

In The Supreme Court Of Ohio

State Of Ohio, :
 Appellee, :
 -vs- : Case No.: 2008-0525
 Phillip L. Jones, :
 Appellant. : **This Is A Capital Case.**

**On Appeal from the
 Summit County Court of Common Pleas
 Case No. 07 04 1294**

**Appellant Phillip L. Jones' Application For Reopening Pursuant To
 S.Ct. Prac. R. 11.06**

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 SUPREME COURT OF OHIO

In The Supreme Court Of Ohio

State Of Ohio,

Appellee,

-vs-

Phillip L. Jones,

Appellant.

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Case No.: 2008-0525

This Is A Capital Case.

Appellant Jones' Application For Reopening Pursuant To S.Ct. Prac. R. 11.06

The Due Process Clause guarantees effective assistance of counsel on a criminal appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). Appellate counsel must act as an advocate. *See, e.g., Anders v. California*, 386 U.S. 738 (1967); *Penson v. Ohio*, 488 U.S. 75 (1988). As can be seen from the lack of meritorious issues filed¹ as well as the oral argument presented in this case², appellate counsel were prejudicially ineffective.³ Ex. A. This Court must reopen Jones' direct appeal. *State v. Murnahan*, 63 Ohio St. 3d 60 (1992); S.Ct. Prac. R. 11.6.

¹ Jones points out that no claims of ineffective assistance of counsel were raised on direct appeal. Besides the fact that no trial counsel are perfect, this Court has pointed out in its Opinion numerous areas where an issue was waived due to counsel's failure to object to violations of their client's constitutional rights. *See State v. Jones*, 135 Ohio St.3d 10 (2012) at ¶74-75, ¶98, ¶101, ¶182-83, ¶204. It is also curious that Jones' appellate counsel consistently work with trial counsel O'Brien and Hicks, similar to colleagues that work together in the same office or law firm. As an example, direct appeal counsel Whitney and trial counsel O'Brien were trial co-counsel on *State v. Fry*, Summit Cty Ct. of Apps. Case No. 2005-08-3007.

² *See* Oral Argument at 11:19-13:04, 15:00-16:45, 16:55-17:39, 21:36-22:19, 29:59-31:28, 62:42-65:58. Appellate counsel were seemingly unaware of the record at: 2:15-3:03, 4:23-4:51, 5:46-8:07, 18:52-19:48, 22:58-25:33, 29:15-29:54, 61:34-62:41, 64:48-65:12.

³ In Ohio, a properly licensed attorney is presumed competent. *See State v Hamblin*, 37 Ohio St.3d 153 (1988). The appellant bears the burden of proving that his trial counsel are ineffective. *Id.* However, appellate counsel in this case should not benefit from this presumption as counsel Ray has been barred from representing capital defendants in the Sixth Circuit Court of Appeals due to "the court's dissatisfaction with both the quality of the appellate briefs and the oral argument ..." *Cooley v. Bradshaw*, 338 F.3d 615, 618-19 (6th Cir. 2003)(Boggs, dissenting). In

Appellate counsel were prejudicially ineffective for failing to raise meritorious issues on Appellant Phillip Jones' behalf.⁴

The failure to present a meritorious issue for review constitutes ineffective assistance of appellate counsel. See *Franklin v. Anderson*, 434 F.3d 412 (6th Cir. 2007); *State v. Ketterer*, 111 Ohio St.3d 70 (2006). Had Jones' appellate counsel presented the following issues, the outcome of the appeal would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984)⁵.

PROPOSITION OF LAW NO. I: A trial court violates a capital defendant's constitutional rights to a fair trial and due process when it commits prejudicial errors during the capital defendant's trial. U.S. Const. Amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

The trial court violated Jones' federal and state constitutional rights when it:

a) **failed to record all sidebars.** Defense counsel filed a Motion to Record All Side Bar Proceedings, which was granted by the trial court. Suppression Hrg, 11/15/07 p. 9; Tr. 352-53. Yet all sidebar conferences were not recorded. See, e.g., Tr. 520, 1107, 1113, 1215, 1308, 1636-37, 2279, 2295, 2302, 2526. Jones is entitled to a "complete, full, and unabridged transcript of all proceedings against him so that he may prosecute an effective appeal." *State ex. rel. Spirko v. Court of Appeals, Third Appellate Dist.*, 27 Ohio St. 3d 13, 18 (1986); *Griffin v. Illinois*, 351 U.S. 12 (1956); S.Ct. Prac. R. 5.1. Counsel was ineffective for failing to object or otherwise attempt to remedy the court's failure to comply with its ruling. Counsel must ensure that the record at every stage is complete. 2003 ABA Guidelines for Defense Counsel 10.7(B)(2).

addition, here Jones filed a *pro se* motion, prior to oral argument, requesting new counsel in part because "[t]he brief they filed for me was poor and unacceptable." Ex. B. That motion was denied. Ex. C. Further, appellate counsel both allowed their Rule 20 appellate certifications to lapse and were not Rule 20 certified at the time of oral argument before this Court.

⁴ Due to the page limitation imposed by S. Ct. Prac. R. 11.06, Jones is unable to fully brief the issues not raised by prior appellate counsel. As such, Jones' failure to fully brief every single point outlined should not be the basis of a waiver of that issue or point.

⁵ A cite to *Strickland v. Washington*, 466 U.S. 668 (1984) should be included at each place that ineffective assistance of counsel is herein alleged.

b) **permitted the State to refer to acts not yet proven beyond a reasonable doubt without using the term “alleged.”** During voir dire, without actually objecting, counsel raised Jones’ concerns with the State’s use of the terms “murder” and “rape” without using the word “alleged.” Tr. 379-80. The State refused to use the word “alleged.” Tr. 380. The trial court agreed with the State. *Id.* This was error, as the presumption of innocence is a basic component of the fundamental right to a fair trial. *See Coffin v. United States*, 156 U.S. 432, 453 (1895). Counsel were ineffective to Jones’ prejudice when they failed to object and also when they failed to offer *any* rebuttal to the State’s position that it was not required to use the term “alleged.”

c) **permitted biased and speculative testimony from the medical examiner.** Dr. Sterbenz repeatedly made speculative statements and assertions using biased terms. *See, e.g.*, Tr. 1562, 1601, 1615, 1669, 1676-77. Counsel were ineffective for failing to object to this testimony or effectively cross-examine the medical examiner regarding the victim’s injuries. Counsel was further ineffective for failing to move to strike and request a curative instruction for the speculative assertion that reports of failed asphyxial acts are “probably homicidal strangulation” Tr. 1669. The State also committed misconduct for eliciting this biased, speculative testimony. *See State v. Apanovitch*, 33 Ohio St.3d 19, 24 (1987).

d) **admitted cumulative, gruesome photos in both phases and the autopsy protocol in mitigation.** In capital cases, the probative value of each photo must outweigh any potential danger of prejudice. *State v. Morales*, 32 Ohio St. 3d 252, 258 (1987); Evid. R. 403(A). Photos must also be excluded if they are “repetitive or cumulative in number.” *State v. Maurer*, 15 Ohio St.3d 239, syl. para. 7 (1984). The gruesome and cumulative photos admitted here in both phases and the admission of the autopsy protocol in mitigation deprived Jones of his right to a fair trial and due process. Counsel were ineffective for failing to object pursuant to Evid. R. 403 to the

admission of these photos during the trial phase. It was also State misconduct to offer the photos at trial, and then to reoffer them and this other inflammatory evidence during mitigation. Tr. 2608-09, 2240, 2307; *State v. Thompson*, 33 Ohio St. 3d 1, 14-15 (1987).

e) **allowed the admission of victim impact evidence.** Victim impact evidence must be excluded from the trial phase because it “serves to inflame the passion of the jury with evidence collateral to the principal issue at bar.” *See State v. White*, 15 Ohio St. 2d 146 (1968). This evidence is only admissible when it relates to the “facts attendant to the offense.” *State v. Fautenberry*, 72 Ohio St.3d 435 (1995). The State committed misconduct when it introduced impermissible evidence at trial (Tr. 1290, 1314-21, 2188) and in mitigation (Tr. 2488). The court erred in allowing it, and counsel were ineffective to Jones’ prejudice for failing to object to it.

f) **allowed the circumvention of the requested separation of witnesses.** Evid. R. 615 requires separation of witnesses upon motion of defense counsel or the court. Defense counsel, the trial court, and the State all expressed concern about ensuring separation of witnesses. *See* Tr. 1276. Yet the State repeatedly told witnesses what other witnesses had said. Tr. 1459, 1822, 1829, 1840. The State committed misconduct in doing this, the court should not have allowed it, and counsel were ineffective to the extent that they failed to object.

g) **failed to give requested jury instructions.** Jones’ rights were violated because the jury was not permitted to consider lesser included non-capital offenses, as required by the Constitution and Ohio law. *Beck v. Alabama*, 447 U.S. 625, 627 (1980); R.C. § 2945.74; *see also State v. Wilkins* 64 Ohio St.2d 282 (1980). The trial court overruled Jones’ motion for jury instructions for involuntary manslaughter, because Jones claimed that the death was accidental. Tr. 2254-55. If the accidental killing was committed during the course of another crime he would be guilty of involuntary manslaughter, and the trial court erred. R.C. § 2903.04. Further, if the

killing was accidental, Jones could still have been guilty of reckless homicide, on which the jury should have been instructed. R.C. § 2903.041. A reasonable fact-finder also could have found voluntary manslaughter. R.C. § 2903.03. To the extent that these claims are waived because counsel failed to request these instructions, counsel were ineffective to Jones' prejudice.

h) failed to life-qualify Jones' venire. During voir dire, the trial court made sure to death-qualify almost every juror, yet the court failed to ask life qualifying questions of most of these same jurors. Tr. 14-1152. "The right to a fair trial is a fundamental liberty..." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). A biased and partial juror deprives the criminal defendant of that right. *Morgan v. Illinois*, 504 U.S. 719, 727 (1992). Jurors who will *always* impose death are not fair and impartial. *See Wainwright v. Witt*, 469 U.S. 412 (1985); *Morgan*, 504 U.S. at 729. Both the U.S. Constitution and the Ohio Revised Code require that both kinds of juror be sought out and removed. *See* R.C. § 2945.27; *Id.* The court erred in failing to life-qualify the jurors in Jones' jury, and Jones' counsel were similarly ineffective for failing to either 1) ensure such proper process took place or 2) ask the life-qualifying questions themselves.

i) misstated the burdens of proof. The trial court, the State, and defense made impermissible comments regarding the burden of proof throughout Jones' trial. *See, e.g.*, Tr. 27, 52, 139, 197, 390, 391, 2177, 2241. Implications to the jury that the burden of proof is lower than reasonable doubt are unconstitutional. *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979). There were also repeated instances where jurors were told they would weigh "aggravating circumstances", even though there was only one aggravating circumstance. *See, e.g.*, Tr. 115-17, 139, 382-85, 396-99, 407-08, 416, 496-97, 510-11, 542-45, 564-67, 591-97, 2564-71, 2599. Jones' federal and state constitutional rights were violated by these errors of the court, misconduct of the State, and ineffectiveness of counsel.

j) relied on improper sentencing considerations. The trial court, in its sentencing opinion, improperly considered Jones' prior rape conviction, which is of no relevance to the aggravating circumstance or mitigating factors. The court wrote "he has a history of prior sexual offenses and multiple incarcerations." Sent. Op., 1/30/08, at p. 5. This is irrelevant and also inaccurate, as Jones had one prior sexual offense. *State v. Gumm*, 73 Ohio St.3d 413 (1995).

k) misapplied the rape shield statute. The trial court misapplied the rape shield statute, prohibiting counsel from questioning a critical witness about alternative sources of the victim's injuries and DNA found on the victim's breast. Tr. 1650-54, 1835. A contested issue in this case is consent, which directly relates to an element of the crime of rape (the sole aggravating circumstance). Where contested evidence has probative value to an issue of fact, the probative value outweighs any interest in exclusion. *See State v. Williams*, 21 Ohio St.3d 33, 36 (1986).

l) did not permit cross examination on relevant matters. The court did not allow counsel to cross-examine witnesses on relevant matters and matters affecting credibility, in violation of Evid. R. 611(B) and the Confrontation Clause of the Constitution. *See* Tr. 1422, 1490.

PROPOSITION OF LAW NO. II: A capital defendant is denied the right to the effective assistance of counsel when counsel prejudicially fails his client during his capital trial. U.S. Const. VI and XIV.

When evaluating claims of ineffective assistance of counsel, this Court must determine if counsel's performance was deficient, and if so, whether petitioner was prejudiced by that deficient performance. *Strickland*, 466 U.S. at 686-87; *Glenn v. Tate*, 71 F.3d 1204, 1210-11 (6th Cir. 1995). Here, Jones' counsel rendered deficient performance to Jones' prejudice by:

a) failing to request expert assistance and forensic testing: Counsel has a duty to subject the State's case to "meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656 (1984). Capital defendants are entitled to the assistance of experts when necessary. *Ake v.*

Oklahoma, 470 U.S. 68 (1985)). **A competency expert.** Instead of merely stipulating to the Court's expert's opinion as to Jones' competency (Status Conf., 8/15/07, Tr. 2-3), particularly when counsel have reason to believe that a NGRI plea is a possibility, counsel had a duty to their client to request their own expert funding to challenge and/or corroborate the Court's expert's findings. **An expert on erotic asphyxiation.** Counsel attempted to offer evidence through two articles on erotic asphyxiation (Defendant's Ex. D and E), that Jones' killed the victim accidentally. Tr. 2144-45. The court denied these two exhibits because "the jury [could not be permitted to] read[] medical literature that not been discussed by an expert." *Id.* Counsel should have obtained an expert. Failing to do so was deficient to Jones' prejudice. **A medical expert and/or forensic pathologist.** Because the medical examiner utilized at trial was biased, it was counsel's duty to test that expert's findings and the State's case (i.e. the recency of the injuries) through their own medical expert; counsel prejudicially failed. **Forensic testing of the condom, twig, and knife.** The knife and condom should have been tested for DNA or any forensic evidence, while the twig should have been tested as to whether it could have been ingested. Tr. 1522, 1659, 2149. *See Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

b) **failing to object to the admission of other acts testimony, the admission of the plastic cross found in Delores Jones' jewelry box, and the prejudicial nature of the mannequin and demonstration.** Appellate counsel raised in their brief that this evidence was erroneously admitted, but they failed to raise that it was ineffective assistance in failing to object to that admission.⁶ Counsel never challenged the admission of testimony by Thea Johnson. Tr. 1108, 1124-25. Counsel failed to object to the admission of the plastic cross, even though it was

⁶ Jones is aware that these claims previously failed in this Court (*State v. Jones*, 135 Ohio St.3d 10 (2012)), however to avoid default and/or waiver, Jones raises these issues in order to preserve them for federal court review. *See State v. Poindexter*, 36 Ohio St. 3d 1 (1988).

irrelevant, a violation of the spousal privilege⁷, as well as prejudicial pursuant to Evid. R. 403. Counsel solely objected to the mannequin due to its size and lifelessness, but failed to object to its prejudicial nature. Tr. 2002-04. Counsel also failed to object to use of the mannequin by Dr. Sterbenz and the State. Counsel's failure to object was ineffective and prejudicial.

c) **failing to object to prosecutorial misconduct throughout Jones' trial.** See Proposition of Law No. III. *Washington v. Hofbauer*, 228 F.3d 689, 709 (6th Cir. 2000).

d) **failing to request a continuance and advocate for their client.** Even though a supplemental indictment was filed on October 24, 2007, five weeks before the scheduled trial date of December 3, 2007, counsel failed to request a continuance of that trial date. The court acknowledged the short time-frame by stating, "we have not left ourselves much time." Supp. Arraignment, 10/24/07, Tr. 3, 6-7. The failure to request a continuance prejudiced Jones. Counsel did not have the time to thoroughly investigate Jones' defense or his history.

e) **opening the door during mitigation phase.** Counsel asked Joseph Dubina "in the last 15 years, has any governor pardoned anybody or let them off death row?" Tr. 2482. In response, the State elicited that the governor can and had recently commuted a death sentence. Tr. 2486.⁸ Defense counsel ineffectively conveyed to the jury that the responsibility for a death sentence would be shifted to the governor. See *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985).

f) **failing to effectively advocate during voir dire.** Defense counsel asked no questions about specific mitigation which was to be presented, or about jurors attitudes towards accidental killings and the death penalty. Counsel implied to one juror that Jones was guilty. Tr. 391. Counsel did not challenge for cause a juror who knew Thea Johnson. Tr. 1172. That juror was

⁷ See also argument regarding spousal privilege in Proposition of Law II raised on direct appeal.

⁸ Had counsel prepared, they would have known that Jerome Campbell was granted Clemency in 2003. http://enquirer.com/editions/2003/06/27/loc_campbell27.html, retrieved May 15, 2013; see also www.DRC.ohio.gov/public/capital.htm.

seated and heard Johnson testimony. Tr. 1909-13. Counsel failed to challenge for cause a prospective juror who was in (not merely at) Prosecutor Dougherty's wedding; she was seated as an alternate. Tr. 706. Counsel also failed to challenge for cause or through peremptory challenges jurors who were unfairly biased in favor of the death penalty. Tr. 145, 388.

g) failing to effectively advocate during mitigation. Counsel was ineffective during the mitigation phase for failing to secure a mitigation specialist before trial (*see* 12/5/07 Court Order); failing to prepare mitigation theory prior to start of voir dire (*id.*; Tr. 14); permitting the highly prejudicial testimony of Dr. Siddall (Tr. 2332-2419); and failing to communicate with their client (*see, e.g.*, Tr. 2099-2100 (regarding facts at issue in case); 1358 (counsel did not know Jones' mother, a mitigation witness, was even alive at the start of trial)).

These failures, alone and in the cumulative, prejudiced Jones. *Strickland*, 466 U.S. 668.

PROPOSITION OF LAW NO. III: A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, §§ 9 and 16 when a prosecutor commits acts of misconduct during his capital trial.

The State violated Jones' federal and state constitutional rights when it:

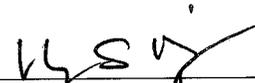
a) repeatedly asked leading questions on direct examination. *See, e.g.*, Tr. 1113-19, 1334, 1337-38, 1354, 1381, 1396-98, 1404-05, 1412, 1429, 1437, 1446-54, 1458-60, 1498-99, 1542, 1572, 1591, 1602, 1614-15, 1630, 1735-36, 1748, 1796, 1822-23, 1840-41, 1871-72, 1878-79, 1906-07, 1914, 2151, 2158. *See State v. Diar*, 120 Ohio St. 3d 460, 482-85 (2008).

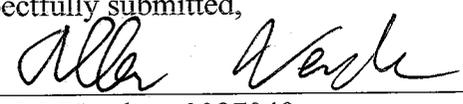
b) elicited inadmissible hearsay. *See, e.g.*, Tr. 1398, 1498-99, 2018. *See State v. Cowans*, 10 Ohio St. 2d 96, 105 (1967); *Chapman v. California*, 386 U.S. 18 (1967).

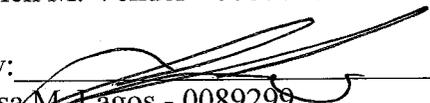
c) elicited inflammatory information. The State elicited Delores' fear of her husband (Tr. 1412) as well as where Yates was buried (Tr. 1361). Both were irrelevant and inflammatory.

d) **committed misconduct during closing argument: Commenting on Jones' silence.** In its closing argument, the State argued that Jones was guilty because he exercised his fifth amendment rights. Tr. 2153, 2178-79. The Constitution forbids comment by the prosecution on the accused's silence to infer guilt. *See Griffin v. California*, 380 U.S. 609 (1965). **Referring to Jones as a liar.** The State committed misconduct during closing argument by repeatedly calling Jones a "liar". Tr. 2179-82. The State claimed it was "fact that [Jones] just outright tells you lies, lying to the fact that he tells you that he comes home the morning following the murder...." Tr. 2185. He called Jones' version of events "so absurd, so unbelievable, I hope that you don't even consider it." Tr. 2197. It is patently improper for a prosecutor either to comment on the credibility of a witness or to express a personal belief that a particular witness is lying. *Hodge v. Hurley*, 426 F.3d 368, 378 (6th Cir. 2005). The trial court erred when it failed to sustain two separate early objections by defense counsel. Tr. 2179-80. Counsel was ineffective for failing to continue to object to the patent prosecutorial misconduct throughout closing argument. **Improper comments/vouching.** During the State's rebuttal, the State improperly vouched for or commented upon several witnesses, including: defense witness Snodgrass "is a part of that family and she is going to do anything she can to help them." (Tr. 2236); Thea Johnson is "brave" (Tr. 2238); and "I don't think that [Delores Jones's] that good of an actress" to fake an excited state (Tr. 2247). This was improper. *State v. Smith*, 14 Ohio St.3d 13, 14 (1984). Jones was prejudiced, and his counsel was ineffective for failing to object. *See also Hodge*, 426 F.3d at 389.

CONCLUSION. This Court must grant Jones' Application for Reopening. S.Ct. Prac. R. 11.6.

By: 
Kimberly S. Rigby - 0078245
Counsel of Record

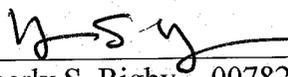
Respectfully submitted,
By: 
Allen M. Vender - 0087040

By: 
Lisa M. Lagos - 0089299

Certificate of Service

I hereby certify that on May 16, 2013, I served a copy of the foregoing by depositing it in the United States mail addressed to:

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EXHIBIT A

In The Supreme Court Of Ohio

State Of Ohio, :
Appellee, :
-vs- : Case No.: 2008-0525
Phillip Jones, :
Appellant. : **This Is A Capital Case.**

AFFIDAVIT OF KIMBERLY S. RIGBY

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, Kimberly S. Rigby, after being duly sworn, hereby state as follows:

1. I am an attorney licensed to practice law in the state of Ohio, and I have been an assistant state public defender since 2004. My sole area of practice is capital litigation.
2. I was assigned to work on Phillip Jones' post-conviction case.
3. I have reviewed the record in *State v. Jones*, Summit County Common Pleas Case No. 2007-04-1294 . I have also reviewed the direct appeal briefs and oral argument presented to this Court in this case.
4. I am Rule 20 certified to represent indigent clients in death penalty appeals.
5. Because of the focus of my practice of law, my Rule 20 certification, and my attendance at death-penalty seminars, I am aware of the standards of practice involved in the appeal of a case in which the death sentence was imposed. Because of my specialized practice, I have also taught as faculty at the Ohio Association of Criminal Defense Lawyers annual death penalty seminar as well as the Ohio State Bar Association annual death penalty seminar, both held in Columbus, Ohio.
6. The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on an appeal as of right. *Evitts v. Lucey*, 469 U.S. 587 (1985).

7. The initial responsibility of appellate counsel, once the transcript is filed, is to ensure that the entire record has been filed with the appellate court. Appellate counsel has a fundamental duty in every criminal case, and especially in a capital case, to ensure that the entire record is before the reviewing courts on appeal. R.C. 2929.05; *State ex rel. Spirko v. Judges of the Court of Appeals*, Third Appellate District, 27 Ohio St. 3d 13, 501 N.E. 2d 625 (1986); See also *Griffin v. Illinois*, 351 U.S. 12, (1956) (recognizing the necessity of the transcript in order to vindicate a defendant's constitutional right to appellate review).
8. After ensuring that the record is complete, counsel must then review the entirety of the record for purposes of issue identification. This review of the record not only includes the transcript, but also the trial motions, exhibits, and the jury questionnaires.
9. For counsel to properly identify issues, they must have a good knowledge of criminal law in general. Most trial issues in capital cases will be decided by criminal law that is applicable to non-capital cases. As a result, appellate counsel must be informed about the recent developments in criminal law when identifying potential issues to raise on appeal.
10. Counsel must remain knowledgeable about recent developments in the law after the merit brief is filed. Keeping up on Rule 20 certification and attending annual seminars is one of the best ways to stay informed and abreast of new developments in the law. It has come to my attention that appellate counsel here allowed their Rule 20 certification to lapse while this appeal was pending.
11. Since the reintroduction of capital punishment in response to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the area of capital litigation has become a recognized specialty in the practice of criminal law. Many substantive and procedural areas unique to capital litigation have been carved out by the United States Supreme Court. As a result, anyone who litigates in the area of capital punishment must be familiar with this Supreme Court precedent and developments in the law to raise and preserve all relevant issues for appellate review.
12. Appellate representation of a death-sentenced client requires recognizing that the case will most likely proceed to the federal courts at least twice: first, on petition for Writ of Certiorari in the United States Supreme Court, and again on petition for Writ of Habeas Corpus filed in a federal district court. Appellate counsel must preserve all issues throughout the state-court proceedings on the assumption that relief is likely to be sought in federal court. The issues that must be preserved are not only issues unique to capital litigation, but also case- and fact-related issues unique to the case that impinge on federal constitutional rights.
13. It is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be exhausted in the state courts. This is all the more important in light of a recent case out of the United State Supreme Court, *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). To exhaust an issue, the issue must be presented to the state courts in such a manner that a reasonable jurist would have been alerted to the existence of a violation of

the United States Constitution. The better practice to exhaust an issue is to cite directly to the relevant provisions of the United States Constitution in each proposition of law to avoid any exhaustion problems in federal court.

14. It is important that appellate counsel realize that the reversal rate in the state of Ohio is approximately eleven percent on direct appeal and two percent in post-conviction. It is my understanding that forty to sixty percent (depending on which of several studies is relied upon) of all habeas corpus petitions are granted. Thus, appellate counsel must realize that in Ohio, a capital case is very likely to reach federal court and, therefore, counsel should prepare the appeal accordingly.
15. It is my understanding that a significant number of those reversals are based upon ineffective assistance of trial counsel. That makes it absolutely crucial that all claims of ineffective assistance be briefed and preserved for federal court review.
16. Based on the foregoing standards, I reviewed the record in Phillip Jones' case. I have identified the following issues that should have been evaluated by appellate counsel and fully presented to this Court:

PROPOSITION OF LAW NO. I: A trial court violates a capital defendant's constitutional rights to a fair trial and due process when it commits prejudicial errors during the capital defendant's trial. U.S. Const. Amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

The trial court violated Jones' federal and state constitutional rights when it:

- a) failed to record all sidebars.
- b) permitted the State to refer to acts not yet proven beyond a reasonable doubt without using the term "alleged."
- c) permitted biased and speculative testimony from the medical examiner.
- d) admitted cumulative, gruesome photos in both phases and the autopsy protocol in mitigation.
- e) allowed the admission of victim impact evidence.
- f) allowed the circumvention of the requested separation of witnesses.
- g) failed to give requested jury instructions.
- h) failed to life-qualify Jones' venire.
- i) misstated the burdens of proof.
- j) relied on improper sentencing considerations.
- k) misapplied the rape shield statute.
- l) did not permit cross examination on relevant matters.

PROPOSITION OF LAW NO. II: A capital defendant is denied the right to the effective assistance of counsel when counsel prejudicially fails his client during his capital trial. U.S. Const. VI and XIV.

Jones' counsel rendered deficient performance to Jones' prejudice by:

- a) failing to request expert assistance and forensic testing.

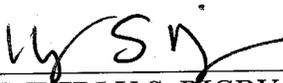
- b) failing to object to the admission of other acts testimony, the admission of the plastic cross found in Delores Jones' jewelry box, and the prejudicial nature of the mannequin and demonstration.
- c) failing to object to prosecutorial misconduct throughout Jones' trial.
- d) failing to request a continuance and advocate for their client.
- e) opening the door during mitigation phase.
- f) failing to effectively advocate during voir dire.
- g) failing to effectively advocate during mitigation.

PROPOSITION OF LAW NO. III: A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, §§ 9 and 16 when a prosecutor commits acts of misconduct during his capital trial.

The State violated Jones' federal and state constitutional rights when it:

- a) repeatedly asked leading questions on direct examination.
 - b) elicited inadmissible hearsay.
 - c) elicited inflammatory information.
 - d) committed misconduct during closing argument.
17. These issues are meritorious and warrant relief. Thus, appellate counsel's failure to present these errors amounts to ineffective assistance of appellate counsel in this case.
18. Appellate counsel failed to raise these issues in appellant Phillip Jones' direct appeal to this Court. Based on my evaluation of the record and understanding of the law, I believe the issues raised in this Application to Re-open are meritorious. Also, had appellate counsel raised these issues, each error would have been properly preserved for federal-court review.
19. Therefore, Appellant Phillip Jones was detrimentally affected by the deficient performance of his former appellate counsel.

Further affiant sayeth naught.

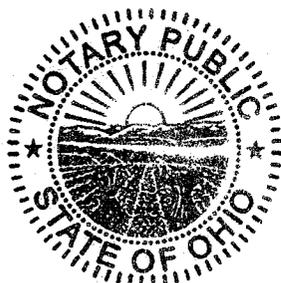


 KIMBERLY S. RIGBY
 Counsel for Appellant Jones

Sworn to and subscribed before me on this 16th day of May, 2013.



 Notary Public



KELLE HINDERER
 Notary Public
 In and for the State of Ohio
 My Commission Expires
 October 07 2013

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case Nos. 2008-0525, 2010-0344
 :
 vs. :
 :
 PHILLIP JONES, :
 :
 Defendant-Appellant. : Death Penalty Case

Appellant Phillip Jones' Pro Se Notice of Dissatisfaction with Appellate Counsel and Motion for New Attorneys to be Appointed for the Direct Appeal

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SUPREME COURT OF OHIO

PHILLIP L. JONES, APPELLANT
A542-310
Mansfield Correctional Institution
P.O. Box 788
Mansfield, Ohio 44901-0788
PRO SE

SHERRI BEVAN WALSH
Prosecuting Attorney

HEAVEN DIMARTINO
Assistant Prosecuting Attorney
53 University Ave.
Akron, Ohio 44308
(330) 643-7459
Counsel for the State of Ohio

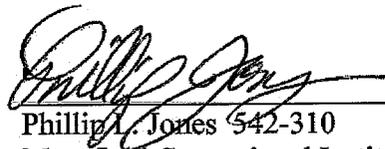
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JUL 01 2010
CLERK OF COURT
SUPREME COURT OF OHIO

PENGAD 800-631-8888
PETITIONER'S
EXHIBIT
B

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case Nos. 2008-0525, 2010-0344
 :
 vs. :
 :
 PHILLIP JONES, :
 :
 Defendant-Appellant. : Death Penalty Case

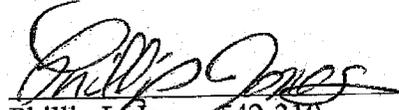
I, Phillip L. Jones, pro se, request that this Court remove my direct appeal attorneys, Lawrence J. Whitney and Nathan A. Ray, and appoint competent attorneys to represent me. There has been a breakdown in our attorney-client relationship. These attorneys do not respond to my letters, etc. I can't speak with them about my death penalty case because their office does not accept prison phone calls. They do not visit me. The brief they filed for me was poor and unacceptable. They did not even file a reply brief on my behalf in case no. 2008-0525. My life and liberty are at stake, but these attorneys are not fighting for me. I would like this Court to appoint new attorneys for my case. I am indigent.



Phillip L. Jones 542-310
Mansfield Correctional Institution
P.O. Box 788
Mansfield, Ohio 44901-0788
PRO SE

Certificate of Service

I, Phillip L. Jones, mailed a copy of this motion by regular U.S. mail to attorneys Lawrence J. Whitney and Nathan A. Ray, at 137 South Main Street, Suite 201, Akron, Ohio 44308, and to the Summit County Prosecutor, at 53 University Ave., Akron, Ohio 44038, on the 27th day of June, 2010.


Phillip L. Jones 542-310
ManC.I.

The Supreme Court of Ohio

FILED

AUG 04 2010

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

Case No. 2008-0525

v.

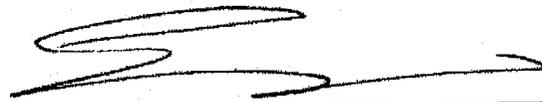
ENTRY

Phillip L. Jones

This cause is pending before the Court as a death penalty appeal from the Court of Common Pleas for Summit County. Upon consideration of appellant's motion for new attorneys to be appointed for the direct appeal,

It is ordered by the Court that the motion is denied.

(Summit County Court of Common Pleas; No. CR07041294)



ERIC BROWN
Chief Justice

PENGAD 800-631-6889

PETITIONER'S
EXHIBIT

C