, do you understand what's going to happen after
19 today?
20 DEFENDANT: No. What you say about
21 my bonds?
22 COURT: Your bond is -- you are
23 being denied bond in the two capital cases, you are
24 denied bond. I am accepting the State's
25 recommendation.

1 As to the two first degree felony cases, your bond
2 is fifty thousand dollars in each case, but you are
3 given no bond concerning the two capital charges.
4 Your bond in the two other cases is fifty thousand
5 dollars in each case, those are cash or surety at this
6 time.
7 DEFENDANT: So, I don't have a
8 bond?
9 COURT: You do not have a bond,
10 yes.
11 Mr. Simon, anything else you need to address in
12 this hearing?
13 MR. SIMON: No, your Honor.
14 DEFENDANT: Why am I not having a
15 bond?
16 COURT: The State is alleging
17 they are seeking the death penalty here, so when the
18 proof is evident, the presumption is great, the State
19 is entitled to have bond denied and I am accepting
20 that at this point.
21 DEFENDANT: You said when the proof
22 is evident, it's evident now?
23 COURT: The State has indicated
24 they have information pertaining from eyewitnesses
25 indicating that they have very strong proof in this

1 case.

2 Now, again, I don't want to get into this issue, I

3 am certainly able to revisit the issue. I want you to

4 have an attorney. I want you to discuss the matter

5 with your attorney.

6 For now, that is my bond.

7 DEFENDANT: So, when will I be able

8 to, you don't know?

9 COURT: Today we will put you

10 in touch with an attorney.

11 Good luck.

12 (RECESSED).

13 (RECONVENED).

14 COURT: Let the record reflect,

15 we are now reconvened referenced Case Number

16 97CRA01449A\B and 97CRA01425 and 97CRA01448.

17 These are all styled State of Ohio v. Odraye G.

18 Jones. Mr. Jones is present at this hearing.

19 Mr. Jones, we are reconvened after a short recess

20 concerning these cases for the purpose of having an

21 opportunity of me advising you of my efforts to the

22 question you put to me earlier regarding counsel.

23 Now, I personally contacted the State of Ohio

24 Public Defenders Office and at that time, conveyed my

25 concern that you have representation in this court,

1 that you have it immediately. They indicated that the
2 person that they to refer those calls to, the person
3 that's certified to represent people in capital cases,
4 was not present. They indicated they would convey the
5 message to him.
6 I officially called back, and intending to cover
7 all the basis here, and left a message on this guy's
8 voice mail, his name is Mr. Meyers, Greg Meyers.
9 Now, what I would like to do, since I am required
10 to wrap up these proceedings as soon as reasonable, I
11 would like to go through your rights, finish up this
12 proceeding and as soon as I hear word from the public
13 defenders office, I am going to give them the number
14 where you can be reached, so you will have an
15 opportunity to touch base with them as soon as
16 possible.
17 You have the right to have the complaints read to
18 you -- I did read them to you earlier.
19 You have the right to understand the nature of the
20 charge.
21 You have the right to a trial by jury of this
22 matter.
23 You have the right to confront your accusers and
24 ask questions of any witness called by the State of
25 Ohio to support these allegations.

1 You have a right to use the subpoena power of the
2 court, yourself, to have subpoenas issued to compel
3 people to come to court and give testimony and
4 evidence on your behalf.
5 You have the right not to testify in these
6 matters, no one can force you. Should you choose to
7 give testimony or evidence, it can be used against you
8 in court.
9 You have the right to be represented by an
10 attorney of your choosing.
11 You have the right to be granted a period of
12 reasonable continuance so you can confer with legal
13 counsel prior to going forward, and you may have an
14 attorney appointed, and I already made that
15 appointment for the reasons we discussed earlier.
16 You have the right to appeal, if you are
17 convicted.
18 You have the right to a have reasonable bond set
19 in connection with your matter.
20 Do you understand these things?
21 DEFENDANT: Why haven't my bond --
22 why isn't my bond reasonable?
23 Why don't I have a bond now?
24 COURT: At this point, I made a
25 determination based on what the State has represented

1 to me, that bond should be denied.
2 What I am trying to do now is put you in touch
3 with an attorney so you can advise your concerns
4 regarding that to your attorney and they can be heard
5 by him.
6 I am very reluctant to have you say anything on
7 the record concerning this case. That's what I am
8 trying to do here, and that's why I wanted you to have
9 brought up right away so you know, sitting downstairs,
10 that I am making every effort to get someone here for
11 you.
12 I am going on the record, we are being recorded,
13 so I am trying to put it to you straight here.
14 That's all I am trying to do here.
15 DEFENDANT: So, no bond is not a
16 reasonable bond?
17 COURT: In a capital case, no
18 bond is reasonable if proof is evident or presumption
19 is great. The State has represented to me, those are
20 the facts in this case.
21 Your attorney, once he's had a chance to talk to
22 you, is going to talk to the prosecutor, I assure you.
23 DEFENDANT: What proof is that?
24 COURT: Well, again, I don't
25 know what the proof is, they are indicating they have

1 those witnesses. That information will be conveyed to
2 your attorney. The problem you have is, anything you
3 say in this proceeding can be used against you in
4 court. So, I am reluctant to take up the issue
5 without you having an attorney sitting in that chair
6 with you.
7 So, for the time being, I am accepting the State's
8 representation. I understand why you don't like that,
9 but that's what I am doing.
10 And, as soon as we can get an attorney in to
11 represent you, then I'm perfectly able to hear both
12 sides to talk to me about the issue of bond.
13 DEFENDANT: Where is the attorney
14 from?
15 COURT: Columbus.
16 DEFENDANT: So, I got to wait until
17 he comes all the way from Columbus.
18 COURT: I don't know that to be
19 true. That's the State of Ohio Public Defenders
20 Office. There's one attorney that's in charge of
21 those cases, he goes all over the state. Okay?
22 Mr. Simon, do you have anything that needs to come
23 before the Court?
24 MR. SIMON: No, sir.
25 COURT: Then, we are back in

recess then.

DEFENDANT: I can't talk to you after--

COURT: Not at this point.

DEFENDANT: I need to talk to somebody, man. I -- they ain't treating me right.

- - - - - -

CERTIFICATE

I HEREBY CERTIFY that the above and forgoing is a true and correct transcript, as requested, of the testimony and proceedings in the Preliminary Hearing to the Court of the within named case, as shown by my steno-type notes, taken by me during the Preliminary Hearing to the Court, and at the time the testimony was being introduced.

Juanita A. Tittle-Thorpe

JUANITA A. TITTLE-THORPE,
Registered Professional Reporter
and Notary Public, In and For
the State of Ohio.

My Commission Expires: August 6, 2000

Ex#6

STATE OF OHIO)
) SS:
ASHTABULA COUNTY)

IN THE COURT OF COMMON PLEAS

CRIMINAL DIVISION

STATE OF OHIO Plaintiff	)	CASE NOS. 97-CR-220 97-CR-221
-vs-	)	
ODRAYE G. JONES Defendant	)	TRANSCRIPT OF PROCEEDINGS

- - -

Arraignment Hearing

Held Before

Honorable Ronald W. Vettel

December 3, 1997

APPEARANCES:

On Behalf of the Plaintiff:

Thomas L. Sartini, Esq., County Prosecutor, and Ariana Tarighati, Esq., Chief Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, Ohio 44047

On Behalf of the Defendant:

Andrew J. Love, Esq. and Marc B. Minor, Esq., Ohio State Public Defenders, 8 East Long Street, 11th Floor, Columbus, Ohio 43215

Jean A. Whitney, RPR
Official Court Reporter
Ashtabula County Courthouse
Jefferson, Ohio 44047

COPY

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1 WEDNESDAY, DECEMBER 3, 1997 AT 11:30 A.M. O'CLOCK:
2 THE COURT: Let the
3 record show the Court of Common Pleas is in
4 session for the purpose of conducting criminal
5 arraignments this morning.
6 The first case we are going to take
7 up is criminal case No. 97-CR-221. This case
8 is entitled State of Ohio v. Odraye G. Jones.
9 Present before the Court at this time
10 on behalf of the State of Ohio is Prosecuting
11 Attorney Thomas Sartini and Chief Assistant
12 Prosecutor Ariana Tarighati.
13 The defendant, Odraye G. Jones, is
14 that your name, sir?
15 MR. JONES: Yeah.
16 THE COURT: Is present
17 and he is represented by two members of the
18 Ohio Public Defender's Office, Mr. Andrew J.
19 Love and Mr. Marc B. Minor.
20 It appears to the Court that the
21 Ashtabula County Grand Jury in this case has
22 returned an indictment alleging the offense
23 of Aggravated Murder with aggravated
24 circumstances, specifications, and also with
25 a firearm specification. It's in violation of

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2903.01(A). Maximum penalty upon conviction for the offense could result in a death sentence. There is a maximum $25,000 fine and a three-year mandatory sentence if convicted on the gun specification.

At this time, the Court would like to ask has the defendant received a copy of the indictment?

MR. LOVE: Yes, he has, your Honor.

THE COURT: And did he receive that more or less than 24 hours before this hearing?

MR. LOVE: It was, in respect to that charge, more than 24 hours.

THE COURT: Maybe we'll back up here just a minute. There's some rights I'd like to read to the defendant before we proceed.

Mr. Jones, you're entitled to the following rights. Under the Criminal Rules of Procedure, you have the right to the services of an attorney before being arraigned on the charges listed on the indictment and for the defense of the charges upon trial.

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1 If you're found to be indigent, that
2 means you cannot afford counsel, you have the
3 right to have the Court appoint counsel for
4 you at public expense.
5 You have a right to a reasonable
6 continuance in order to obtain and consult
7 with counsel.
8 In this case, there is no right to
9 bail. We'll take that issue up.
10 You have a right to a trial by jury,
11 and you need make no statement in these
12 proceedings. And any statement you do make,
13 can and may be used against you.
14 Do you understand those basic rights?
15 MR. JONES: Yeah.
16 THE COURT: Mr. Jones,
17 let me ask you, do you have the financial
18 ability to hire an attorney to represent you
19 on this charge?
20 MR. JONES: Not at this
21 time.
22 THE COURT: Prior to the
23 commencement of this hearing, the Court was
24 supplied with an affidavit of indigency signed
25 by the defendant, Odraye G. Jones, notarized

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1 by counsel, Andrew J. Love. And for the
2 reasons stated in the written affidavit, the
3 Court finds that the defendant, Odraye G.
4 Jones, is indigent, and the Court will appoint
5 counsel for him.
6 Now, let me ask Mr. Love, does the
7 State Public Defender's Office wish to be
8 considered for appointment as counsel in this
9 case?
10 MR. LOVE: Your Honor,
11 I have been directed and Mr. Marc Minor has
12 been directed to handle this matter up to and
13 through the arraignment procedure. Beyond that,
14 the Director of the Ohio Public Defender's
15 Office has stated to us, and I believe to
16 counsel as well as the Court, that it recommends
17 other lawyers whose names have been provided to
18 this Court to handle the matter. And the basis
19 for Mr. Bodiker, the Director's, decision is
20 because the distance would be a constraint on
21 the ability of the office to include not only
22 attorneys, but also investigators and possible
23 mitigators and experts who would have to travel
24 if not only on a daily basis, certainly on a
25 a two-day basis in order to properly assist

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1 Mr. Jones in his defense of these charges.
2 As a consequence, our instructions are
3 that we are to terminate our involvement after
4 these proceedings today.
5 THE COURT: The Court
6 has had an opportunity to talk to Mr. Love
7 and also the State Public Defender, Mr. David
8 Bodiker, and names have been given to the
9 Court of attorneys in northeastern Ohio that
10 are certified by the Ohio Supreme Court to act
11 as lead or co-counsel in this type of case.
12 The Court also has had an opportunity
13 to contact Mr. David L. Doughten whose office
14 is in Cleveland, Ohio. He is certified by the
15 Ohio Supreme Court to act as lead counsel in
16 a capital case such as this one.
17 Does the defendant have any objection
18 to the Court appointing Mr. David L. Doughten
19 as lead counsel in this case? There will also
20 have to be a second attorney, and the Court has
21 not confirmed second counsel yet.
22 MR. LOVE: Not at this
23 point.
24 THE COURT: Not at this
25 time? Very well.

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1 The Court having found the defendant,
2 Odraye G. Jones, is indigent, and the Court
3 having been advised by the State Public
4 Defender's Office that they did not wish to
5 be appointed as trial counsel in this case,
6 the Court will appoint at this time Attorney
7 David L. Doughten, and his address is 4403
8 St. Clair Avenue, Cleveland, Ohio. I'm going
9 to appoint him as lead counsel in the case.
10 Mr. Doughten has indicated to the Court that
11 he will accept this appointment.
12 The Court will also appoint a second
13 attorney. The Court has been given two names
14 of attorneys that are both certified by the
15 Ohio Supreme Court, and upon confirmation, a
16 second counsel will be appointed.
17 Will the defense have any objection
18 to the Court's considering a Mr. Robert L.
19 Tobik as co-counsel?
20 MR. LOVE: No objection,
21 your Honor.
22 THE COURT: The Court
23 is going to make contact with Mr. Tobik. If
24 he agrees to accept appointment, the Court
25 will appoint him as co-counsel in the case.

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1 Mr. Love, you've had an opportunity
2 to talk with Mr. Jones prior to this arraignment
3 hearing?
4 MR. LOVE: Yes, I have.
5 THE COURT: Is the
6 defendant prepared to proceed with the
7 arraignment at this time?
8 MR. LOVE: Yes, your
9 Honor.
10 THE COURT: You have
11 indicated the defendant has received a copy
12 of the indictment more than 24 hours before
13 this hearing. Would the defendant wish to
14 have the indictment read by the Court at this
15 time?
16 MR. LOVE: Your Honor,
17 we would waive the reading of the indictment.
18 We acknowledge the time of service and enter
19 pleas of not guilty.
20 THE COURT: That's to
21 the charge and specifications?
22 MR. LOVE: That's
23 correct.
24 THE COURT: Does counsel
25 wish to speak on the issue of bond?

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1 MR. SARTINI: Yes, thank
2 you, your Honor.
3 As the Court knows, Criminal Rule 46(A)
4 permits denial of bail in capital cases where
5 the proof is evident, the presumption great.
6 In this case, the indictment contains
7 three capital specifications. The defendant,
8 Odraye Jones, has a prior criminal record and
9 has been observed by witnesses leaving the
10 scene. He was captured in possession of a
11 weapon. Ballistics has established that
12 the weapon that was in possession of the
13 defendant at the time he was captured was in
14 fact the murder weapon, and additional tests
15 have indicated that the defendant at the time of
16 capture had recently fired a weapon.
17 Accordingly, the State submits that
18 the proof in this case is evident and the
19 presumption great. And accordingly, the State
20 moves that the Court have no bond or bail in
21 this case.
22 THE COURT: Mr. Love?
23 MR. LOVE: Your Honor,
24 we're in no position to say yes or disagree
25 or agree with the Court with the position of

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1 the prosecutor for this county. The fact is
2 that we have no evidence, documentation, or
3 anything that would support an otherwise
4 position. So I suppose based on that, we can't
5 say anything except that he should be entitled
6 to bond absent any conviction that has
7 occurred, that would have occurred that would
8 mitigate against his entitlement to bond.
9 THE COURT: Anything
10 else by the State?
11 MR. SARTINI: Nothing,
12 thank you, your Honor.
13 THE COURT: The Court
14 notes the Rule 46(A) of the Rules of Criminal
15 Procedure provides generally all persons are
16 entitled to reasonable bail bond set with the
17 exception of a captal case where the proof
18 is evident or presumption is great.
19 Based on the representations of the
20 State that there are witnesses who observed
21 the criminal act, that the defendant was
22 apprehended in possession of the weapon that
23 was used to commit the crime, and there was
24 evidence he recently acquired the weapon, the
25 Court finds that the proof is evident, and

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1 the Court will order the defendant, Odraye G.
2 Jones, held without bond. And I note the
3 defendant has been incarcerated since November
4 17, 1997, is that correct, for purposes of
5 speedy trial?
6 MR. LOVE: Yes, your
7 Honor.
8 THE COURT: Would you
9 pull the judge?
10 THE CLERK: Number 3,
11 Judge Vettel.
12 THE COURT: This case
13 is assigned to Judge Ronald Vettel, and this
14 case will be scheduled within the requirements
15 of the Ohio Revised Code. Written notice will
16 be furnished to all counsel of hearings and
17 all trial dates.
18 Anything else to take up at this time
19 on behalf of the State?
20 MR. SARTINI: Nothing,
21 your Honor.
22 THE COURT: On behalf of
23 the defense?
24 MR. LOVE: No, thank you.
25

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1 THE COURT: The Court is
2 going to move on to a second case No. 97-CR-220.
3 This case is also entitled State of Ohio v.
4 Odraye G. Jones. Present for this arraignment
5 are the same parties, Prosecutor Tom Sartini,
6 Chief Assistant Ariana Tarighati, and Attorneys
7 Marc B. Minor and Andrew J. Love.
8 Case No. 97-CR-220, it appears that
9 the defendant has been indicted on two counts
10 of Aggravated Robbery with firearm
11 specifications in violation of R. C. 2911.01.
12 Each of these counts are felonies of the
13 first degree. Maximum penalties are ten years
14 imprisonment, $20,000 fine, and three-year
15 mandatory term on the gun specification under
16 each count.
17 Now, let me ask Mr. Love, have you
18 also had an opportunity to discuss this case
19 with Mr. Jones?
20 MR. LOVE: Yes, we have,
21 your Honor.
22 THE COURT: And what you
23 just said previously in Case 221 is equally
24 applicable here that the Public Defender's
25 Office does not wish to be appointed as trial

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1 counsel?
2 MR. LOVE: That's
3 correct.
4 THE COURT: The Court
5 also was handed a second affidavit of indigency
6 which mirrored the first affidavit, and the
7 Court finds in this case that Mr. Jones is also
8 indigent, and I'm going to appoint also in this
9 case Attorney David L. Doughten of Cleveland,
10 Ohio, to represent him as counsel.
11 Mr. Jones, just so the record is clear,
12 you understand the criminal rights, your right
13 to counsel, right to a jury trial, your right
14 to counsel at public expense. Those are
15 equally applicable in this case. Do you
16 understand that?
17 MR. JONES: Yeah.
18 THE COURT: Did Mr. Jones
19 receive a copy of the indictment in Case No.
20 97-CR-220?
21 MR. LOVE: Yes, he has,
22 your Honor.
23 THE COURT: That was
24 more or less than 24 hours?
25 MR. LOVE: Yes. It was

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more than 24 hours.

THE COURT: More than 24 hours. Would the defendant like to have the indictment read?

MR. LOVE: We would waive the reading of the indictment, your Honor.

THE COURT: As to plea?

MR. LOVE: The plea would be not guilty as to all counts.

THE COURT: And the specifications?

MR. LOVE: And the specifications.

THE COURT: Would you like to be heard on the issue of bond in this case?

MR. SARTINI: There's a prior bond of $50,000 cash or surety, and the State of Ohio's position would be that that bond should be continued.

THE COURT: Mr. Love?

MR. LOVE: In light of no bond on the other charge to which Mr. Jones has pled not guilty, we see no point

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in arguing that question. So we have nothing to say regarding that.

THE COURT: The Court will continue that bond as previously set in this case in the sum of $50,000 cash or surety.

Do you know how long the defendant's been incarcerated on this particular case?

MR. SARTINI: I believe since the 17th also. Actually, it would be the 18th when he was actually served with the charges in this case by the lower court.

THE COURT: I wanted a general idea as to speedy trial time.

Pull the judicial assignment please.

THE CLERK: Number 1, Judge Mackey.

THE COURT: This case has been assigned to Judge Alfred Mackey. This case will be scheduled within the requirements of the Ohio Revised Code. Written notice will be to all parties of all hearings and trial dates.

Anything else to bring to the Court's attention on Case No. 97-CR-220?

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1 MR. SARTINI: Nothing by
2 the State, thank you.
3 THE COURT: On behalf of
4 the defense?
5 MR. LOVE: Nothing from
6 the defense, your Honor.
7 THE COURT: Very well.
8 That will complete the arraignment of Odraye
9 G. Jones. He may be returned to the Ashtabula
10 County Jail.
11 (Thereupon, the Court adjourned the
12 within hearing at 11:50 a.m. o'clock).
13 * * * * * *
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9 C E R T I F I C A T E

10 I HEREBY CERTIFY that the above and foregoing
11 is a true and correct Transcript of Proceedings of the
12 hearing held in the within-named cause, as shown by my
13 stenotype notes, taken by me during and at the time the
14 hearing was held.
15
16
17 Jean A. Whitney
18 Jean A. Whitney, RPR
Official Court Reporter
Ashtabula County Courthouse
19 Jefferson, Ohio 44047
20
21 DATE FILED: April 22, 1999
22
23
24
25

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EX#7

1 MR. TOBIK: Might as well
2 take the Monday.
3 MR. DOUGHTEN: I guess we'll
4 take the Monday, March 16th.
5 MS. TARIGHATI: 4:30 P.M.
6 MR. SARTINI: March 16th,
7 that's my birthday.
8 THE COURT: Won't be back
9 until the 20th. Well, set a hearing maybe
10 middle of April. Do you want a couple
11 weeks after you get back to look at
12 whatever you --
13 MS. TARIGHATI: We're set for
14 trial May 5th.
15 THE COURT: I'm looking
16 at that.
17 MR. SARTINI: You're back
18 April 5th.
19 MS. TARIGHATI: I'll be back
20 a week. That will give me a couple days.
21 MR. SARTINI: We'll try to
22 respond immediately.
23 MS. TARIGHATI: The week of
24 April 5th is going to be fine.
25 MR. DOUGHTEN: We'll file

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1 the basic constitutional ones to protect
2 ourselves. We'll file the change of
3 venue, which I understand we have to wait
4 to seat the jury before, but we'll get it
5 in in time. There's not a -- we're not
6 expecting a lot of other pre-trial
7 motions.
8 MR. SARTINI: Not the 60 or
9 80 motions.
10 MR. DOUGHTEN: Most of these
11 things have been decided.
12 THE COURT: As I look at
13 this case from what I know as -- from what
14 I've discussed here, I don't think Odraye
15 has given any statements to anybody.
16 MS. TARIGHATI: He's given
17 quite a few.
18 MR. DOUGHTEN: Not
19 professional-type things. More like blurt
20 out-type things.
21 THE COURT: You know, the
22 typical pre-trial motion to suppress, you
23 know, serious motion can result in a
24 dismissal, might be unlawful arrest or
25 evidence gained. But I think, as I

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1 understand it, the police had a warrant
2 and were looking for him at the time. So
3 I don't think you have an illegal arrest
4 issue.
5 All right. Well, just make a note
6 here there were some statements. I guess
7 what I meant, I was under the impression
8 that he had not sat down after his arrest.
9 MR. SARTINI: No. He gave
10 no custodial interrogative statement. We
11 asked.
12 THE COURT: All right.
13 You probably got some people in your
14 office that are going to look at these
15 things, even if you're not here. I would
16 guess there would be some preliminary
17 research done if there's something that
18 needs to be researched.
19 MS. TARIGHATI: We have
20 started that already. We're anticipated
21 some of the stuff they're filing.
22 THE COURT: Once you get
23 back, we'll give you a first weeks --
24 MR. SARTINI: Like Ariana
25 said, the week of April 5th would be fine.

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Ex #8

A. Yes.

Q. Could you tell the members of the jury what the defendant said?

MR. DOUGHTEN: Objection.

THE COURT: Overruled and the reasons have previously been stated on the record. Go ahead.

A. He made some derogatory remarks towards Officer Glover's family and then --

MR. DOUGHTEN: Objection.

THE COURT: Just a minute. Counsel come up to the bench.

(Thereupon, a Bench Conference was had, out of the hearing of the jury, and the following proceedings were held:)

THE COURT: Where is this coming from?

MR. SARTINI: It's coming from the report. It's just a lead in and the very next statement --

MR. DOUGHTEN: That wasn't what we were expecting to come in at all. That's completely irrelevant to what's going on at all. We ask that the Court instruct the jury to disregard the last comment.

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1 THE COURT: Is he specific
2 what the remarks were?
3 MR. SARTINI: I'll tell you. He
4 didn't put it in his report, if you want to know
5 what they were.
6 THE COURT: I'm going to
7 strike what he said about the family.
8 MR. SARTINI: The other officer,
9 who we're not calling, Pete Droese, put in quotes
10 exactly what he said.
11 THE COURT: Let's just get
12 directly to what he said. I'm going to strike
13 the comment about the family.
14 Thereupon, the following proceedings
15 were held in open court:
16 THE COURT: The objection is
17 sustained. Ladies and gentlemen, there was just
18 a comment made about Mr. Glover's family. You're
19 to disregard that comment. That's ordered
20 stricken from the record and you may proceed.
21 Q. Let me ask you this, Deputy. Do you know what an
22 SKS is?
23 A. Yes, Russian assault rifle.
24 Q. You say Russian assault rifle?
25 A. I believe it is.

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Q. Did the defendant, on the morning and back in that jury room there, make a remark regarding an SKS rifle?

A. Yes, he did.

Q. I would like you at this time to say exactly what the defendant said. What you heard him say.

A. Excuse my language. He said, "If I had my SKS, I would have killed 16 of you mother fuckers."

MR. SARTINI: That's all. Thank you.

THE COURT: You may cross examine.

MR. DOUGHTEN: No cross examination.

THE COURT: Thank you, Officer. That will be all. State have any additional witnesses?

MR. SARTINI: Your Honor, the State of Ohio has additional witnesses but they're not scheduled until tomorrow morning. They're coming from out of town. Because we had to try to guess when we would need them, that's the best we could do.

THE COURT: Does the defense have a witness?

MR. DOUGHTEN: Your Honor,

THE DORBY GROUP 1-800-[illegible]-8040 BER BIOOK FORM PO

Ex #9

1 FRIDAY, MAY 15, 1998 AT 9:20 A.M. O'CLOCK:

2 THE COURT: Let the record
3 show the Court is in session at this time on
4 criminal case 97-CR-221. The case is entitled
5 State of Ohio v. Odraye G. Jones.
6 Present at this time is the State
7 represented by Prosecutor Tom Sartini, Chief
8 Assistant Ariana Tarighati. Defendant Odraye
9 Jones is present at this time, and he's
10 accompanied by counsel, David Doughten and
11 Robert Tobik. The Court notes also in the
12 courtroom is Attorney David Per Due.
13 Now, this hearing was scheduled on very
14 short notice yesterday. This case actually
15 started to trial on May 5, 1998. We began a
16 jury selection process. It is a capital case,
17 so it was a very long, tedious, involved
18 process. The jury was finally completed and
19 selected yesterday on May 14, 1998. I think the
20 jury was sworn at 1:00. There was some
21 preliminary trial instructions that were given,
22 and they were excused by 2:45.
23 It came to the Court's attention that it
24 was 3:21 that an entry of appearance had been
25 filed by Attorney David W. Per Due filed with

1 the Clerk's Office. I believe there was a copy
2 dropped off to the prosecutor and to the Court.
3 At that time, defense attorneys, David
4 Doughten and Robert Tobik, were still in the
5 building, so they were also advised that there
6 had been an entry of appearance.
7 There was nothing else filed at the
8 time. There was no motion for a continuance.
9 It was strictly a three-line entry of
10 appearance. "Now comes David W. Per Due,
11 Attorney at Law, and hereby enters his
12 appearance as counsel of record for the
13 defendant, Odraye G. Jones." Nothing else
14 was filed.
15 This case was not scheduled to go
16 forward today because an expert witness, I can't
17 think of the name, but he's a clinical
18 neurologist, was scheduled to spend I think up
19 to eight or nine, ten hours with the defendant
20 today to conduct some tests and some
21 examinations to determine whether there was any
22 neurology evidence, I believe, that's pertinent
23 to this case. So the case was not scheduled for
24 resumption today. The jury was told to be back
25 at 8:30 Monday morning, and the Court intended

1 certainly yesterday to resume this trial at that
2 time.
3 So the Court put on an order yesterday
4 afternoon. The order went on about 4:17, and
5 the Court tried to make telephone contact or
6 personal contact. At the time the office of
7 David Per Due was contacted, he was not there.
8 It was indicated he wouldn't be back until
9 evening, and the Court was of the opinion that
10 this was such a serious matter that the Court
11 had to ensure that Mr. Per Due had notice of
12 this notice this morning. So the Court did
13 order the sheriff's department to make personal
14 service of the notice of hearing on him, and I
15 believe that was returned. Mr. Per Due is here
16 this morning.
17 So I'm not sure how we want to proceed
18 here. The Court would like some indication from
19 the defendant or from Mr. Per Due what's your
20 position in this case? What's happening?
21 MR. PER DUE: Well, Judge,
22 back about a month ago in your chambers on the
23 George case, which was a civil case, you were
24 noticed by me of the possibility of being
25 retained in this case. If you want, I can relay

1 the conversation exactly to you.
2 THE COURT: I recall it.
3 MR. PER DUE: Stuart
4 Douglas was there. You talked about Mr.
5 Doughten and Mr. Tobik. So you had notice that
6 we were trying to get funding together to do
7 something to be retained. So this was not
8 something that was just dropped on you at 3:00
9 in the afternoon as you stated.
10 Secondly, I'd like to get into the way
11 that you treated my wife, talking to my wife
12 yesterday on the telephone. I don't appreciate
13 it. I plan on going to the State Judiciary
14 concerning your conduct. She is not an
15 attorney. She is not a representative. And you
16 don't make threats. If you want to make a
17 threat to hold me in contempt, be a man and tell
18 me personally. I was at a death penalty seminar
19 in Cleveland. She told you that. She told you
20 I'd be home. You were told that. I never
21 missed a court hearing in your court before, and
22 I was planning on being here. I don't like you
23 making threats, and I don't think it's
24 appropriate. And I think you ought to read
25 Canon 3(B)4. I think it's very pertinent for

1 you about being patient, dignified with people.
2 I think you better read that canon, Judge.
3 Also, along that line, you didn't care
4 if I paid $400 for a seminar or not. It didn't
5 matter to you that was going to cause me to miss
6 a death penalty seminar. They're only twice a
7 year. I should have been there this morning. I
8 don't think it didn't cost anything to you, with
9 your livelihood.
10 Also the judgment entry delivered to my
11 house, I really don't appreciate. I would like
12 to know how you got my address at home.
13 Secondly, I'd like to know why you sent someone,
14 an officer, had my kids crying thinking I was
15 going to get locked up for contempt. That's
16 like me calling your wife and telling her you're
17 a poor Judge. I think its unethical. I think
18 it's despicable. And I think it's uncalled for.
19 And I might add the officer got in my
20 face and said, "Dave, I'm going to remember
21 this", made a threat to me with my kids there.
22 Totally uncalled for with my neighbors and
23 everything else.
24 You can think it's a joke, Judge. I
25 don't find it humorous at all.

1 THE COURT: You see me
2 laughing? You do?
3 MR. PER DUE: Yeah.
4 THE COURT: Anybody else
5 see me laughing?
6 MR. PER DUE: Also the
7 indigency, you said about $7,000 of witness
8 fees or something, an expert. I don't know
9 anything that's been done in this case. I know
10 that Odraye has given me no money as far as I
11 know. If you know anything he's given me, I'd
12 like the Court to present it to me because
13 he's given me nothing. There's no money he has
14 given me. If his grandmother's given me funds
15 or anything else, that's between his grandmother
16 and myself.
17 Last point I'd like to make, Judge, is
18 you also mentioned about the wires being run at
19 this time for the press and media or whatever
20 you told my wife. They're running telephone
21 lines right now. I'm more concerned with
22 justice than running telephone lines and
23 worrying about the media or whatever. His
24 grandmother asked me to take the case. Odraye
25 asked me to take the case, and I told him I

1 would. The ability to take it just came about
2 yesterday at 3:00 when it was filed. It's been
3 worked on, as I stated earlier, for months. So
4 this wasn't something that was just done at the
5 last minute.
6 With that, I think I'll let Mr. Jones
7 state who he wants his counsel and let him go
8 from there. Like I said, I find the whole thing
9 deplorable coming to my house. And I'd like to
10 say if you said I wasn't on this case, what
11 gives you the authority to cite me at 9:00 in
12 the morning in this case? I'd like to know
13 that.
14 THE COURT: Are you done,
15 Mr. Per Due?
16 MR. PER DUE: Yes, I am,
17 sir.
18 THE COURT: I'm going to
19 note this is all collateral to anything that's
20 involved in this case, but I'm going to make a
21 comment or two for the record.
22 Mr. Per Due is correct. About a month
23 ago during a civil case during a pre-trial
24 conference, he indicated to the Court that he
25 had been approached by the Jones family about

1 possible representation in this case. My
2 recollection is he indicated at that time he
3 didn't think they had been able to obtain a
4 retainer. And he said he'd been approached and
5 that was as far as it went to my knowledge.
6 There's been no contact between Mr. Per
7 Due and the Court since that time regarding
8 possible representation in this case.
9 The Court's not going to go on the
10 defensive here, but I reject totally any
11 allegations that I threatened Mrs. Per Due
12 yesterday on the phone. David Per Due's office
13 was called by one of the Court staff after I
14 received this notice to find out just what was
15 going on in the case. He wasn't in the office.
16 Mrs. Per Due apparently serves as his secretary.
17 She was there. She talked to the staff. When
18 it was indicated that Mr. Per Due was going to
19 be out of town for two days, I indicated I would
20 talk to her, and I tried to impress upon her
21 that this case was already seven or eight days
22 into trial, that she indicated that Mr. Per Due
23 spent $400 to attend this seminar out of town.
24 I think I did indicate to her that the Court's
25 spent $7,000 today to have an expert down here

1 to examine Mr. Jones. And I indicated since
2 this case was in trial, this matter had to be
3 taken up now and Mr. Per Due would have to be
4 here. I did not threaten her with any
5 alternatives. I don't recall threatening to
6 hold him in contempt of Court.
7 Now, let's see what was stated here.
8 The Court, after talking to Mrs. Per Due when
9 she indicated he was not in the office, she said
10 he was going to be home probably that night.
11 This Court felt this hearing was of such
12 importance that I had to ensure on the record
13 that Mr. Per Due had notice of this hearing. I
14 don't distrust his wife, but I had to ensure
15 that he was personally notified. So at that
16 time as part of the order that's been made part
17 of the record in this case, the Court did direct
18 the sheriff's department to make personal
19 service upon it of the notice upon Mr. Per Due.
20 There was no time to use mail. The Court
21 presumed his office was closed and didn't want
22 to fax to an office that wouldn't be noticed
23 until this morning. So the Court, that's part
24 of the entry, the Court ordered the sheriff was
25 to serve the notice.

His comment made about money Odraye gave him, $7,000 was mentioned in connection with the expense that's been incurred today for this clinical neurologist.

Mr. Jones, let me ask you directly. What's your position on counsel in this case?

MR. JONES: My position is I was unable, me and my grandmother, were unable to attain a lawyer until yesterday. And now that we've done that, I would like to have the lawyer that I attained.

THE COURT: Can you give me any reasons why you prefer different counsel?

MR. JONES: I see a conflict of interest against me and these gentlemen here.

THE COURT: What was that conflict?

MR. JONES: Well, I really rather not get into that conflict, but we just have two different ways of seeing things or two different goals in this trial that I see.

MR. DOUGHTEN: I could elaborate just to clarify. I think we've had our relationship with Mr. Jones has frankly

1 been pretty good. We have not had fights.
2 We've had our disagreements. That is Mr. Jones
3 feels that our goal is to keep him out of the
4 electric chair. He's worried that we're not
5 concentrating on having him acquitted. He also
6 is a little concerned because our relationship
7 with the prosecutor has been cordial. He would
8 like us to take more of an adversarial posture.
9 We explained to him that, one, that's not my
10 style. I don't view the prosecution as the
11 enemy. I also explained to him that in capital
12 cases, the most important factor is that we have
13 full discovery.
14 We have had our disagreements with the
15 prosecution. We have our arguments with the
16 prosecution. We have fought over certain
17 aspects of evidence. But for the most part,
18 we've been provided an open discovery, and we
19 are providing them with an open discovery.
20 So I told Odraye I saw no reason to pick
21 a fight where we are receiving the information
22 we need to properly defend him.
23 He's uncomfortable with the fact that we
24 haven't taken a more adversarial position with
25 the prosecutor. Again, he's not accusing us of

1 anything, and our relationship we've been able
2 to speak one on one. I don't think either one
3 of us are hiding anything from anybody, but he
4 has indicated that concern and his grandmother,
5 Theresa Lyons, also has that concern.
6 I might add that Theresa, and in
7 particular myself, have had our disagreements.
8 Again, not any full-blown battles, but I don't
9 think she was in agreement with the way I've
10 presented what I think the evidence will be.
11 And I'm sure she is here in the courtroom today
12 and it was correct and again she's not had any
13 personal conflicts. But she was just worried
14 we're addressing the second phase more than the
15 first phase, and I think that's why they're
16 uncomfortable about our representation.
17 Is that essentially true, Odraye?
18 MR. JONES: For the most
19 part.
20 MR. DOUGHTEN: You can
21 correct anything.
22 THE COURT: You can
23 correct or add.
24 MR. JONES: Yeah.
25 It's that just I feel like they're not in my

1 best interest. They're I feel like they're
2 mostly concerned with saving my life. I don't
3 see where that's necessary if you're going to
4 save my life. For what? To spend the rest of
5 it in jail? That's not what I want. I feel if
6 you can't get me off the case, if you can't win
7 the case for me, then you can't do nothing for
8 me. So that's how I feel.
9 MR. DOUGHTEN: That's an
10 accurate reflection of our disagreement.
11 THE COURT: The Court
12 notes, reviewing the file, that there has been a
13 number of compliances with discovery, and I
14 think when the State has forwarded more
15 information, they filed additional notices. I
16 recall the last one I saw there were over 1800
17 pages of discovery that's been forwarded since
18 this case began.
19 Mr. Jones, the reason you have attorneys
20 is to get discovery, find out what evidence the
21 State has, and to weigh that discovery, to make
22 some tactical decisions. Both Mr. Doughten and
23 Mr. Tobik are certified by the Supreme Court of
24 Ohio. I think they're both certified as lead
25 counsel. Some attorneys aren't even certified

as lead counsel. They can only sit second seat.

The Court made an effort to find attorneys that were familiar with this process. A capital case is like no other case. If you get into that second phase, that sentencing phase, it's highly technical. These two gentlemen have been through that before.

I'll give Mr. Per Due an opportunity to add to this if he wants, but the Court has checked the most recent Ohio Supreme Court certification list and Mr. Per Due is not certified by the Supreme Court. That's not to say he couldn't be retained, but I could not appoint Mr. Per Due to represent you in this case because the Supreme Court says only attorneys certified that met certain requirements can do that.

So Mr. Per Due would not have qualified to be appointed in this case. It's not to say he's not a competent attorney, but he doesn't have the experience in capital cases.

MR. DOUGHTEN: I would also like to put on the record when we found out about this, I did contact Mr. Per Due. We did have a long conversation last night, and I would

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1 indicate that we have no problem between us. As
2 far as Mr. Per Due or Mr. Tobik and myself,
3 we're all in agreement we will do the best for
4 Odraye.
5 If this Court would have Mr. Per Due sit
6 on the case, I indicated, Mr. Tobik and I
7 indicated to Odraye that we will do everything
8 in our power to assist. Also Mr. Per Due has
9 indicated if he's appointed to the case, that he
10 would assist in any way that he can, and he sat
11 down with Odraye and told him so. I want the
12 record clear that there's been absolutely zero
13 problems between defense counsel, and we both
14 agree that regardless of the decision, that we
15 will work together as best we can in Odraye's
16 best interest. So I would like to make that
17 clear for the record.
18 MR. PER DUE: Until a year
19 ago, I missed a seminar, I was qualified for
20 eight years. The Court can check back other
21 than this year.
22 THE COURT: I just checked
23 the list that was currently--
24 MR. PER DUE: That's why I
25 was going to the death penalty seminar, and that

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1 was required.
2 THE COURT: I think Mr.
3 Doughten and Mr. Tobik indicated they were both
4 presenters at that seminar, that they couldn't
5 be there yesterday because they were in Court
6 picking a jury. So Doughten and Tobik would be
7 teaching what Mr. Per Due would have been
8 covering at that seminar.
9 Mr. Per Due, you ready to proceed on
10 Monday morning?
11 MR. PER DUE: Absolutely
12 not. If you're going to order me, you might
13 have to have the sheriff take me over to the
14 jail now. I'm not going to put a life on the
15 line on a case that took seven months too long
16 into the year to get the evidence and have a
17 paid investigator. And I'm going to do my own
18 work. I'm absolutely not going to start on
19 Monday morning. I can assure the Court on that.
20 THE COURT: I don't see
21 any motions.
22 MR. PER DUE: I'm making an
23 oral motion. You told me I wasn't allowed. How
24 can I if I'm not on the case?
25 THE COURT: You entered an

appearance here yesterday indicating you had been hired and you were on the case. I put on an order that you and the other attorneys be here there morning so the Court could gain some information as to what's going on in this case.

MR. PER DUE: You told my wife I was not on the case. You had not accepted my appointment. Is that true or not?

THE COURT: You did not file an entry of appearance?

MR. PER DUE: You said you were not accepting it. That's what you said. That's why we're here.

THE COURT: You're not ready to proceed on Monday?

MR. PER DUE: Absolutely not.

THE COURT: What kind of continuance would you need?

MR. PER DUE: I would like to continue to at least September to get ready at the minimum.

THE COURT: The Court notes that if Mr. Per Due were in this case, he said he just made an oral motion for a

1 continuance to September, the Court finds it
2 interesting the timing on this. This jury was
3 sworn yesterday at 1:00. My understanding of
4 the law is that jeopardy attaches once the jury
5 is sworn. I think for this Court to continue
6 this case until September, you got a half of
7 month of May, June, July, August, September,
8 probably three and half to four months, the jury
9 would have to follow those instructions not to
10 investigate, read, listen, watch, talk, and it
11 might be an awful stretch to expect that 16
12 people would be able to do that for a four-month
13 period. And the Court notes that Mr. Per Due is
14 not asking for what I would characterize a
15 reasonable continuance.
16 In effect, from what I understand, you
17 want to start all over again. If you are in
18 this case, you're going to start all over.
19 You're going to do your own investigation, etc.
20 Is that correct?
21 MR. PER DUE: Certainly I'm
22 going to do my own investigation. I don't rely
23 on anything as any other attorney might.
24 THE COURT: What's your
25 position if the Court determined that Mr. Tobik

1 and Mr. Doughten would continue? Mr. Doughten
2 would be lead counsel. What's your position on
3 assisting them? They would do the presentation.
4 You would have some input with them, be able to
5 discuss it and talk to your client.
6 MR. PER DUE: We're not
7 interested in doing that. I would do the case,
8 or the Court could continue on with Mr. Tobik
9 and Mr. Doughten as it sees fit.
10 THE COURT: You're not
11 interested in being third counsel?
12 MR. PER DUE: No.
13 THE COURT: State of Ohio
14 care to be heard on this?
15 MR. SARTINI: Yes, thank
16 you, your Honor.
17 Your Honor, this trial was scheduled on
18 January 20th to begin on May 5, 1998. We're now
19 eight days into trial. There is not a motion
20 that was made before trial. Hundreds of
21 people's lives have already be disrupted by the
22 proceedings to date to a varying extent. State
23 of Ohio has witnesses from out of the county
24 scheduled, including expert witnesses whose
25 schedules are busy and already been disrupted

1 for this trial.

2 Mr. Jones has been represented since
3 November of 1997 with competent counsel who have
4 significant capital case experience and who have
5 reported time and time again that they have a
6 good working relationship with the defendant in
7 this case.

8 This Court must balance the rights of
9 the defendant to a fair trial with the right of
10 the people of the State of Ohio to a fair trial
11 and to the orderly administration of justice.

12 Mr. Per Due has filed with this Court a
13 bare bones entry of appearance at 3:21,
14 Thursday, some two and half hours after a jury
15 was sworn in and after eight days of jury
16 selection.

17 This document contains Mr. Per Due's
18 signature. Upon learning that Mr. Per Due was
19 allegedly out of town on Thursday, we confirmed
20 that it was in fact Mr. Per Due's signature on
21 the document. Therefore, it appears that this
22 document must have been prepared prior to
23 Thursday and perhaps purposely not filed until
24 late yesterday afternoon.

25 Additionally, Mr. Per Due is scheduled

1 for a jury trial on a non-capital jury in Judge
2 Yost's on May 27, 1998. Mr. Per Due had filed a
3 suppression motion in that case which was
4 scheduled for an all-day hearing. After a half
5 day, Mr. Per Due announced that his schedule
6 didn't permit him to be there any longer and the
7 Court again accommodated Mr. Per Due--
8 MR. PER DUE: It's
9 irrelevant.
10 THE COURT: This is his--
11 MR. SARTINI: Agreed to
12 continue the hearing to a later date, but
13 indicated that it might result in a delay of
14 that trial. Soon thereafter, Mr. Per Due
15 withdrew the suppression hearing in this case
16 for the sole purpose of having that case go to
17 trial on May 27th. He now wants to jump into
18 this case in mid-trial.
19 Apparently, that other case going to
20 trial on May 27th is now not so important to Mr.
21 Per Due any longer as this case will not be
22 concluded by May 27th.
23 For the record, Mr. Per Due also
24 requested to join the Legal Aid Department as
25 co-counsel in State v. Wolf, another case of

1 some notoriety in this county.
2 Your Honor, the State of Ohio believes
3 that the late entry by Mr. Per Due was concocted
4 by Mr. Per Due and made in bad faith for the
5 sole purpose of disrupting these proceedings and
6 attempting to build error in this case. The
7 jail visitation log says that Mr. Per Due has
8 never visited Odraye Jones and apparently had no
9 conversation with him, at least face-to-face,
10 until perhaps this morning, 24 hours
11 approximately after he filed his entry of
12 appearance. Therefore, is this truly Mr. Jones'
13 choice of counsel?
14 Additionally, Mr. Per Due was over here
15 a few weeks saying that he had a surprise for
16 the State of Ohio and the prosecutor's office.
17 Hearsay to be sure. But in retrospect with
18 everything else that has happened in this case,
19 it is not out of the realm of probability that
20 his late entry in this case was for disruptive
21 purposes and that is what he was referring to at
22 that time.
23 Your Honor, the evidence points to a bad
24 faith, dilatory maneuver as opposed to a
25 reasonable request for a new attorney based on a

1 "total lack of cooperation and trust between
2 counsel and defendant", which is the standard.
3 In State v. Haberek, 47 Ohio App. 3d
4 35, the Court states as follows:
5 "The right to counsel guaranteed by the
6 Sixth Amendment of the United States
7 Constitution, in Section 10, Article 1 of the
8 Ohio Constitution does not always mean counsel
9 of one's own choosing. The right to counsel
10 must be tempered by the public's right to a
11 prompt, orderly, and efficient administration of
12 justice. Attorneys cannot be shed at every
13 stage of the proceedings so as to impede that
14 orderly administration. On the other hand,
15 there is a right to discharge counsel because of
16 the personal nature of the services being
17 performed. Thus, it is the trial court's duty
18 to balance the defendant's right to counsel of
19 his preferential choosing against the public
20 interest in the administration of justice. A
21 review of the cases in this area reveals the
22 courts tip the balance in favor of the defendant
23 when there existed a total lack of cooperation
24 and trust between counsel and defendant.
25 Conversely, the balance is tipped in favor of

1 the orderly and efficient administration of
2 justice when defendant's request for new counsel
3 is for purposes of delay or made in bad faith."
4 "In addition to the fact a motion to
5 substitute counsel made the day of trial, when
6 such date was set in excess of two months prior
7 to the date of trial, intimates such motion is
8 made in bad faith for the purposes of delay. In
9 denying defendant's request to substitute
10 counsel, the trial court suggested an improper
11 motive served as an impetus for the request.
12 The trial court acted within the bounds of its
13 discretion in denying defendant's motion to
14 substitute." Defendant has been, in this case,
15 afforded his Sixth Amendment right to counsel.
16 Your Honor, the prosecuting attorney
17 strenuously rejects any continuance be granted
18 in this case. Mr. Per Due, and there are cases
19 that indicate that a one-day delay is
20 sufficient. Mr. Per Due, if he's in the case,
21 he can have three days to get ready by Monday
22 morning. We're prepared to go to trial. The
23 State of Ohio and the people of the State of
24 Ohio expect a trial to start Monday. And I
25 believe that the orderly administration of

1 justice under all the facts and circumstances of
2 this case indicate that this trial should go
3 forward on Monday with or without Mr. Per Due.
4 Thank you.
5 THE COURT: Let me ask Mr.
6 Doughten, anything you want to add in response?
7 MR. DOUGHTEN: No, your
8 Honor. I just want to reiterate again we've had
9 nothing but good relationships with Mr. Per Due,
10 and we discussed the case and the evidence at
11 length, and that whatever decision the Court
12 makes, we will cooperate with Mr. Per Due any
13 way possible.
14 THE COURT: Mr. Per Due,
15 anything you want to add?
16 MR. PER DUE: Yeah. I think
17 it's amazing that Mr. Sartini's finally in court
18 trying a case first off. He has a little
19 problem with veracity. Usually, you take
20 complaints to the State Bar. But Mr. Sartini, I
21 didn't ask to get into that Wolf case. If you
22 do a little reading, it was Mr. McCarthy, the
23 public defender, asked me to be appointed. And
24 I didn't bring anybody from Lake County to fight
25 it either. While you're at it, Mr. Sartini, you

have the facts a little wrong. My signature, we didn't concoct anything. You didn't listen. Maybe you didn't hear. Maybe you have a hearing problem. But the Judge, as I told him, I talked to him a month ago about being retained. Did you hear that part? There's nothing concocted. But I can tell you one thing. A Bar complaint against your prosecutor's conduct will be done and filed.

THE COURT: All right, Mr. Per Due, that's--

MR. PER DUE: Thank you, Judge.

THE COURT: You don't need threats.

MR. PER DUE: It's not a threat.

THE COURT: If you want to take some action go ahead.

MR. PER DUE: I will. The man sat there and called me a liar.

THE COURT: You said you were going to file a complaint. Now you're going to file one against the prosecutor?

MR. PER DUE: Certainly am.

THE COURT: You have a right to do just that. Go ahead and do it. It has nothing to do--

MR. PER DUE: It's not a threat, Judge. It's a promise.

MR. JONES: May I say something?

THE COURT: Certainly, Mr. Jones.

MR. JONES: In the hearing back in the other courtroom, in Judge Mackey's courtroom, he had asked if I was indigent and whatever, and then I said yes. And you said then we'll appoint these attorneys to you. You said if you or your family's financial situation should change and you're able to hire an attorney, then let us know. It came at this moment, so we're letting you know.

THE COURT: May be too late at this time, Mr. Jones. If you came in here a month ago when Mr. Per Due first indicated to this Court that he had been approached. And the conversation was not that he was retained. He said he had been approached. They talked about it, and they didn't think they could hire him.

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1 He didn't think he'd be getting into it.
2 When this matter first came before the
3 Court, you were arraigned. The Court contacted
4 the Public Defender's Office in Columbus to see
5 if they'd represent you. If you recall, there
6 were two attorneys that came up from Columbus
7 for the arraignment, both African-American
8 attorneys. The Court asked them if they would
9 represent you in this case, if they would be
10 your attorneys. And their position was that
11 Columbus was so far from Ashtabula County. It's
12 about a three-hour drive from Columbus, and they
13 said they had so many other cases around the
14 state, they did not have the manpower to send
15 attorneys up here to actually handle the trial.
16 You know we've had a lot of hearings up
17 here. We've been in trial for seven days
18 already. So those two attorneys, and I think
19 they talked to you in the jail, and I
20 specifically directed them to tell you why they
21 weren't going to represent you, and I believe
22 they did that.
23 It was also at the time I talked with
24 the Public Defender. I asked him if he had any
25 recommendations, any attorneys. And we got a

1 list, and the Court checked that list against
2 the attorneys that are approved by the Supreme
3 Court. Mr. Doughten and Mr. Tobik are both
4 chief lawyers. They had represented cases out
5 here last year. I've read cases from the
6 Supreme Court where they were named on them.
7 This witness, Mr. See, they got a case reversed
8 because a Judge refused to appoint Mr. See as an
9 expert witness, and Mr. Doughten handled this
10 case.
11 These people are experienced. They know
12 what they're doing. And there were no other
13 attorneys here in the county that were certified
14 on an indigent basis. The Court has to be
15 assured that you have an attorney that is
16 competent to handle these things that they've
17 been trained and they have some experience. I
18 don't make that decision. That's made by the
19 Supreme Court. They publish a list. And I said
20 earlier Mr. Per Due wasn't on the current list.
21 He indicated he was on the list some years ago,
22 but he's not current at this time.
23 So the Court's gone to great efforts to
24 try and find you attorneys here that weren't
25 connected with anybody around here, that were

1 competent, experienced, and certified by the
2 Supreme Court of Ohio, and that was the
3 selection process that resulted in Mr. Doughten
4 and Mr. Tobik. They're both in different
5 offices. They're not partners. They don't
6 practice together. But the Court even made a
7 point to appoint two attorneys who had offices
8 close by so they could confer and get back and
9 forth with each other and wouldn't have to be
10 running from Cleveland, out to Mentor, or
11 someplace else. I tried to make it convenient
12 for them so they could give you the best defense
13 possible.
14 Anything else you want to say?
15 MR. JONES: Yeah. I have
16 no problem with these lawyers competency. It's
17 just that I don't trust them. I like them, but
18 I don't trust them. And I don't feel that
19 they're in my best interest. And now that I'm
20 able to hire an attorney, that attorney should
21 be appointed to represent me.
22 THE COURT: Mr. Jones, if
23 you would come in about a month ago before the
24 jury notices went out and we started the trial,
25 and if you indicated at that time you had a

1 different attorney, the Court probably would
2 take a whole different view of this because we
3 wouldn't have started anything. You know we've
4 been through three hundred people in here for
5 jury selection. We've had pre-trial
6 conferences. There's been a lot of discovery
7 that was passed. If I had been told a month ago
8 or at least before this trial started that you
9 honestly wanted different attorneys, there would
10 be no harm done. The case would have been
11 passed a couple months. You could have gotten
12 anybody you want, and you could have proceeded
13 in September.
14 I initially set this case--I had to set
15 it within a 90-day period. It was set in
16 February. At that time you and your attorneys
17 approached the Court and said we can't get the
18 discovery done. We have experts wee need
19 appointed. The experts need time to accumulate
20 the records and study them and get together on
21 what they found and what they're going to do
22 with it. So it's at your request I continued
23 the trial another three months. You asked
24 specifically to have it set in early May, and
25 that's when it was set. And that was in

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1 accordance with your right to a speedy trial,
2 which you've known from I think it was in, you
3 mentioned--I don't remember the date. January
4 20th I think it was. It was back on January
5 20th I think when this case was actually
6 scheduled for trial to today's date.
7 Is there anything else anyboyd wants to
8 present to the Court?
9 MR. SARTINI: Nothing by the
10 State.
11 THE COURT: Anything else
12 from the defense?
13 MR. DOUGHTEN: Nothing
14 further, your Honor.
15 THE COURT: Mr. Per Due?
16 Miss Lyons, you're not a party to this
17 action.
18 MR. PER DUE: I have nothing
19 further to say.
20 THE COURT: The Court has
21 done a little research on this myself, and I
22 think the case that was cited by the
23 prosecution, State v. Haberek, 47 Ohio App. 3d
24 35, is the most recent case I can find that
25 really discusses the issue.

1 The Court tried to Shepardize this. I
2 haven't found anything more current than that.
3 But I think the statement that the prosecutor
4 made is accurate. The defendant in any criminal
5 case has an absolute right to counsel, an
6 absolute right to an attorney. What you don't
7 have necessarily is an absolute right to an
8 attorney of your choosing. Mr. Per Due has
9 entered an appearance regardless of what I did
10 or didn't say or what he claims I said to his
11 wife. He's entered this case by filing this
12 document. That's why we need him this morning.
13 That's why I've given him the chance to talk.
14 Once he entered the case, now the Court
15 has to make a determination whether or not I'm
16 going to continue this case. Mr. Per Due has
17 indicated he didn't file anything in writing.
18 He indicated here orally that he will not be
19 ready to proceed on Monday, that he has no
20 interest in assisting Mr. Doughten or Mr. Tobik
21 and permitting Mr. Doughten to remain as lead
22 counsel, and that he would need until September
23 of 1998 to adequately prepare to represent the
24 defendant in this case.
25 Now, the Court finds in the Haberek

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1 case that the Court used the term "total lack of
2 cooperation", total lack. And the Court notes
3 there has been absolutely nothing filed on the
4 record of this case indicating any dispute, any
5 lack of cooperation, any distrust between the
6 defendant and counsel.
7 Now, the Court's aware of the fact that
8 the defendant's grandmother has been active in
9 trying to assist him in trying to get counsel.
10 She's not the defendant in this case. It's Mr.
11 Jones that's the party to the lawsuit. And
12 there's nothing on this record to indicate any
13 disputes, any total lack of trust or
14 cooperation. And the word "total" was used by
15 that Court.
16 So what that Court said is this Court
17 gets into a weighing situation. If the Court
18 finds that there's a total lack of cooperation
19 and trust between the defendant and counsel,
20 then that weighs in favor of putting him to
21 attain new counsel. The Court also balances and
22 determines whether or not the request for delay
23 is made, the request for new counsel is made,
24 for the purposes of delay or made in bad faith.
25 Now, the Court has already noted this

1 entry of appearance was filed about two hours
2 after the jury was sworn in this case. Now,
3 there was some indication from counsel that Mr.
4 Per Due was out of town yesterday. So I'm
5 assuming he had to sign this sometime before he
6 went out of town because it was filed at 3:21.
7 The Court wonders why it wasn't filed earlier,
8 possibly first thing in the morning. Once a
9 jury is sworn in a case, jeopardy attaches, and
10 for any reason this case would not go either to
11 a mistrial or dismissal, there would be
12 certainly a request by the defendant for
13 discharge due to double jeopardy purposes.
14 So we've passed a critical stage in this
15 trial. This is not a week or two or month
16 before trial. This is seven days into trial
17 after jeopardy has attached and the jury has
18 been selected. So the Court is very suspicious
19 of the filing date being two hours after
20 jeopardy attached in this matter.
21 Also at the time it was filed, there was
22 a copy delivered to the Court's office but there
23 was no explanation, no indication whether Mr.
24 Per Due intends even to be here Monday for
25 trial, no indication that he even knew what was

1 going on in the trial. There was no motion for
2 a continuance filed. There was just nothing.
3 So that's why the Court scheduled this hearing
4 this morning, to get to the bottom of this and
5 make some determinations.
6 The Court notes, and I already stated on
7 the record, if this continuance were ordered in
8 favor of Mr. Per Due, this trial would be
9 delayed for three to four months. This jury is
10 sworn and under oath, and the Court questions
11 whether the jury could follow those instructions
12 truly and faithfully for that long a period of
13 time.
14 The Court's read a number of cases. I
15 think there was a statement made by the court in
16 the Haberek case that said attorneys cannot be
17 shed at every stage of the proceedings so as to
18 to impede the orderly administration of justice.
19 That's one function this Court must serve. It's
20 a judicial responsibility to see that both the
21 State's interests and the defense's interests
22 are protected, that there's an orderly
23 proceeding, and this Court is concerned and
24 required to fulfill that obligation. I think
25 there was another case that a court talked about

1 the Court makes a determination whether the
2 reasons for dissatisfaction were justifiable.
3 There was one comment that Mr. Sartini
4 made, and I want the record to reflect that the
5 Court is placing absolutely no weight on it, and
6 I've totally disregarded it. And this was
7 conversation about Mr. Per Due made a statement
8 he had a surprise for the State. There's no
9 evidence of that and that's totally disregarded
10 by the Court.
11 I may ask Mr. Per Due, have you ever
12 visited Mr. Jones in the jail?
13 MR. PER DUE: I think I'm
14 aware of the rules of the code of professional
15 responsibilities. He had two attorneys, and I'm
16 not allowed to discuss the case. I'm sure Mr.
17 Sartini is. He practices law in the state. I
18 had a three-way conversation with him, with his
19 grandmother. I'm sure he'll verify that I told
20 him what the code was. We did not discuss it
21 because I'm not at liberty and was not at
22 liberty. And I never talked to him about it.
23 That is a code of professional responsibility
24 when he's represented by other attorneys, as you
25 well know.

1 MR. DOUGHTEN: I should
2 answer something that Theresa indicated to us
3 that she was trying to raise money. So she did
4 tell us that she was attempting. We spoke to
5 her three days ago I think and asked her before
6 we swore in the jury how it was going. She
7 indicated to us at that time that she didn't
8 think she had the money to hire him, although I
9 spoke to her yesterday and they were then able.
10 Is that correct?
11 MS. LYONS: Yes.
12 THE COURT: I think
13 the Court's adequately discussed the law
14 here and the evidence and the arguments that
15 have been made. And the Court will now finally
16 conclude, based on this balancing test set forth
17 in the State v. Haberek case that the Court
18 has weighed the reasons for a change of counsel,
19 and it's been indicated Mr. Jones has had more
20 than adequate opportunity here. Basically,
21 he's saying he's not comfortable. He doesn't
22 think they're spending enough time on the guilt
23 phase, and he indicated that he had no problem
24 with their competency. He just doesn't trust
25 them.

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1 Monday morning at 8:30 a.m. Attorneys Doughten
2 and Tobik previously appointed will proceed and
3 provide representation in this case. That will
4 be all.
5 (Thereupon, the Court adjourned
6 the within hearing at 10:10 a.m. o'clock).
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1 (Thereupon, the following proceedings
2 were held on Monday, May 18, 1998, starting on
3 Page 2113):
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EX #10

Don't form any opinion in your own mind yet. You haven't received all the information you're going to receive. And step back please and we'll call out the smokers in just a minute.

(Thereupon, the Court recessed the within trial at 10:50 a.m. o'clock).

(Whereupon, at 11:15 a.m. o'clock, the following proceedings were held):

THE COURT: Let the record show we're back in session on criminal case 97-CR-221. Both parties are present. All counsel are present at this time. And the Court is ready to proceed with the instructions on the law.

Is the State ready to proceed?

MR. SARTINI: Yes, your Honor.

THE COURT: Defense ready?

MR. DOUGHTON: Yes, we are, your Honor.

THE COURT: Call the jury back.

(Thereupon, the following proceedings were held before the jury):

THE COURT: You may be

1 seated. And let the record show that the jury
2 is now in the courtroom. All members and
3 alternates are present and accounted for.
4 Ladies and Gentlemen of the Jury, the
5 next stage of these proceedings will be for the
6 Court to deliver to you the instructions on the
7 law. I told you earlier that I intend to give
8 you written copies of these instructions to take
9 with you into the juryroom, and the law requires
10 that I deliver them verbally or orally to you at
11 this time. So I'm going to ask you for your
12 close attention. And for no other reason, you
13 have some idea where to look if you wanted to
14 re-read a portion of these instructions.
15 Ladies and Gentlemen, you have heard the
16 evidence and the arguments of counsel. It is
17 now my duty to instruct you on the law which
18 applies to this lawsuit.
19 The Court and jury have separate
20 functions. You decide the disputed facts and
21 the Court provides the instructions of law. It
22 is your sworn duty to accept these instructions
23 and to apply the law as it is given to you. You
24 are not permitted to change the law nor to apply
25 your own conception of what you think the law

should be.

A criminal case begins with the filing of an indictment. The indictment is the instrument used to inform this defendant that he has been charged with a crime. The fact that it was filed may not be considered as evidence for any purpose.

The plea of not guilty by this defendant is a denial of the charges and puts in issue all the essential elements of the crime charged. The effect of the plea of not guilty by the defendant is to place upon the State of Ohio and the prosecution the burden of proof.

The law presumes that everyone who is charged with a crime is innocent until his guilt is proven beyond a reasonable doubt. Therefore, this defendant must be acquitted unless the State produces evidence which convinces you beyond a reasonable doubt of every essential element of the crime charged in the indictment.

The Legislature of the State of Ohio has defined the term "reasonable doubt", and that definition is as follows:

"Reasonable doubt is present when jurors, after they have carefully considered and

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1 compared all the evidence, cannot say they are
2 firmly convinced of the truth of the charge. It
3 is a doubt based on reason and common sense.
4 Reasonable doubt is not a mere possible doubt
5 because everything relating to human affairs or
6 depending on moral evidence is open to some
7 possible or imaginary doubt. Proof beyond a
8 reasonable doubt is proof of such character that
9 an ordinary person would be willing to rely and
10 act upon it in the most important of his own
11 affairs."
12 If after a full and impartial
13 consideration of all the evidence you are firmly
14 convinced of the truth of the charge, then the
15 State has proved its case beyond a reasonable
16 doubt. However, if you are not firmly convinced
17 of the truth of the charge, then you must find
18 the defendant not guilty.
19 The evidence in this case consists of
20 the testimony received from the witnesses upon
21 the stand, the exhibits which have been admitted
22 into evidence and which you will have for
23 further observation and examination with you in
24 the juryroom, and the stipulations by counsel
25 occurring during the trial, which were entered

1 into the record and which you were directed to
2 accept as evidence.
3 You are, as I have said to you earlier,
4 the sole judges of the facts, but as a matter of
5 law, the Court says to you that there are two
6 kinds of evidence, direct and indirect evidence.
7 Direct evidence is the testimony given
8 by a witness who has seen or heard the facts to
9 which he testifies as well, of course, as the
10 exhibits admitted into evidence and the
11 stipulations agreed upon by counsel. Evidence
12 may also be used to prove a fact by inference.
13 This is referred to as circumstantial evidence.
14 Circumstantial evidence is the proof of
15 facts or circumstances by direct evidence from
16 which you may reasonably infer other related or
17 connected facts which naturally and logically
18 follow, according to the common experience of
19 mankind.
20 To infer or make an inference is to
21 reach a reasonable conclusion of facts which you
22 may, but are not required to, make from other
23 facts which you find have been established by
24 direct evidence. Whether an inference is made
25 rests entirely with you.

A fictional set of facts to illustrate direct and circumstantial evidence is as follows: A witness testifies that he saw two persons enter a cabin in the woods and only saw one come out. This is direct evidence of what the person observed. Another witness says that she did not actually see anyone enter or leave the cabin, but she observed two sets of footprints in the snow leading to the door of the cabin and one set of footprints leading away from the door of the cabin. This is evidence of the circumstances from which the jury could reasonably but not necessarily infer that two people entered the cabin and one person left.

In the absence of direct evidence, circumstantial evidence by itself will justify a finding of guilt if the circumstances are so convincing as to exclude reasonable doubt as to the defendant's guilt.

Where the evidence is both direct and circumstantial, the combination of the two must satisfy you of the defendant's guilt beyond a reasonable doubt.

You may not make one inference from another inference, but you may draw more than

one inference from the same facts or circumstances.

If the circumstances create inferences that are equally consistent with either innocence or guilt, such inference must be resolved in favor of the defendant's innocence.

Neither the opening statements at the beginning of this trial, the closing arguments which have just been concluded, or the jury view of the alleged scene, are to be considered by you as evidence.

Arguments of counsel to the jury are provided by law for the purpose of aiding the jury in its analysis of the evidence and affords them an opportunity to summarize the evidence and present their views. Also the purpose of such argument is to give the jury the benefit of such deduction and reasonable inferences made by counsel as may logically and reasonably appeal to the wisdom and judgment of the jury.

The only purpose of the jury view is to help you understand the evidence as it is presented in the courtroom.

Statements made or answers given throughout the course of the trial that were

ordered stricken by the Court and you were instructed to disregard are not evidence and must be considered as if they never had been spoken. You must not and you have no right to speculate as to why the Court sustained the objection to any question or what the answer to any such question might have been.

You must not draw any inference or speculate to the truth of any suggestion included in a question that was not answered.

You are the sole judges of the facts, the credibility of the witnesses, and the weight of the evidence. To weigh the evidence, you must consider the credibility of each witness. You will apply the tests of truthfulness which apply in your daily lives. These tests include the appearance of each witness upon the stand, his or her manner in testifying, the reasonableness of the testimony, the opportunity the witness had to see, hear, and know the things concerning which he or she testified, his or her accuracy of memory, frankness or lack of it, intelligence, interest, and bias, if any, together with all the facts and circumstances surrounding the testimony. Applying these

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1 tests, you will assign the testimony of each
2 witness such weight as you Members of the Jury
3 deem proper.
4 You are not required to believe the
5 testimony of any witness simply because he or
6 she was under oath. You may believe or
7 disbelieve all or any part of the testimony of
8 any witness. It is your province to determine
9 what testimony is worthy of belief and what
10 testimony is not worthy of belief.
11 You will also determine what weight, if
12 any, the exhibits, and the stipulations should
13 receive in the light of all the evidence.
14 The testimony of the defendant in this
15 case is to be weighed by the same rules that
16 apply to other witnesses.
17 A number of exhibits and testimony
18 related to them have been introduced. You may
19 consider whether the exhibits are the same
20 objects and in the same condition as originally
21 taken by the police officers. You will
22 determine what weight, if any, the exhibits
23 should receive in light of all the evidence.
24 Testimony was introduce that the
25 defendant, Odraye G. Jones, and other witnesses

1 were previously convicted of a criminal act.
2 This testimony may be considered for the purpose
3 of helping you to test the credibility or weight
4 to be given to their testimony. It cannot be
5 considered for any other purpose.
6 Some evidence was introduced that the
7 witness, Anthony Barksdale, was charged with a
8 crime that was dismissed. This evidence may be
9 considered as it relates to his credibility on
10 the issue of the consideration he may have
11 received in order to obtain his testimony. This
12 evidence cannot be considered for any other
13 purpose.
14 Some evidence was received that two
15 witnesses are currently awaiting sentencing upon
16 prior criminal convictions. The jury may
17 consider this evidence in determining
18 credibility of such witnesses. This evidence
19 may not be considered for any other purpose.
20 Some questions have been asked various
21 witnesses concerning written or oral statements
22 given by them prior to this trial. You will
23 determine whether or not any prior inconsistent
24 statements were made by a given witness, and I
25 say to you that the testimony is permitted by

1 the Court in order to assist you in determining
2 the credibility of such witnesses.
3 In this case, some evidence was received
4 that the defendant, Odraye G. Jones, may have
5 fled the vicinity of the crime. In regard to
6 this evidence, you are instructed that flight in
7 and of itself does not raise a presumption of
8 guilt, but it may tend to show consciousness of
9 guilt or a guilty connection with the crime.
10 If, therefore, you find that the defendant did
11 flee from the scene of an alleged crime, you may
12 consider these circumstances in the case in
13 determining the guilt or innocence of the
14 defendant. Upon you alone rests the decision
15 what weight, if any, you place upon the evidence
16 you find, if any, which bears upon this issue.
17 Generally, a witness may not express an
18 opinion. However, one who follows a profession
19 may express his opinion because of his or her
20 education, knowledge, or experience. Such
21 testimony is admitted for whatever assistance it
22 may provide to help you to arrive at a just
23 verdict.
24 Questions have been asked in which
25 expert witnesses were permitted to assume that

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1 certain facts were true and to give an opinion
2 based on such assumption. You must determine
3 whether the assumed facts upon which the experts
4 base their opinion are true. If any assumed
5 fact was not established, you will determine its
6 effect upon the opinion of the experts.
7 Questions have been asked of expert
8 witnesses after they had disclosed the
9 underlying facts or data. It is for you, the
10 jury, to decide if such facts or data on which
11 they base their opinions are true. And you will
12 decide the weight to give to such evidence.
13 However, as with other witnesses, upon
14 you alone rests the duty of deciding what weight
15 should be given to the testimony of the experts.
16 In determining it's weight, you may take into
17 consideration their skill, experience,
18 knowledge, veracity, familiarity with the facts
19 of this case, and the usual rules for testing
20 credibility and determining the weight to be
21 given to the testimony.
22 The State charges the defendant, Odraye
23 G. Jones, with the crime of Aggravated Murder.
24 The charge of Aggravated Murder is brought under
25 or based upon Ohio Revised Code Section

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2903.01(A), which insofar as is applicable to the facts of this case provides as follows:

"No person shall purposely and with prior calculation and design, cause the death of another."

Before you can find the defendant guilty of Aggravated Murder, you must find beyond a reasonable doubt that on or about November 17, 1997, in Ashtabula County, Ohio, 1) the defendant, Odraye G. Jones, did purposely 2) and with prior calculation and design, 3) cause the death of William D. Glover, Jr.

You will note that purpose to kill William D. Glover, Jr. is an essential element of the crime of Aggravated Murder.

A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendant a specific intention to kill William D. Glover, Jr.

Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally. Purpose and intent mean

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the same thing. The purpose with which a person does an act is known only to himself unless he expresses it to others or indicates it by his conduct.

The purpose with which a person does an act may be inferred from the manner in which it is done, the means used, and all the other facts and circumstances in evidence.

If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to cause the death may be inferred from the use of the weapon. Whether such inference is made rests entirely with you.

Proof of motive is not required. The presence or absence of motive is one of the circumstances bearing upon purpose.

No person may be convicted of Aggravated Murder unless he specifically intended to cause the death of another.

"Prior calculation and design" means that the purpose to cause the death was reached by a definite process of reasoning in advance of the homicide, which process of reasoning must have included a mental plan involving studied consideration of the method and means with which

to cause the death of another.

To constitute a prior calculation, there must have been sufficient time and opportunity for the planning of an act of homicide, and the circumstances surrounding the homicide must show a scheme designed to carry out the calculated decision to cause the death. No definite period of time must elapse and no particular amount of consideration must be given, but acting on the spur of the moment or after momentary consideration of the purpose to cause the death is not sufficient.

The State charges that the act of the defendant caused the death of William D. Glover, Jr. Cause is an essential element of the offense. Cause is an act which in a natural and continuance sequence directly produces the death and without which it would not have occurred.

The Court has now instructed you on all of the law applicable to the offense of Aggravated Murder. If you find that the State failed to prove beyond a reasonable doubt any one of the essential elements of the offense of Aggravated Murder, your verdict must be not guilty of that offense. If you find that the

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1 State failed to prove prior calculation and
2 design, or if you are unable to agree that the
3 State proved this element, you must find the
4 defendant not guilty of Aggravated Murder. You
5 will then proceed with your deliberation and
6 decide whether the State has proved beyond a
7 reasonable doubt all of the elements of the
8 lesser offense of Murder.
9 The offense of Murder is distinguished
10 from the offense of Aggravated Murder by the
11 failure to prove the existence of prior
12 calculation and design. To constitute a murder,
13 it must be established that on or about the 17th
14 day of November, 1997, and in Ashtabula County,
15 Ohio, the defendant purposely caused the death
16 of William D. Glover, Jr.
17 Purpose and causation have been defined
18 for you previously and those definitions are
19 equally applicable here.
20 If you find that the State failed to
21 prove beyond a reasonable doubt any one of the
22 essential elements of the lesser offense of
23 Murder, your verdict must be not guilty of
24 Murder, and in that event your deliberations
25 would be completed.

1 If you find that the State has proved
2 beyond a reasonable doubt all of the essential
3 elements of the offense of Aggravated Murder, or
4 in accordance with your deliberations all the
5 essential elements of the lesser offense of
6 Murder, your verdict must be guilty of
7 Aggravated Murder, or in accordance with these
8 instructions, of the lesser offense of Murder.
9 If the evidence warrants it, you may
10 find the defendant guilty of an offense lesser
11 than that charged in the indictment. However,
12 notwithstanding this right, it is your duty to
13 accept the law as given to you by the Court, and
14 if the facts and the law warrant a conviction of
15 the offense charged in the indictment, to-wit:
16 Aggravated Murder, then it is your duty to make
17 such finding uninfluenced by your power to find
18 a lesser offense.
19 This provision is not designed to
20 relieve you from the performance of an
21 unpleasant duty. It is included to prevent
22 failure of justice if the evidence fails to
23 prove the original charge, but does justify a
24 verdict for the lesser offense.
25 The jury will note that under these

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1 instructions, and in accordance with your
2 findings, the jury may find the defendant not
3 guilty of both Aggravated Murder and Murder.
4 But the jury may not find the defendant guilty
5 of both of these offenses.
6 Under these instructions, and in
7 accordance with the jury's findings, the jury
8 may find the defendant guilty of Aggravated
9 Murder or Murder, in other words, of one or the
10 other charge but not of both charges.
11 If your verdict is guilty of Aggravated
12 Murder or the lesser offense of Murder, you will
13 then determine beyond a reasonable doubt under
14 specification number 4, whether the defendant,
15 Odraye G. Jones, at the time he committed the
16 offense, had a firearm on or about his person or
17 under his control and whether he used the
18 firearm to facilitate the offense. On this
19 issue, the State of Ohio has the burden of proof
20 beyond a reasonable doubt.
21 "Deadly weapon" means any instrument,
22 device or thing capable of inflicting death and
23 designed or specially adapted for use as a
24 weapon, or possessed, carried, or used as a
25 weapon.

A "firearm" means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. Firearm includes an unloaded firearm and any firearm which is inoperable but which can readily be rendered operable.

"On or about his person or under his control" means on or so near to his person as to to be conveniently accessible and within his immediate physical reach.

To facilitate the offense, means to make easy or easier to carry out.

If your verdict is guilty of Aggravated Murder, you will then determine beyond a reasonable doubt under specification number one, whether the defendant, Odraye G. Jones, committed the offense of Aggravated Murder for the purpose of escaping apprehension, trial or punishment for another offense committed by the defendant.

Under specification number 2, whether the victim of the offense, William D. Glover, Jr., was a peace officer whom the defendant had reasonable cause to know or knew to be a peace

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1 officer, and at the time of the offense the
2 victim, William D. Glover, Jr., was engaged in
3 his duties as a peace officer.
4 Under specification number 3, whether
5 the defendant, Odraye G. Jones, had reasonable
6 cause to know or knew that William D. Glover,
7 Jr. was a peace officer, and that it was the
8 defendant's specific purpose to kill a peace
9 officer at the time of the offense.
10 The term "peace officer" includes a
11 member of the organized police department of any
12 municipal corporation.
13 The term "offense" includes felonies,
14 misdemeanors, and violations of ordinances of
15 municipal corporations as well as statutes
16 adopted by the State Ohio.
17 The term "specific purpose to kill" has
18 previously been defined in these instructions
19 and that definition is equally applicable here.
20 I have prepared one verdict form which
21 you will have with you in the juryroom. No
22 inference is to be drawn from the order in which
23 I read this verdict form to you. Since this
24 verdict form will be with you in the juryroom
25 its contents will not been stated in these

1 written instructions.
2 The verdict form is a seven-page
3 document. On the first page it starts out with
4 the caption. It says Verdict, Court of common
5 Pleas, Ashtabula County, Ohio, May Session,
6 1998. Then it has the caption of the case. It
7 says State of Ohio, Plaintiff v. Odraye G.
8 Jones, Defendant, Case No. 97-CR-221, Indictment
9 for Aggravated Murder.
10 The first paragraph reads as follows:
11 "We, the jury in this case, being duly impaneled
12 and sworn, find the defendant, Odraye G.
13 Jones...", and then you'll see a single asterisk
14 and a blank line. If you look down below the
15 paragraph you'll see another single asterisk and
16 behind it the words "Insert in ink guilty or not
17 guilty." So on that blank line you will insert
18 the word "guilty" or the words "not guilty" in
19 accordance with your findings. And it goes on,
20 "...of Aggravated Murder in the manner and form
21 as he stands charged in the indictment under
22 Section 2903.01(A) of the Ohio Revised Code."
23 Then down below that paragraph you're
24 going to see two additional paragraphs in
25 parentheses. The first paragraph reads "If you

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find the defendant guilty of Aggravated Murder in the form above, you will consider and complete the following verdict forms relating to specifications 1, 2, 3 and 4."

The next paragraph in parenthesis says "If you find the defendant not guilty of the offense of Aggravated Murder, or if your unable to reach a unanimous verdict of either guilty or not guilty of Aggravated Murder, you will consider and complete the following verdict form on Page 6." If that were the case, you would then go to Page 6. Below that you'll see 12 signature lines.

On Page Number 2, is specification number 1. It reads, "We, the jury in this case, find the defendant, Odraye G. Jones...", and there you'll see a double asterisk, two of them. If you look down that paragraph, you'll see another double asterisk and behind it the words "Insert in ink did or did not" on that blank line directly to the right the word "did" or the words "did not" in accordance with your findings. And it goes on, "...commit the offense of Aggravated Murder for the purpose of escaping apprehension, trial, or punishment for

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1 another offense committed by the defendant.
2 Again you'll see 12 signature lines below that
3 specification. The last line is always
4 reserved for the foreman or forelady.
5 On Page 3, it says specification number
6 2. "We, the jury in this case, find that the
7 victim of the offense, William D. Glover, Jr..."
8 and behind that you're going to see three
9 asterisks or a triple asterisk. And if you look
10 down below that paragraph you'll see another
11 triple asterisk and the words "Insert in ink was
12 or was not." On that first blank line you're
13 going to write in "was" or "was not" in
14 accordance with your findings. And it goes on,
15 "...a peace officer, whom the defendant...", and
16 then you'll see a double asterisk and you look
17 below. You'll see another double asterisk with
18 the words "Insert in ink did or did not".
19 So on that second line you're going to
20 write in the words "did" or "did not" in
21 accordance with your findings. And it goes on,
22 "... know or have reasonable cause to know to be
23 a peace officer, and at the time of the offense
24 the victim, William D. Glover, Jr...", and again
25 a triple asterisk with the words "Insert in ink

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1 was or was not" engaged in his duties as a peace
2 officer. You'll see 12 signature lines.
3 On Page 4, specification number 3, "We,
4 the jury in this case, find that the defendant,
5 Odraye G. Jones...", and you'll see a double
6 asterisk with directions to "Insert did or did
7 not." And it goes on, "...know or have
8 reasonable cause to know that William D. Glover,
9 Jr. was a peace officer, and that it...", and
10 then you'll see the asterisks with the
11 instructions to "Insert was or was not." And it
12 goes on, "...the defendant's specific purpose to
13 kill a peace officer at the time of the
14 offense." And again you'll see 12 more
15 signature lines.
16 Page number 5 is specification number 4.
17 "We, the jury in this case, find the defendant,
18 Odraye G. Jones, at the time he committed the
19 offense...", and you'll see the double asterisk
20 and again instructions to "Insert the words did
21 or did not" on that line. And it goes on,
22 "...have a firearm on or about his person or
23 under his control...", and another double
24 asterisk with instructions to "Insert did or did
25 not, use the firearm to facilitate the offense."

1 Again you'll have 12 signature lines.
2 On Page Number 6, it reads "We, the jury
3 in this case, duly impaneled and sworn, find the
4 defendant, Odraye G. Jones...", and here again
5 you'll see the single asterisk with the
6 instructions to "Insert in ink the word guilty
7 or words not guilty" in accordance with your
8 findings. You do that on the blank line. And
9 it goes on, "...of the lesser included offense
10 of Murder under Section 2903.02(A) of the Ohio
11 Revised Code.
12 Below that paragraph you'll see some
13 additional instructions in parentheses, and they
14 read as follows: "If you find the defendant
15 guilty of the lesser offense of Murder, you will
16 consider and complete the following verdict form
17 relating to specification number 4." You'll see
18 12 signature lines below that.
19 Going on to Page 7, it's specification
20 number 4. "We, the jury in this case, find that
21 the defendant, Odraye G. Jones, at the time he
22 committed the offense...", and you'll see the
23 double asterisk again with instructions to
24 "Insert the word did or the words did not" in
25 accordance with your finding, "...have a firearm

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on or about his person or under his control...", and another double asterisk with instructions to write in the word did or the words did not in accordance with your findings, "...use the firearm to facilitate the offense." Again, you'll see 12 signature lines at the very bottom of that page. You'll see it says date, blank line, 1998. Today's date is written on the first page of the jury instructions. It's May 26, 1998.

That completes the verdict form.

You may not consider at this time or in any way discuss the subject matter of punishment. Your duty is confined to the determination of the guilt or innocence of the defendant.

Now, you should consider all of the evidence and make your findings with intelligence and impartiality and without bias, sympathy, or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

If during the course of the trial the Court said or did anything which you consider an indication of the Court's view of the facts, you

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1 are instructed to disregard it.
2 Your initial conduct upon entering the
3 juryroom is a matter of great importance. It is
4 not wise immediately to express a determination
5 or insist upon a certain verdict. Because if
6 your sense of pride is aroused, you may hesitate
7 to change your position even if you decide you
8 are wrong.
9 Consult with one another. Consider each
10 others views and deliberate with the objective
11 of reaching an agreement if you can do so
12 without disturbing your individual judgment.
13 Each of you must decide this case for
14 yourself, but you should do so only after a
15 discussion and consideration of the case with
16 your fellow jurors. Do not hestitate to change
17 an opinion if convinced that it is wrong.
18 However, you should not surrender honest
19 convictions in order to be congenial or to reach
20 a verdict solely because of the opinion of other
21 jurors.
22 The Court will place if your possession
23 the verdict form, the exhibits that were
24 admitted into evidence, and this written charge.
25 The foreman or forelady shall retain possession

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1 of this charge, the exhibits, and the verdict
2 form and return them to the courtroom.
3 Until your verdict is announced in open
4 court, you are not to disclose to anyone else
5 the status of your deliberations or the nature
6 of your verdict.
7 This being a criminal case, it is
8 necessary that all of your number, to-wit,
9 twelve, agree upon a verdict and sign it in ink
10 before you can return to the courtroom. You
11 will not be allowed, without the permission of
12 the Court, to separate until you have agreed
13 upon your verdict or are otherwise discharged.
14 And you will be in the charge of the Bailiff
15 during all of your retirement.
16 After you retire, select first a foreman
17 or forelady to preside over your deliberations.
18 The foreman or forelady will see to it that your
19 deliberations are conducted in an orderly
20 manner. However, the Court hastens to add that
21 the foreman or forelady has no greater voice or
22 vote than any other member of this jury.
23 Whenever all twelve, and I repeat, all
24 twelve jurors agree upon the verdict, you will
25 sign the verdict in ink and advise the Bailiff

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1 by sounding the buzzer. You will then be
2 returned to the courtroom.
3 If during your deliberations the jury
4 has a question to propound to the Court, it
5 should be submitted in the following manner.
6 First, you should reflect upon it and discuss it
7 in the juryroom. Then it should be reduced to
8 writing so that there will be no
9 misunderstanding as to what has been requested.
10 The request should be signed by the foreman or
11 forelady, and you should keep in mind that never
12 in any way should the request made reflect the
13 status of your deliberations. The request
14 should indicate specifically what is requested,
15 and it should be delivered to the Bailiff so
16 that she in turn can hand it up to the Court.
17 I will provide you with a copy of these
18 instructions in written form. During your
19 deliberations you may refer to the instructions
20 to guide your decision making. You must
21 consider the instructions as a whole and not
22 follow some and ignore others. Please return
23 the instructions to the Court at the time your
24 verdict is rendered.
25 At this time I'd like to ask counsel,

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1 and you can just indicate yes or no, does
2 counsel desire anything further at this time?
3 Or are there any additions or corrections to be
4 requested?
5 MR. SARTINI: Nothing on
6 behalf of the State. Thank you.
7 THE COURT: Mr. Doughten?
8 MR. DOUGHTEN: Nothing that
9 we haven't already discussed.
10 THE COURT: To the
11 alternate jurors, the Court says that you are
12 selected to serve in the event of any misfortune
13 to a member of the panel. Fortunately, your
14 services have not been needed up to this point.
15 And it will not be necessary for you to
16 deliberate. However, your services as alternate
17 jurors are still necessary and you are not
18 excused. You will accompany the jury panel into
19 the juryroom, and you will be present during the
20 time of the deliberations. You may listen to
21 the deliberations, but you may not participate,
22 in any fashion whatsoever, in the jury
23 deliberations.
24 You will be permitted to accompany the
25 jury panel and to listen to their deliberations