

ORIGINAL

IN THE SUPREME COURT OF OHIO

Pierre Yates
Petitioner

Case No. **13-0286**

V.

STATE OF OHIO
Respondent

On Appeal from the Cuyahoga
County Court of Appeals
Eighth Appellate District

Court of Appeals Case No. 86631

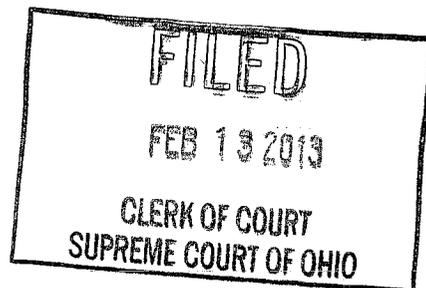
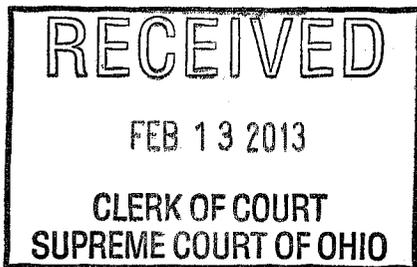
MOTION FOR LEAVE TO FILE DELAYED DISCRETIONARY APPEAL

COUNSEL FOR APPELLEE:

TIMOTHY MCGINTY
CUYAHOGA COUNTY PROSECUTOR
1200 ONTARIO STREET
CLEVELAND, OHIO 44113

COUNSEL FOR APPELLANT:

PIERRE YATES #484-276
PRO-SE
5701 BURNETT ROAD
P O BOX 901
LEAVITTSBURG OHIO 44430



IN THE SUPREME COURT OF OHIO

Pierre Yates
Petitioner

V.

STATE OF OHIO
Respondent

On Appeal from the Cuyahoga
County Court of Appeals
Eighth Appellate District

Court of Appeals Case No. 86631

MOTION FOR LEAVE TO FILE DELAYED DISCRETIONARY APPEAL

Appellant Pierre Yates hereby seeks permission to file a delayed appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals case No. 86631, on June 15, 2006.

This case involves a felony and raises a substantial constitutional question.

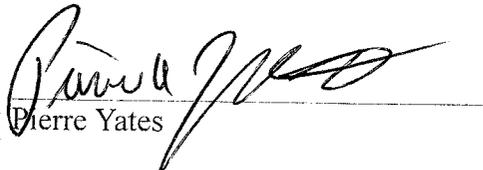
Respectfully submitted,


Pierre Yates

APPELLANT PRO-SE

CERTIFICATE OF SERVICE

I certify that a copy of this Motion was sent by U.S. Mail to counsel for appellees, Timothy McGinty, Cuyahoga County Prosecutor, 1200 Ontario street, Cleveland Ohio, 44113 on February 8th, 2013.


Pierre Yates

APPELLANT PRO-SE

AFFIDAVIT IN SUPPORT OF MOTION

I, Pierre Yates, the affiant herein, do hereby depose and state, sworn and cautioned upon my oath as required by law, the following as being true statements to the best of my knowledge and belief and in accordance with Ohio Supreme Court Practice Rule 2.2(4)(a)[S.Ct. Prac. R. 2.2(4)(a):

When the time to file a court action has expired, Ohio Criminal Rule 45 gives a court the authority to grant and permit an action to be done. As stated in **Ohio Criminal Rule 45(B)**:

When an act is required or allowed to be performed at or within a specified time, the court for cause shown may at any time in its discretion (2) upon motion permit the act to be done after expiration of the specified period, if the failure to act on time was the result of excusable neglect or would result in injustice to the defendant.

The appellant filed a properly filed post-conviction relief petition. This petition was pending while the direct appeal was pending and decided. Because the trial court did not enter the mandatory finding of facts and conclusions of law for the denial of the post-conviction relief petition the order is incomplete. As stated in **R.C. 2953.21(C)**:

The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending... If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

In *State of Ohio V. Mapson* (1982), 1 Ohio St. 3d 217, 438 N.E.2d 910, 1982 Ohio lexis 732 it states:

"A judgment denying post-conviction relief must include findings of fact and conclusions of law and a judgment entry without such findings is incomplete and thus does not commence running a time period for filing an appeal therefrom."

Thus, when the court failed to file the findings for the appellant's denied post-conviction relief petition, the appellant could not appeal the denial of post-conviction relief petition, and thus had to pursue the findings in order to appeal. When the date to file to the Ohio Supreme Court expired, Ohio Administrative Code(O.A.C.) 5120-05-03 allowed the appellant to have a

maximum of \$10.00 per month due to being assessed court cost by the trial court. The appellant could not pursue an appeal to the Ohio Supreme Court and pursue the findings of fact and conclusions of law and appeal the denial of his post-conviction relief petition all while also providing for his own personal hygiene items such as: toothpaste, soap, and laundry detergent, which is not provided by the State Correctional Institution. The time to file to the Ohio Supreme Court expired while the appellant pursued the findings of fact and conclusions of law for post-conviction relief and an appeal to exhaust all remedies to a state proceedings, in order to file a federal habeas corpus. The appellant filed for the mandatory findings in February 2006 and their issuance was denied in February 2006. The findings were filed in May 2008. In September 2008, while the case was pending on collateral review, two Ohio statutes were amended, and pertain to this case. Also, around the same time, Ohio Administrative Code (O.A.C.) 5120-05-03 was amended and allowed the appellant to have \$15.00 per month. The appellant has diligently pursued his rights and options to review of his case and conviction. On June 15, 2006 the Eighth District Appellate Court affirmed conviction. The time to file to the Ohio Supreme Court expired 45 days after the Appellate court decision, on August 1, 2006. A Motion to Vacate and/or set aside sentence was filed January 16, 2006 and denied January 27, 2006. The "mandatory" findings were not filed by the trial court until May 2008. The appellant filed to amend the findings of facts and conclusions of law in Appeal No. 91580, the appeal was denied on February 12, 2009 in *State V. Yates* 2009 Ohio 609; 2009 Ohio App. LEXIS 513. The appellant then filed to appeal the denial of first post-conviction relief petition in Appeal No. 93947, the appeal was denied November 12, 2009. Appeal No. 93947 was appealed to the Ohio Supreme Court, which declined jurisdiction to hear the case, Case No. 2009-2230 on February 10, 2010. The appellant filed an Application for Delayed Reconsideration under Ohio Appellate Rule 26(B) on August

09, 2010 in Appeal No. 86631, and the Application was denied on August 31, 2010 in *State V. Yates (2010)* 2010 Ohio-4101; 2010 Ohio App LEXIS 3485. The appellant appealed the denial of Delayed Reconsideration to the Ohio Supreme Court as Case No. 2010-1620, which declined jurisdiction on December 01, 2010. (*see State V. Yates (2010)* 127 Ohio St. 3d 1447; 2010 Ohio 5762; 937 N.E. 2d 1037; 2010 Ohio LEXIS 2935) The appellant filed for Writ of Certiorari to the United States Supreme Court in case No. 10-8495 which denied the Writ on March 21, 2011. (*see Yates V. State of Ohio* 131 S.Ct. 1692; 179 L.Ed. 2d 6291 ; 2011 U.S. LEXIS 2269; 79 U.S.L.W. 3538.) Appellant filed for Petition for Rehearing from the denial of Writ of Certiorari in U.S. Supreme Court Case No.10-8495, rehearing was denied on May 23, 2011. (*see Yates V. State of Ohio*, 2011 U.S. LEXIS 3952.) The appellant filed for leave to file for a new trial on June 24, 2009, leave was denied on March 18, 2011. The appellant appealed the denial of leave to file for a new trial. The appeal was denied in Appeals No. 96664 in the Eighth Appellate District Court of Appeals of Ohio.(*see State V. Yates*, 2011 Ohio 4962; 2011 Ohio App LEXIS 4105(September 29, 2011); 130 Ohio St. 3d 1497; 2011 Ohio 6556; 958 N.E. 2d 959; 2011 Ohio LEXIS 3220(December 21, 2011); certiorari denied 132 S.Ct 2437; 182 L.Ed. 2d 1068; 2012 U.S. LEXIS 3914; 80 U.S.L.W. 3647(May 21, 2012)) The appellant filed a second or successive post-conviction relief petition on October 19, 2010. Notification has not been sent to the appellant about this petitions status. The appellant filed a Writ of Habeas Corpus under 28 U.S.C. § 2254 on June 20, 2011. The Northern District court of Ohio dismissed the writ February 14, 2012. A Certificate of Appealability was denied. The Sixth Circuit Court of Appeal's review of the Writ lead the Circuit's order denying habeas relief filed September 14, 2012 in no. 12-3252. The appellant file for Writ of Certiorari to the U.S. Supreme Court for the dismissal of Writ of Habeas Corpus in November 2012. These facts demonstrate that while the

time to file to this court was expiring and then had expired, the appellant had been using the time to file other actions necessary to exercise his rights to review of his sentence and conviction and to exhaust his state-remedies for federal review.

Further in support of why this court must grant this motion:

In support that the requested instruction for voluntary manslaughter should have been given at trial, in the appellate court decision from this case it states:

*" [*P12] Even though McIntosh had traces of cocaine in his system and was the initial aggressor, there is no evidence that he did anything towards defendant to justify defendant using deadly force. ...There is no evidence that McIntosh did anything directly threatening towards defendant with his arms. Moreover, even though we do not know the exact nature of the argument between the two men, "words alone" usually do not constitute sufficient provocation to use deadly force." State V. Yates 2006 Ohio 3004, *; 2006 Ohio App. LEXIS 2893, ***

On the contrary, Johnathan McIntosh (hereforth referred to as the deceased) drove his vehicle directly at the shooter's vehicle. State of Ohio case law states:

"An automobile may be so used as to constitute a deadly weapon." State V. Orlett (1975) 355 N.E. 2d 894

"This court concludes that the act of driving a ... vehicle directly at another vehicle constitutes a threat of force. In that, such conduct is a threat of violence against the occupants of the other vehicle." Gaydash V. Gaydash (2006) 168 Ohio App. 3d 418; 2006-Ohio- 408; 860 N.E. 2d 789; 2006 Ohio App. LEXIS 4035

From the deceased's actions, the court can see that a threat of violence was used to stop the shooter's vehicle and the deceased's car and an accomplice sitting in the vehicle are used to intimidate the shooter into staying put or risk injury to self. It must be determined whether the provocation may have occurred over a period of time resulting in the build up of extreme emotional stress. It is not whether the extreme emotional stress suddenly occurred within a short period of time or was built up over a longer period of time. It must be determined whether or not it was brought on by serious provocation reasonably sufficient to incite one into using deadly

force. This determination is separate for the shooting at the vehicle, and for what witnesses describe as another shooting in a field. The shooter satisfies Ohio's codification of duties for self-defense in R.C. 2901.05(B) and R.C. 2901.09(B) and self-defense defined as the "Castle Doctrine" for the shooting at the vehicle which are 1) the person using force cannot have created the situation giving rise to the affray. The deceased blocked off the shooter's vehicle, and approached the shooter's vehicle while it was still blocked. 2) The person using force had to be in fear of death or great bodily harm. The deceased's actions were threatening to the shooter, first with the car, then he exits the car and goes directly to the shooter's window where he attempted to enter the vehicle. The deceased then has his accomplice in the vehicle continue his attempt to ram into the shooter's vehicle for no reason, or to run down or run over the shooter should he decide to flee from his own vehicle. 3) The person using force must not have violated any duty to retreat. The shooter was lawfully in his own vehicle when he was blocked off, threatened with being rammed or run over by another vehicle, then confronted by the deceased. At trial, the suspected shooter's vehicle has deceased's DNA on the door, which would mean the deceased tried to enter the shooter's vehicle. Under **R.C. 2901.09(B)**, a person has no duty to retreat when lawfully in his own vehicle. An act committed while under extreme emotional stress described in **R.C. 2903.03(A)**, is one performed under the influence of sudden passion or in the heat of blood, without time and opportunity for reflection or for passions to cool. There is no time to cool after an attempt to ram vehicles is halted by deceased for a direct personal confrontation. After the initial confrontation at the shooter's vehicle and the deceased is repelled, instead of going back to his vehicle he opts to run into a field. The deceased goes into that field to discard illegally possessed items. Where the deceased falls out without being assaulted.(T. 495) The shooter was reckless putting himself into a situation where he could be

attacked again by the deceased or retaliated against by the accomplice where both the deceased and his accomplice conspired to committed robbery, assault, murder, etc. in order to help the wounded by performing first aid for example. **R.C. 2901.05(B)** states:

"...a person is presumed to have acted in self defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force."

The State's evidence of prior calculation and design was ambiguous. The evidence shows that a reckless homicide instruction should have been requested by defense counsel and could have been given by the trial court. Certainly, a jury instruction of Voluntary manslaughter was warranted.

In support of the sentence is illegal for the conviction of **R.C. 2941.145** and **R.C. 2941.146**, these revised codes are allied offenses of similar import and a merged sentence of both should be given as stated in *State V. Price* (1999) 1999 Ohio App. LEXIS 887 where it states:

"Although R.C. 2941.25(A) does not specifically apply to separate specifications as opposed to separate offenses, it seems unlikely that the legislature intended a different result as it applies to specifications which include elements which correspond to such a degree that commission of one specification will result in the commission of another..."

One cannot fire a firearm from a motor vehicle without brandishing it. As stated in *U.S. V.*

Booker (2005) 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed. 2d 621, 2005 U.S. LEXIS 628 it states:

"The fact that a State labels a crime a 'sentence enhancement' rather than a separate criminal act is irrelevant for Constitutional purposes. Merely using label 'sentence enhancement' does not provide a principled basis for treating two crimes differently."

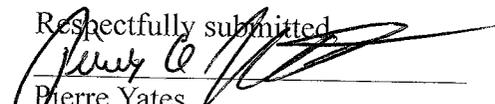
Further using the *Booker Supra*, a sentencing in this case under **R.C. 2941.146** violates the Double Jeopardy Clause where the action of discharging a firearm from a motor vehicle is a fourth degree felony under **R.C. 2923.16(A)(I)**. A fourth degree felony is punishable by a maximum of eighteen months in prison under the State of Ohio sentencing guidelines of **R.C.**

2929.14(A) (4) and not the five years given under R.C. 2941.146.

In support of conviction is against the manifest weight of the evidence, the court misconstrued the ammunition which was contaminated from the seizure prior to getting a warrant, and the fact that the bullets were in the car gave many people access to them. Also, in pro-se actions, the appellant was not allowed access to the DNA samples, pictures of the samples, and for samples that were said to be blood, the blood type of contributor(s) of the samples. The State only allowed its own expert's report to be available at trial and only allowed the appellant to view it on pro-se appeal nearly five years after the conviction and the report still lacked the scientific data of the testing. Additionally, the deceased's DNA is found on the suspected shooter's door handle. The deceased and suspected shooter, the appellant in this case, who was convicted in a jury trial; are relatives. They are cousins. The DNA shows that the deceased has been a passenger in the vehicle, or that he attempted to enter the vehicle of someone he was attempting to assault, rob or murder etc. Other biological material can test as blood and not be blood. Also, a bloody nose from sniffing cocaine, which is not unusual could be the cause of leaving blood DNA on a item without there being bruises or cuts to the hands of the deceased. The deceased had traces of cocaine in his system.

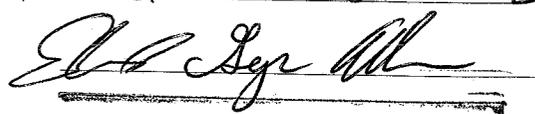
For these above stated reasons the appellant request that this court grant leave to file a delayed discretionary appeal. The appeal is untimely as the result of excusable neglect and failure to grant permission to appeal will result in an injustice to the defendant.

Respectfully submitted,


Pierre Yates
APPELLANT PRO-SE

Sworn to before me and signed in my presence on

11th day of January 2013



EDWARD GEORGE ALLEN, NOTARY PUBLIC
IN AND FOR THE STATE OF OHIO
MY COMMISSION EXPIRES MAY 4, 2015

JUN 25 2006

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86631



STATE OF OHIO

Plaintiff-appellee

vs.

PIERRE YATES

Defendant-appellant

JOURNAL ENTRY

AND

OPINION

DATE OF ANNOUNCEMENT
OF DECISION:

JUNE 15, 2006

CHARACTER OF PROCEEDING:

Criminal appeal from Common
Pleas Court, Case no. Cr-460767

JUDGMENT:

AFFIRMED.

DATE OF JOURNALIZATION:

JUN 26 2006

APPEARANCES:

For plaintiff-appellee:

WILLIAM D. MASON, ESQ.
CUYAHOGA COUNTY PROSECUTOR
KRISTEN L. LUSNIA, ESQ.
Assistant County Prosecutor
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

For defendant-appellant:

STEPHEN L. MILES, ESQ.
20800 CENTER RIDGE ROAD STE 211
ROCKY RIVER, OH 44116



10615 00281



KARPINSKI, J.:

Defendant appeals his conviction for the murder of his cousin, Jonathon McIntosh on December 17, 2004.

On the 17th, at approximately 1:00 p.m., McIntosh and his friend, Robert Wearren, were driving down E. 150th Street in the City of Cleveland, when McIntosh saw defendant in his own car traveling in the opposite direction. McIntosh pulled in front of defendant's car and forced him to stop.

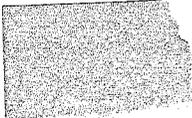
McIntosh exited his car and walked up to the driver's side of defendant's car. An argument ensued between the two men. Witnesses saw defendant shoot McIntosh in the chest. Grabbing his chest, McIntosh ran and then fell to the ground. Defendant followed and shot McIntosh at least two more times. McIntosh was dead at the scene.

Defendant was indicted on one count of aggravated murder in violation of R.C. 2903.01. He was also indicted on two firearm specifications, R.C. 2941.145 and R.C. 2941.146, respectively. Following a jury trial, defendant was convicted of the lesser-included offense of murder and the two firearm specifications. He was sentenced to a prison term of twenty-three years to life.

Defendant filed this timely appeal, in which he asserts two assignments of error, the first of which states:

I. THE TRIAL COURT ERRED BY NOT INSTRUCTING THE JURY ON THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER.

VOL 615 PG 0282



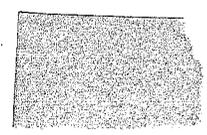
Defendant argues there was sufficient evidence to instruct the jury on the lesser-included offense of voluntary manslaughter. Defendant claims that before he shot McIntosh to death, he was provoked into a state of sudden passion or rage.

On appeal, the issue is whether the trial court abused its discretion when it denied defendant's request to instruct the jury on the lesser-included offense of voluntary manslaughter. *State v. Wolons* (1989), 44 Ohio St.3d 64, 541 N.E.2d 443.

R.C. 2903.03(A), which defines voluntary manslaughter, provides: "No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another ***." Voluntary manslaughter is an inferior degree of aggravated murder. *State v. Tyler* (1990), 50 Ohio St.3d 24, 36, 553 N.E.2d 576.

An instruction on a lesser-included offense "is warranted only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. In making this determination, a trial court must view the evidence in a light most favorable to defendant." *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶133, 842 N.E.2d 996.

Before giving an instruction on voluntary manslaughter in a murder case, the trial court must determine "whether evidence of reasonably sufficient provocation occasioned by the victim has been presented to warrant such an



instruction." *State v. Shane* (1992), 63 Ohio St.3d 630, 590 N.E.2d 272, paragraph one of the syllabus. The initial inquiry requires an objective standard: "For provocation to be reasonably sufficient, it must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *Id.* at 635, 590 N.E.2d 272.

State v. Braden 98 Ohio St.3d 354, 2003-Ohio-1325, ¶68, 785 N.E.2d 439; *Conway*, 2006-Ohio-791, ¶130; *State v. Brooks*, Cuyahoga App. No. 83668, 2005-Ohio-3567, ¶44-¶46.

In the case at bar, defendant was indicted for aggravated murder. Along with instructing the jury on the offense of aggravated murder, the trial court also gave the jury an instruction on the lesser-included offense of murder. Defendant's request for an instruction on voluntary manslaughter was denied.

According to defendant, the record establishes that McIntosh was the initial aggressor. Not only did McIntosh cut off defendant's car, but he then exited his vehicle and began arguing with defendant. This series of events, defendant claims, prompted him into a sudden fit of passion or rage, which caused him to shoot McIntosh. We disagree.

Even though McIntosh had traces of cocaine in his system and was the initial aggressor, there is no evidence that he did anything towards defendant to justify defendant using deadly force. Jermaine Boykins and Lynniece Love, both eyewitnesses to the shooting, establish that, while standing beside defendant's car, McIntosh never pulled a gun or did anything other than argue and

wave his arms around. There is no evidence that McIntosh did anything directly threatening towards defendant with his arms. Moreover, even though we do not know the exact nature of the argument between the two men, "words alone" usually do not constitute sufficient provocation to use deadly force. *State v. Shane* (1992), 63 Ohio St.3d 630, 590 N.E.2d 272, paragraph two of the syllabus. Boykins further stated that at no time was defendant's vehicle unable to leave the premises.

Most fatal to defendant's claim that he was entitled to a jury instruction on voluntary manslaughter is the eyewitness testimony from Boykins, Love, and Gales. All three people testified consistently that, after being shot, McIntosh began to run away from defendant's vehicle. Instead of leaving the area or simply remaining in his car, defendant exited his vehicle in pursuit of McIntosh.

Once McIntosh was on the ground, defendant kicked him and stomped on him. Defendant then shot McIntosh at least two more times at close range. There is no evidence McIntosh ever had any opportunity to defend himself.

From the record before this court, we find no evidence that the trial court erred in denying defendant's request to instruct the jury on the offense of voluntary manslaughter. Defendant's first assignment of error is overruled.

II. THE CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

YUL0615 PD0285

Defendant argues that his convictions are not supported by the manifest weight of the evidence. In determining whether a conviction is against the manifest weight of the evidence, the court on appeal applies the following test:

"The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered."

State v. Marinello, Cuyahoga App. Nos. 86028 and 86113, 2006-Ohio-282, ¶73, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. In a manifest weight determination, the reviewing court should consider the following factors.

"1) Knowledge that even a reviewing court is not required to accept the incredible as true; 2) Whether evidence is uncontradicted; 3) Whether a witness was impeached; 4) Attention to what was not proved; 5) The certainty of the evidence; 6) The reliability of the evidence; 7) The extent to which a witness may have a personal interest to advance or defend their testimony; and 8) The extent to which the evidence is vague, uncertain, conflicting or fragmentary."

Marinello, ¶74, citing *State v. Wilson*, (June 9, 1994), Cuyahoga App. Nos. 64442/64443, 1994 Ohio App. LEXIS 2508, citing *State v. Mattison* (1985), 23 Ohio App.3d 10, 23 Ohio B. 43, 490 N.E.2d 926, syllabus.

From the record of evidence adduced at trial, we are compelled to reject defendant's argument. A salesman from a sporting goods store testified from a receipt that on October 28, 2004, he sold to

a person who signed as Pierre Yates and who was listed as five feet eight inches tall and weighing 178, a Hi-Point nine-millimeter gun with the serial number P 1226831. It was packaged in a cardboard box. The salesman identified a cardboard box found in defendant's vehicle as a box for a Hi-Point firearm. The box bore the same serial number listed on the sales receipt. From the glove compartment of this vehicle, furthermore, police recovered a purchase receipt for a Hi-Point nine-millimeter firearm.

The police found six spent casings: five near the body and one "on the street on the curb." They were each marked "Geco nine millimeter Luger." A forensic specialist stated it was possible the shell casings found at the scene could have been fired by a Hi-Point nine-millimeter gun, the same type of gun defendant bought.

From the vehicle defendant had been driving, the police recovered eight live rounds of ammunition on the front passenger's seat, one live round on the floor to the right of the driver's seat, and another round from under the front passenger's seat. This ammunition was for a nine-millimeter weapon (Tr. 346-9) and all bore the Geco head stamp. Thus the type of ammunition found in defendant's vehicle was the same type as the casings found around the victim's body.

There was also forensic evidence of gunshot residue found on the defendant's left hand. Moreover, blood found on the car defendant drove, specifically from the interior and exterior

handles on the driver's side, was found by DNA analysis, with a reasonable degree of scientific certainty, to consist of the victim's blood, mixed with that of defendant. The victim's blood was also on a coat found in the trunk of that car. This objective evidence, in addition to the testimony of Boykin, Love, and Gale, was sufficient to convict defendant, who did not provide any rebuttal through any defense witnesses.

Nevertheless, defendant claims that his murder conviction¹ must be reversed because Wearren's identification of him as the person who shot and killed McIntosh is unreliable. To the contrary, not only is Wearren's account of the events on the 17th consistent with the testimony of the other witnesses, it is supported by the forensic and other circumstantial evidence presented by the state.

Wearren said he heard six shots.² This report is consistent with forensic evidence that established McIntosh died from five gunshot wounds. Police recovered five spent bullet casings around McIntosh's body and one casing from the street.

¹Defendant does not challenge his convictions on the two firearm specifications. Accordingly, we do not address them here.

²Wearren said he heard a gunshot (Tr. 427) and from the rear window of the car saw defendant holding a gun "out the window shooting at him" (Tr. 431). Wearren exited the car (Tr. 428). He then saw defendant chase the victim behind the house (Tr. 429). At that time he heard four shots (Tr. 439). Wearren saw the gun again when defendant walked back from behind the house, at which point they were twenty feet apart (Tr. 457-8).

Defendant further claims that Wearren's testimony was not credible because he mistakenly identified the gun defendant used to kill McIntosh as a nine-millimeter "Glock." What Wearren said was, "I think it was a Glock nine handgun because it was really big and all black." (Tr. 457) A forensic specialist testified that the Glock and Hi-Point "have a similar appearance" and are "frequently confused." Tr. 567-8. Wearren's misnaming the gun is of little significance, therefore.

Defendant also argues that he was wrongly identified as the shooter because the police never recovered either the gun used to kill McIntosh or the red jacket Wearren and Boykins described and because defendant did not have McIntosh's DNA on him, although the gunshots to McIntosh were made at close range. He also points out that a half-hour after the shooting he was involved in a motor vehicle accident, at which time he was videotaped as wearing a tan-colored jacket, not a red one:

We reject these arguments. First, defendant could have discarded the gun anywhere between East 150th Street, where the shooting occurred, and the location of the accident in University Heights—a distance too far to locate a discarded gun. Finally, a coat found in the car that defendant was driving had tested positive for McIntosh's blood. That witnesses could be confused about the color of the coat is unimportant compared to the strength of the total evidence.

VA0615 00289

Accordingly, after reviewing the entire record, weighing the evidence and all reasonable inferences, along with considering the credibility of the witnesses, we conclude that the jury did not lose its way in concluding defendant killed McIntosh. The manifest weight of the evidence clearly supports the jury's determination that defendant committed the offense of murder against McIntosh.

Defendant's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FILED AND JOURNALIZED
PER APP. R. 22(E)

JUN 26 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

JAMES J. SWEENEY, P.J., AND

MARY EILEEN KILBANE, J., CONCUR.

[Signature: Diane Karpinski]

DIANE KARPINSKI
JUDGE

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

JUN 15 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

VOL 615 NO 291



34066907

IN THE COURT OF COMMON PLEAS CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

PIERRE YATES
Defendant

Case No: CR-04-460767-A

Judge: NANCY R MCDONNELL

INDICT: 2903.01 AGGRAVATED MURDER /FRM3 /FRM5

JOURNAL ENTRY

DEFENDANT IN COURT WITH ATTORNEY DAVID L ROWTHORN.
ADDITIONAL COUNSEL MIKE BANCROFT PRESENT.
COURT REPORTER RICHARD HAMSKI PRESENT.

ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF MURDER WITH FIREARM SPEC - 3
YEARS (2941.145), FIREARM SPEC - 5 YEARS (2941.146) / 2903.02 - F1 UNDER THE INDICTMENT.
DEFENDANT ADDRESSES THE COURT.
PROSECUTOR ADDRESSES THE COURT.

VICTIM/REP ADDRESSES THE COURT.

THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW.

THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R. C. 2929.11.

THE COURT IMPOSES A PRISON SENTENCE AT THE LORAIN CORRECTIONAL INSTITUTION OF 23 YEARS TO LIFE.
DEFENDANT SENTENCED TO 3 YEARS ON FIRST GUN SPEC, 5 YEARS ON SECOND GUN SPEC; GUN SPECS TO BE
SERVED CONSECUTIVE TO EACH OTHER AND PRIOR TO AND CONSECUTIVE WITH 15 YEARS TO LIFE FOR THE

UNDERLYING OFFENSE OF MURDER FOR AN AGGREGATE OF 23 YEARS TO LIFE.

POST RELEASE CONTROL IS PART OF THIS PRISON SENTENCE FOR THE MAXIMUM TIME ALLOWED FOR THE
ABOVE FELONY(S) UNDER R.C.2967.28.

DEFENDANT TO RECEIVE JAIL TIME CREDIT FOR 153 DAY(S), TO DATE.

DEFENDANT ADVISED OF APPEAL RIGHTS.

DEFENDANT INDIGENT, COURT APPOINTS STEPHEN D MILES AS APPELLATE COUNSEL.

TRANSCRIPT AT STATE'S EXPENSE.

DEFENDANT REMANDED.

SHERIFF ORDERED TO TRANSPORT DEFENDANT PIERRE YATES, DOB: 12/06/1978, GENDER: MALE, RACE: BLACK.
DEFENDANT IS TO PAY COURT COSTS.

05/31/2005

CPDXM 06/01/2005 08:47:13

THE STATE OF OHIO Cuyahoga County	I, GERALD E. FUERST, CLERK OF SS. THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY,
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL <i>Journal Entry filed 6-1-05</i>	
NOW ON FILE IN MY OFFICE.	
WITNESS MY HAND AND SEAL OF SAID COURT THIS DAY OF <i>June</i> A.D. 20 <i>05</i>	
By <i>[Signature]</i>	GERALD E. FUERST, Clerk Deputy

Judge Signature

Date

6-1-05

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

2005 JUN - 1 A 11:34

FILED

SENT

05/31/2005

SHERIFF'S SIGNATURE

[Signature] 6-2-05

Lori & cat