Supreme Court of Ohio Clerk of Court - Filed August 01, 2016 - Case No. 1995-0042

In the Supreme Court of Ohio

STATE OF OHIO,	:	
Appellee,	:	**Case No. 1995-0042**
v.	:	
JEFFREY WOGENSTAHL,	:	**This Is A Capital Case.**
Appellant.	:	

MERIT BRIEF OF APPELLANT JEFFREY WOGENSTAHL

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Statement of the Case[1]

On October 9, 2015, Wogenstahl filed a Motion to Vacate His Execution Date and to Re-open His Direct Appeal. This Court granted that Motion on May 4, 2016. *State v. Wogenstahl,* 145 Ohio St. 3d 1455, 2016-Ohio-2807, 49 N.E.3d 318 (2016). On June 1, 2016, the record was filed. On July 11, 2016, Wogenstahl filed a stipulation that the time for him to file his merit brief be extended to August 1, 2016.

Statement of the Facts

The proceedings before this Court involve one issue, whether the trial court lacked subject matter jurisdiction because the victim was killed in the State of Indiana, not in the State of Ohio. *See State v. Yarbrough*, 104 Ohio St. 3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 55 (2004).

A. The Offense

On November 24, 1991, Amber Garrett went missing from her home. Within hours of her being reported missing, the Harrison Police Department arrested Jeff Wogenstahl. Three days later, Garrett's body was discovered in Indiana. State Street is the dividing line between Harrison, Ohio and West Harrison, Indiana. The western side of the street is in Indiana while the eastern side is in Ohio. (Tr. 924; 1109; 1790). The south end of State Street splits into two roads, Jamison Road, located in Indiana, and Campbell Road, located in Ohio.

In the early morning hours of November 24, 1991, Vickie Mozena was working at the United Dairy Farmers (UDF) store on State Street in Harrison, Ohio. The store is located "right

[1] Because the present proceedings involve a single discreet issue, Wogenstahl limits both his Statement of the Case and Statement of the Facts accordingly. Wogenstahl has before this Court another appeal involving the Department of Justice's recent acknowledgement that the trial testimony of the Special Agent had no basis in science. *State v. Wogenstahl*, Case No. 2016-0423.

on the border of Ohio and Indiana." (Tr. 1439). At 3:15a.m., Ms. Mozena saw a vehicle pass the store traveling south on the Indiana side of the road headed towards Jamison Road. She would later identify Jeffrey Wogenstahl as the man driving that vehicle. (Tr. 1452). She saw a "young girl" sitting on the front passenger seat of Wogenstahl's vehicle. (Tr. 1444). The young girl had long hair and looked to be twelve years of age or younger. (Tr. 1475-76). Amber Garrett was a ten year old girl with long blonde hair. (Tr. 859, State's Trial Exhibit 53).

Shortly after 3:13 a.m., Harold Borgman, who resided at 1755 Jamison Road, arose when he heard an automobile passing the front of his residence. (Tr. 1649-50). He looked out his window and saw a car with its lights on "going very slowly down the hill" towards Harrison. (*Id.*). He saw the car pull off to the side of the road. *Id.* He continued watching the car for approximately three to four minutes before returning to bed. (Tr. 1652).

Brian Noel testified that on the evening of November 23rd to the early morning hours of November 24th, 1991, he was in Cheviot visiting with some of his friends. (Tr. 1509-10). At approximately 3:00 a.m., he left his friends to return to his residence in Bright, Indiana. (Tr. 1510). He testified that at 3:40 a.m. while traveling west on Jamison Road he saw a car on the side of the road and a male who appeared to be removing something from the trunk of the vehicle. (Tr. 1510). The car was facing towards Harrison, Ohio. (Tr. 1511). Noel later identified this man as Wogenstahl. (Tr. 1525).

At 2:15 a.m., Fredrick Harms travelled from his residence in Indiana to Harrison, Ohio on Jamison Road and fifteen minutes later he made the return trip to his residence on Jamison Road. (Tr. 1551-52). He did not see a car parked on the side of the road on either of these trips. (Tr. 1551). However, at 3:45 a.m., the third time Harms traveled Jamison Road, he saw a vehicle

parked on the side of the road. (Tr. 1552). At trial, he testified that the rear of the vehicle parked on the side of the road looked like the back of Wogenstahl's car. (Tr. 1549).

At 3:31 a.m. on November 24, 2016, Kathy Roth left work at Skyline Chili in Harrison, Ohio. (Tr. 1554-55). On her way home Roth testified that she saw "a car and gentleman off to the side of [Jamison] Road" between 3:38 a.m. and 3:40 a.m. (Tr. 12, 1556-57). At trial she identified that gentleman as "Wogenstahl." (Tr. 1562-63).

Between 3:45 a.m. and 4:00 a.m. Vickie Mozena testified that she again saw the vehicle that had earlier passed the UDF store at 3:15. (Tr. 1447).The vehicle was parked at the car wash which was located across the street from the UDF. (*Id.*). Shortly thereafter, the vehicle proceeded to the UDF parking lot. The driver exited the vehicle, entered the store, and purchased a pack of cigarettes. (Tr. 1450).

Approximately three days later, on November 27, 1991, Amber Garrett's body was recovered down a steep embankment in a wooded area off to the side of Jamison Road, in Indiana. The location where the victim's body was found is directly across from where Harold Borgman's house still sits and where Wogenstahl and his car were identified as being observed in the early morning hours of November 24, 1991, by Mr. Noel, Mr. Harms, and Ms. Roth.

B. The Trial

Almost ten months after Amber Garret went missing, on September 1, 1992, the Hamilton County Grand Jury indicted Wogenstahl for the aggravated murder of Amber Garrett. (T.d. 1). The indictment contained three capital specifications. The indictment also charged Wogenstahl with kidnapping and aggravated burglary. (*Id.*).

At the close of the prosecution's case, defense counsel, pursuant to Criminal Rule 29, moved for a judgment of acquittal: "we would ask and we would submit that the case is

insufficient evidence [sic] to go forward and more specifically on the issue of venue." (Tr. 2198). The prosecution responded "[t]he issue of venue, the law is clear that if any part of anyone [sic] these crimes begins in Ohio . . . venue appropriate [sic] lies in Hamilton County." (*Id.*). The trial court denied the motion, "[w]ith reference to venue, . . . Hamilton County is clearly the place where the case should be prosecuted." (Tr. 2200).

On February 25, 1993, the jury found Wogenstahl guilty of all three counts in the indictment and the three capital specifications. (Tr. 2651-54; T.d. 136). On March 3, 1993, the jury returned a verdict recommending that Wogenstahl receive the death penalty. (Tr. 2871; T.d. 147). On March 15, 1993, the trial court accepted the jury's recommendation and sentenced Wogenstahl to death on the first count of the indictment and fifteen years of actual incarceration to twenty-five years on both the second and third counts of the indictment, all of which were to be served consecutively. (Tr. 2889; T.d. 165).

Proposition of Law No. I

> An Ohio court lacks subject matter jurisdiction when the state fails to prove such jurisdiction beyond a reasonable doubt. Any resulting conviction is void and violates a defendant's constitutional rights to fair trial and due process. U.S. Const. amends. VI and XIV

The testimony at trial established that while the victim was kidnapped in the State of Ohio, she was murdered in the State of Indiana. Pursuant to the statute then in effect, R.C. § 2901.11(B), the trial court lacked jurisdiction to try Wogenstahl for the murder of the victim. *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 55 ("Under R.C. § 2901.11, a murderer acting alone, who plans his crime in Ohio and carries it out in another stated cannot be tried in Ohio for his or her crime.") The resulting conviction of aggravated murder was void and violated Wogenstahl's rights as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. *See* Proposition of law No. III, which is fully incorporated herein.

"Jurisdiction" refers to a "court's statutory and constitutional power to adjudicate the case." *Steele Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89, S. Ct. 1003, 140 L. Ed. 2d 210 (1998); *Morrison v. Steiner,* 32 Ohio St. 2d 86, 87, 769 N.E.2d 841 (1972), paragraph one of the syllabus. In the absence of subject matter jurisdiction, a court lacks authority to do anything but announce its jurisdiction, and dismiss the case. *Steele Co.*, 523 U.S. at 94. The court having jurisdiction is a "condition precedent to the court's ability to hear the case. If a courts acts without jurisdiction, then any proclamation by the court is void." *Patton v. Diemer,* 35 Ohio St. 3d 68, 518 N.E.2d 941 (1988), paragraph three of the syllabus.

A. The State Has the Burden of Proof Beyond a Reasonable Doubt as to Subject Matter Jurisdiction.

Subject matter jurisdiction "is an element which the State must prove in order to convict an individual of a crime and is 'an essential element of the crime.'" *State v. Wooldridge*, 2nd Dist. No. 18086, 2000 Ohio App. LEXIS 4639 (Oct. 6, 2000). The State must prove the trial court had jurisdiction before a court can exercise its power to adjudicate the charges. *State v. Mitchell,* 8th Dist. No. 51609, 1987 Ohio App. LEXIS 7079, *8 (March 5, 1987). The prosecution must demonstrate by proof beyond a reasonable doubt that the court has jurisdiction. *State v. Neguse,* 71 Ohio App.3d 596, 599, 594 N.E.2d 1116 (10th Dist. 1991); *State v. Nelloms*, 2nd Dist. No. 17663, 19999 Ohio App. LEXIS 5666, * 5 (Dec. 3, 1999).

B. This Court Conducts De Novo Review of Jurisdictional Issues.

Jurisdictional issues involve legal issues. *McClure v. McClure,* 119 Ohio App.3d 76, 79, 694 N.E.2d 515 (4th Dist. 1997). Because jurisdictional issues involve questions of law, an appellate court reviews them de novo. *State v. Marzolf*, 9th Dist. No. 22459, 2009-Ohio-3001, ¶ 7*; State v. Walls* 12th Dist. CA 99-10-10-174, 2000 Ohio App. LEXIS 5779, *5-7 (Dec. 11, 2000).

C. Pursuant to the Former Version of R.C. § 2901.11(B), Trial Courts Lacked Jurisdiction in Homicide Cases When the Murder Itself Did Not Occur in the State of Ohio.

Pursuant to Article IV, Section 4(B) of the Ohio Constitution, the jurisdiction of the court of common pleas is determined by statute. The court of common pleas has original jurisdiction over crimes and offenses committed by an adult, with certain exceptions. *Pratts v. Hurley*, 102 Ohio St. 3d 81, 84, 2004-Ohio-1980, 806 N.E.2d 992 (2004). R.C. § 2901.11 grants jurisdiction to Ohio courts over criminal offenses that occur in Ohio. At the time of the offense in 1991, R.C. § 2901.11 specified the requirements for subject-matter jurisdiction over crimes occurring in the

State of Ohio. That statute narrowed those requirements for homicides. The relevant portions of the 1991 version of the statute, provided:

> (A) A person is subject to criminal prosecution and punishment in this state if any of the following occur:
>
> (1) The person commits an offense under the laws of this state, any element of which takes place in this state.
>
> ...
>
> (B) In homicide, ***the element referred to in division (A)(1) of this section is either the act that causes death, or the physical contact that causes death, or the death itself. If any part of the body of a homicide victim is found in this state, the death is presumed to have occurred within this state.*** *Id.*
>
> * * *
>
> (D) When an offense is committed under the laws of this state, and it appears beyond a reasonable doubt that the offense or any element of the offense took place either in this state or in another jurisdiction or jurisdictions, but it cannot reasonably be determined in which it took place, the offense or element is conclusively presumed to have taken place in this state for purposes of this section.

The language of the statute was clear and ambiguous: for a trial court to have jurisdiction in a murder case, the killing itself must have occurred in the State of Ohio. *Yarbrough*, 104 Ohio St.3d at ¶ 55 ("Under R.C. § 2901.11, a murderer acting alone, who plans his crime in Ohio and carries it out in another stated cannot be tried in Ohio for his or her crime."). The statute provided an exception; jurisdiction may lie in Ohio for homicides when it cannot be reasonably determined in which jurisdiction (i.e. which state) the offense occurred. R.C. § 2901.11 (D). However, that exception is not applicable "if it can reasonably be determined in which jurisdiction an offense took place, and that jurisdiction is not Ohio, then the crime is properly prosecuted in that other jurisdiction." *State v. Rydbom*, 4th Dist. No. 97CA16, 1998 Ohio App. LEXIS 1652, *10 (April 14, 1998).[2]

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[2] Following this Court's decision in *Yarbrough*, the General Assembly amended R.C. § 2901.11 to grant jurisdiction to the State of Ohio over homicides that occurred outside of Ohio if the

This Court in *Yarbrough* addressed the jurisdictional issue in homicide cases. In *Yarbrough*, the defendant and an accomplice kidnapped two college students in Steubenville, Ohio, drove across the border into Pennsylvania, and fatally shot the two students. *Id.* at ¶ ¶ 6-10. Although the kidnapping and other charges of robbery and burglary began in Ohio, this Court found sufficient evidence that the actual homicides themselves occurred in Pennsylvania. *Id.* at ¶ 44. ("The felony portion of the aggravated murder charges against Yarbrough began with the burglary, robbery, and kidnapping of the victims in Ohio. However, undisputed evidence established that Muha and Land were shot in Washington County, Pennsylvania. Here, the act causing the deaths, the physical contact causing the deaths, and the deaths themselves all occurred in Pennsylvania."). From these factual findings, this Court concluded, "[t]hus, under a plain reading of R.C. § 2901.11, particularly R.C. § 2901.11(B), Ohio does not have statutory jurisdiction over the homicides of Land and Muha." *Id.*

D. Pursuant to the Version of R.C. § 2901.11(B) in Effect at the Time of Wogenstahl's Trial, The Hamilton County Court of Common Pleas Lacked Jurisdiction Because the Killing Itself Occurred in the State of Indiana.

The facts here are almost identical to the facts in *Yarbrough* – the victim was kidnapped in the State of Ohio and was killed in the State of Indiana. Like the Jefferson County Common Pleas Court in *Yarbrough,* the Hamilton County Common Pleas Court in this case lacked jurisdiction.

The victim was seen alive at 3:15 a.m. in a vehicle that was proceeding south toward Jamison Road on the western side of State Street in West Harrison, Indiana. (Tr. 1446, 1790). Minutes later, a car matching the same description was seen by three individuals parked along

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"course of conduct" began in Ohio. However, the statute was only amended *prospectively* in 2005. *See Yarbrough*, 104 Ohio St.3d at 10. *See* R.C. § 2901.11 (B) (eff. 7-13-05) ("The General Assembly hereby declares that it intends by the amendments made by Sections 1 and 2 of this act to prospectively overrule the decision of the Ohio Supreme Court in *State v. Yarbrough*...").

the side of Jamison Road in Indiana. (Tr. 1511-17, 1548-52, 1556-63). A male was seen taking something from the trunk of the vehicle. (Tr. 1515).The coroner would testify that the victim was fatally beaten with an object consistent with a scissors jack handle and stabbed. (Tr. 1408, 1414).

1. The testimony of the State's witnesses established that the victim was killed in the State of Indiana.

Wogenstahl is not asking this Court to find that the testimony of defense witnesses is more credible than the State's witnesses. Wogenstahl also is not asking this Court to parse the testimony of the State's witnesses. Instead, for purposes of this argument, he is requesting that this Court accept as credible the testimony of the State's eyewitnesses.

a. At 3:15 a.m. the victim was seen alive in a vehicle traveling on the Indiana side of State Street in the direction of Jamison road.

Vickie Mozena, an employee of the United Dairy Farmers (UDF) store located on State Street in Harrison, Ohio, testified that at 3:15 a.m. she saw a vehicle, later identified as Wogenstahl's, driving south down State Street ***on the Indiana side of the street.*** (Tr. 1446, 1790). She saw a silhouette of a man driving and of a young girl in the front seat who was "getting up and stretching and then laying back on the vehicle door asleep." (Tr. 1445). According to the State, this young girl was the victim, Amber Garrett. (Tr. 2597). State Street continues south along the Ohio-Indiana border for a short stretch before it veers west further into Indiana and becomes Jamison Road. At no point south of the UDF does State Street, prior to reaching Jamison Road, veer further into Ohio. (State's Trial Exhibit 54, attached in Appendix at A-29). Jamison Road is a winding and hilly two-lane road that travels along Jamison Creek.

b. At 3:20 a.m., the same vehicle with only a single occupant was seen proceeding in a northerly direction on Jamison Road.

Shortly after Ms. Mozena's sighting of the brown car with two silhouettes, Harold Borgman awoke at his residence at 1755 Jamison Road, Indiana. (Tr. 1645). He saw a vehicle

driving slowly from the direction of Bright, Indiana towards Harrison, Ohio. (Tr. 1650). That vehicle then parked in front of his house on Jamison Road. Based upon his testimony this vehicle appeared in front of his house at or a few minutes after 3:20 a.m. (Tr. 1649-50). He continued watching the car for approximately three to four minutes before returning to bed. (Tr. 1652).

c. At 3:40 a.m., the same vehicle with a single occupant, remained in the same location.

No more than about ten to fifteen minutes later, at approximately 3:40 a.m., three other witnesses – Kathy Roth, Brian Noel, and Fredrick Harms – all testified they saw a vehicle and a man later identified as Wogenstahl parked in the same location and facing in the same direction as Mr. Borgman testified. (Tr. 1511-17, 1548-52, 1556-63). All three State's witnesses testified that the man appeared to be alone.

Ms. Roth testified that saw a vehicle parked on the side of Jamison Road on her way home from work between 3:38 a.m. and 3:40 a.m. (Tr. 1554-57). Roth identified the man she saw on the side of the road that night as Wogenstahl. (Tr. 1562-63).

Mr. Noel testified that when he drove by, he saw the man looking inside the trunk of the vehicle, apparently retrieving something from the trunk. (Tr. 1515).

Mr. Harms testified that he traveled on Jamison Road three times in the early morning hours of November 24, 1991. (Tr. 1551-52). On his third trip, at 3:45 a.m. (Tr. 1552), he saw a vehicle he later identified at trial as looking like Wogenstahl's parked on the side of Jamison Road. (Tr. 1549).

d. At 3:45 a.m., the same vehicle with a single occupant, was seen at the car wash across the street from the UDF in West Harrison, Indiana.

Ms. Mozena testified that she saw the same vehicle she had seen earlier again between 3:45 a.m. and 4:00 a.m. at the car wash across the street from the UDF in West Harrison, Indiana. (Tr. 1446-47). After a few minutes, the same car then proceeded to the UDF where she worked. (Tr. 1447).

2. The prosecution told the jury at trial that the victim was killed in Indiana.

At trial, the prosecution entered into evidence, State's Trial Exhibit 54, a map of Harrison, Ohio and the surrounding area. The State utilized this map to illustrate for the jury the route that it believed Wogenstahl used after he kidnapped Amber Garrett. "Wogenstahl's route" as the State termed it on the map, is clearly marked with a dashed, red and white, line. (*See* State Trial Exhibit 54). This map visibly indicates the State's belief that the victim's death occurred in Indiana.

In closing arguments, defense counsel questioned the State's case and asked why the defendant would "take her [the victim] to a place in Indiana and snuff out her life and get rid of the body." (Tr. 2538). The prosecutor's response was telling. Instead of challenging this statement, the prosecutor, agreed, "[t]here were a lot of decisions he [Wogenstahl] could have made at that point. He could have gone back and dropped her off . . . He could have left her alive somewhere out in Indiana . . ." (Tr. 2800).

The prosecutor later in his closing argument returned to the fact that the victim died in Indiana: "as [the victim] lay on that hillside [where the body was found in Indiana] and that tiny little heart beat its last beat and those little lungs drew that last breath . . . All [the victim] had were the limbs of that juniper tree and the branches of that blackberry bush. . . ." (Tr. 2802). The

prosecutor then concluded, "And, finally, he leaves her for dead on that cold hillside and he goes about his business." (*Id.*)

3. The State on direct appeal to this Court continued to endorse the fact that the death occurred in Indiana.

On direct appeal to this Court, Wogenstahl asserted that the above closing argument was both improper and prejudicial. The State responded, "There is nothing improper in the prosecutor's language. It is a mere straight forward recitation of ***the facts***." See Appellee's Brief at p. 48 (emphasis added), attached in Appendix at A-30.

4 . This Court previously determined that the victim was killed in Indiana.

This Court previously determined the relevant facts at issue. *See State v. Wogenstahl*, 75 Ohio St. 3d 273, 662 N.E.2d 16 at *1-*14 (1996). Of particular importance, in that opinion, this Court found (1) Wogenstahl was seen driving down State Street in the direction of Bright, Indiana with the victim in his car, (2) that within the span of minutes, several eyewitnesses placed Wogenstahl and *his car in Indiana at the time that the homicide was alleged to have occurred*, and (3) that the victim's body was undeniably found in a wooded ravine next to where Wogenstahl was allegedly seen, in Dearborn County, Indiana. *Id.*

Further, when reviewing the evidence that supported the aggravating circumstance of kidnapping, this Court specifically found:

> Appellant physically restrained Amber and bound her arms in the clothing she was wearing. A knife was held to Amber's neck. *She was transported in appellant's vehicle across the Ohio-Indiana border.*

Id. at 367. (Emphasis added).

E. The Parties and the Trial Court Conflated the Issues of Venue and Jurisdiction.

In *Yarbrough*, the prosecutor and trial judge mistakenly relied on Ohio's venue statute, R.C. § 2901.12, and employed Yarbrough's "course of criminal conduct" as the basis for the trial

court to hear that death penalty case That was error. *Id* at ¶ 46. The same error occurred here. Once jurisdiction is established, then venue is determined. "The Legislative Service Committee comments to R.C. § 2901.12 provide, '[t]his section *presupposes that the state has jurisdiction to try an offender*, and speaks to the question of where the trial is to take place.'" *Yarbrough*, 104 Ohio St.3d at ¶ 46, quoting 1974 Committee Comment to H 511. (emphasis added).

Defense counsel only moved for judgment of acquittal based on lack of "venue," arguing that the State failed to prove that the murder occurred in the State of Ohio. (Tr. 2198). The State similarly confused the two concepts when it argued that the law of venue "is clear that if any part of any one of these crimes begins in Hamilton County, and the series of crimes is, of course, a conduct as we have here, venue appropriately lies in Hamilton County." (Tr. 2199). The trial court, in denying trial counsel's Rule 29 motion concerning the "venue statute", found that "Hamilton County is clearly the place where this case could be prosecuted." (Tr. 2200).

It is clear that the issue of "venue" raised at trial should have been the issue of jurisdiction. Venue was never an issue in this case. Subject matter jurisdiction, on the other hand, should have been an issue, but was never raised at trial. Here, at the time of the offense, and as the jurisdiction statute was written in 1991, Indiana, not Ohio, had subject matter jurisdiction over this homicide.[3] Trial counsel's failure to raise this issue constituted deficient performance and prejudiced Wogenstahl. *See* Proposition of law No. II, which is fully incorporated herein.

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[3] Any argument that Ohio has concurrent jurisdiction with Indiana over State Street is unfounded. Ohio only has concurrent jurisdiction over issues that occur on the Ohio River. In *City of Cincinnati v. Dryden*, the court held that the Ohio statute granting concurrent jurisdiction only pertained to incidents "on" the river's waters, and not to disputes concerning the lands below or fixtures spanning across the river. 91 Ohio Misc. 2d 235, 238 (1998).

G. Subject-matter jurisdiction can never be waived.

Because subject matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time. *United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002) ("subject matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived."); *National Wildlife Federation v. United States*, 626 F.2d 917, 924 n.13 (D.C. Cir. 1980) (purported waiver of lack of jurisdiction "necessarily ineffective"). Jurisdiction cannot be conferred on courts by the parties where it does not exist. *Kontrick v. Ryan*, 540 U.S. 443, 457, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004).

Similarly, this Court has held that the issue of subject-matter jurisdiction may be raised at any time and cannot be waived. *Rogers v. State*, 87 Ohio St. 308, 101 N.E. 143 (1913), paragraph one of the syllabus; *State v. Wilson*, 73 Ohio St. 3d 40, 46, 652 N.E.2d 196 (1995). *State ex rel Tubbs Jones v. Suster*, 84 Ohio St. 3d 70, 75, 701 N.E.2d 1002 (1998). Criminal Rule 12(G) provides that a defendant who fails to raise one or more defenses waives only those defenses or objections *that must be raised before trial*, and expressly excepts jurisdictional challenges from the defenses or objections that must be raised before trial.

In *Wilson*, the defendant, who was seventeen years of age at the time of the offense, was tried and convicted in common pleas court without being properly bound over from juvenile court. *Wilson*, 73 Ohio St. 3d at 44. Twelve years after his conviction, Wilson filed a motion to vacate his conviction because the juvenile court had not relinquished its jurisdiction. This Court held that subject-matter jurisdiction could never be waived and that the judgment against him was *void ab initio*. *Id.* This Court concluded "[a] party's failure to challenge a court's subject matter jurisdiction cannot be used, in effect, to bestow jurisdiction on a court where there is

none." *Id.* at 46. Wogenstahl cannot be found to have waived this argument by not raising it sooner.

H. Conclusion, Proposition of Law No. I

The State failed to prove beyond a reasonable doubt that jurisdiction was properly lodged in Ohio. *See Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979); *see also State v. Hubbard*, 12th Dist. No. CA99-12-222, 2001-Ohio-4193 (2001) (A court must dismiss a case for lack of jurisdiction unless "reasonable minds could reach different conclusions as to whether jurisdiction over the offense has been proven beyond a reasonable doubt."). Reasonable minds could not differ as to the jurisdictional issue; the facts point to only one conclusion – this homicide occurred in Indiana. The resulting conviction of aggravated murder was void and violated Wogenstahl's rights as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. *See* Proposition of law No. III, which is fully incorporated herein.

Wogenstahl requests that this Court reverse his conviction of aggravated murder and vacate his death sentence.

Proposition of Law No. II

A defendant is denied the effective assistance of counsel, when a trial court lacks subject matter jurisdiction and defense counsel fails to raise the issue. U.S. Const. amends. VI and XIV

Counsel did not provide Wogenstahl with effective assistance during the trial phase of his capital case. They failed to raise the trial court's lack of subject matter jurisdiction as to count one of the indictment which charged Wogenstahl with aggravated murder and death penalty specifications.

To prevail on an ineffective assistance of counsel claim, a defendant must meet a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant must demonstrate that counsel's performance was deficient and that he was prejudiced by that performance. *Id.* Here, counsel's deficient performance prejudiced Wogenstahl.

A. Trial Counsel Performed Deficiently.

The first prong of the *Strickland* test requires that a defendant identify those acts and omissions of counsel that constitute deficient or unreasonable performance. *Strickland v. Washington,* 466 U.S. at 690. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688.

Counsel is charged with knowing the applicable law. *Hinton v. Alabama*, 571 U.S. __, 134 S. Ct. 1081, 1089, 188 L. Ed.2d 1 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."); *see also Kimmelman v. Morrison*, 477 U.S. 365, 385, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (a "startling ignorance of the law" satisfies the *Strickland* inquiry);

1. The trial court lack subject matter jurisdiction.

As previously set forth herein, the trial court lacked subject matter jurisdiction. *See* Proposition of Law No. I, which is fully incorporated herein. The statute in effect at the time of Wogenstahl's trial provided that in cases involving a homicide, common pleas courts only had had jurisdiction when "the act that causes death, or the physical contact that causes death, or the death itself" occurred in the State of Ohio. R.C. § 2901.11 (B). *See also*, *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 55 (2004) ("Under R.C. § 2901.11, a murderer acting alone, who plans his crime in Ohio and carries it out in another stated cannot be tried in Ohio for his or her crime."). Neither the act that caused death, or the physical contact that cause death, or the death itself occurred in the State of Ohio. *See* Proposition of Law No. I.

2. Counsel failed to raise the jurisdictional issue.

The failure to file the appropriate motion that would have resulted in the dismissal of the charges constitutes deficient performance. *United States v. Cronic,* 46 U.S. 648, 657 n. 20, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) ("the type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to counsel's performance as a whole – specific errors and omissions may be the focus of a claim of ineffective assistance as well"); *United States v. Bankston,* 820 F.3d 215, 234 (6th Cir. 2016) ("Counsel's failure to object to or move to dismiss count 23 satisfies the performance prong of Strickland"); *State v. White*, 8th Dist. No. 99375, 2013-Ohio-2213 (2013), ¶ 18 (failure to file a motion to dismiss that would have resulted in the charges being dismissed constituted deficient performance). Counsel's failure to challenge a trial court's lack of subject matter jurisdiction can constitute ineffective assistance of counsel, if the trial court in fact lacked jurisdiction. *D'Antonio v. Carpenter,* M.D. Tenn. No. 3:1-cv-0355, 2014 U.S. 90998, *47 (July 3. 2014) (rejecting ineffective assistance of counsel claim because

state trial court had subject matter jurisdiction): *Hunter v. Warden,* S.D. Ohio No. 3:09-cv-393, *3 (April 30, 2012) (indictment was not defective and therefore counsel was not ineffective for failing to raise subject matter jurisdictional argument premised on defective indictment).

In this case, trial counsel's failure to file a motion to dismiss constituted deficient performance given that the trial could lacked jurisdiction to hear Count One of the indictment. *See* Proposition of Law No. I.

3. Counsels' failure to file a motion to dismiss did not constitute a strategic decision.

Counsels' decision will only be considered strategic when he has previously conducted a reasonable investigation into the applicable law and facts. *Strickland*, 466 U.S. at 690-91. Counsels' decision not to go forward with a specific argument does not constitute a strategic calculation when it is based on a misunderstanding of the law. *Williams v. Taylor,* 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A decision will not be considered strategic if counsel has not investigated the issue. *Bryant v. Scott,* 28 F.3d 1411, 1419 (5th Cir. 1994).

There is no conceivable strategic basis within the range of reasonable competence for counsel in this case having failed to challenge to the trial court's subject matter jurisdiction. *See Wright v. Angelone*, 151 F.3d 151, 161 (4th Cir. 1998) (ineffective assistance law could be established by failure to challenge jurisdiction if challenge would be meritorious); *see also United States v. Palomba*, 31 F.3d 1456, 1461 (9th Cir.1994) (same; venue).

In this case, counsel realized the need for the prosecution to prove that the murder occurred in the State of Ohio. They moved for judgment of acquittal at the end of the State's case based on the State's failure to produce sufficient evidence. (Tr. 2198). However counsel premised the motion exclusively on the concept of venue as opposed to jurisdiction: "we would ask and we would submit that the case is insufficient evidence [sic] to go forward and more

specifically on the issue of venue." (*Id.*). Because defense counsel made the incorrect argument, the trial court overruled the motion, "[w]ith reference to venue, . . . Hamilton County is clearly the place where the case should be prosecuted." (Tr. 2200).

B. Wogenstahl Was Prejudiced by Counsels' Deficient Performance.

The prejudice resulting from counsels' deficient performance is patent. *Groseclose v. Bell*, 130 F.3d 1161, 1170 (6thth Cir. 1997). Wogenstahl sits today on Ohio's death row only because trial counsel did not object to the trial court's lack of subject matter jurisdiction. For purposes of appellate review, the lack of subject matter jurisdiction is akin to structural error in that it is not subject to harmless error analysis. Structural errors "'defy analysis by harmless-error standards' because they 'affec[t] the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.'" *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (citing *Arizona. v. Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *State v. Hill*, 92 Ohio St. 3d 191, 749 N.E.2d 274 (2001).

C. Conclusion, Proposition of Law No. II

When a trial court lacks subject matter jurisdiction, the remedy is to dismiss those counts to which the court lacked subject matter jurisdiction. *Yarbrough*, 104 Ohio St.3d at ¶ 123. Trial counsel should have challenged the trial court's lack of subject matter jurisdiction in this case. Accordingly, this Court should sustain this proposition of law and dismiss Count One of the indictment.

Proposition of Law No. III

Trial of a defendant in a court without subject matter jurisdiction would necessarily violate the defendant's substantive and procedural constitutional rights to a fair trial and due process. U.S. Const. amends. VI and XIV

As previously set forth, the trial court lacked subject matter jurisdiction. *See* Proposition of Law No. I, which is fully incorporated herein. The trial court's lack of subject matter jurisdiction not only violated R.C. § 2901.12, but also Wogenstahl's rights as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. Wogenstahl will address each provision separately.

A. Trying the Case in Hamilton County Violated Wogenstahl's Statutory Right to Due Process, Protected by the Fourteenth Amendment

Wogenstahl has protected life, liberty, and property interests in not being tried in the State of Ohio because the act that caused the victim's death, the physical contact that caused her death, or the death itself occurred outside the State of Ohio. These interests are created by operation of state law, in the form of R.C. § 2901.12 (B). Those interests, in turn, are protected as rights under the substantive and procedural elements of the Due Process Clause of the Fourteenth Amendment. Trying this case in Ohio violated Wogenstahl's protected life, liberty, and property interests. A State can create interests or expectations to which an individual is entitled. Once a State creates an interest, the individual has a due process right to expect that those interests will be protected by the Fourteenth Amendment. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564, 576-77, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) (stating that property interests are created and defined not by the Constitution but by independent sources such as state law); *Wolff v. McDonnell*, 418 U.S. 539, 556-58, 94 S. Ct. 2963, 41 L. ED. 2d 935 (1974) (liberty interest in state-created system of good-time credits); *Goss v. Lopez,* 419 U.S. 565, 572-73, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975) (protected interest in provision providing for free education,

because Ohio law expressly directed local authorities "to provide a free education to all Residents between five and 21 years of age").

The Due Process Clause similarly protects a state criminal defendant from the arbitrary deprivation of his life and liberty interests. In *Hicks v. Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980), the Court found that a defendant's federal due process rights were violated when he was denied his state statutory right to have a jury determine his punishment:

> Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

Id. at 346. Hicks' state statutory right to have a jury fix his punishment was a right that "substantially affects the punishment imposed." *Id.* at 347. Similarly, Wogenstahl's state statutory right to only be tried in the State of Ohio for aggravated murder when the homicide itself had sufficient contacts with this State "substantially affects" his guilt and death penalty eligibility as well as "the punishment imposed."

More recently, in *Wilkinson v. Austin,* 545 U.S. 209, 221, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005), the United States Supreme Court explained that a "liberty interest . . . may arise from an expectation or interest created by state laws or policies" that create a liberty interest in avoiding assignment to Ohio State Penitentiary arising from Ohio prison policies); *See also Romano v. Oklahoma*, 512 U.S. 1, 12, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994) (defendant has Due Process rights in exclusion of evidence that unfairly infects sentencing proceeding); *Ross v. Oklahoma*, 487 U.S. 81, 89, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988) (defendant has Due Process rights in peremptory challenges provided under state law); *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985) (defendant has Due Process rights in appellate procedure

established by State); *Morrissey v. Brewer*, 408 U.S. 471, 480-490, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (defendant has Due Process rights in State's exercise of discretion). Consistent with these cases, the Sixth Circuit recently recognized that a sentencer's failure to abide by a statute may violate due process. *Fox v. Coyle*, 271 F.3d 658, 665-66 (6th Cir. 2001) ("A defendant's due process rights may also be infringed upon by a state's failure to adhere to its own sentencing statute.).

Beyond the unambiguous holding in *Wilkinson*, the facts are instructive here. The United States Supreme Court therein concluded that Ohio prisoners have a liberty interest protected by the Due Process Clause, arising from state prison policies and regulations, in avoiding assignment to Ohio State Penitentiary. *Wilkinson,* 545 U.S. at 222-24. That court concluded that state prison regulations making assignment to OSP indefinite and making any inmate held at OSP ineligible for parole violated a liberty interest. *Id.* at 223-24.

Similarly, R.C.§ 2901.12 (B) must be read to create life and liberty interests in being tried in a court that has subject matter jurisdiction. A "'duty is the invariable correlative of that legal relation which is most properly called a right or claim.'" *Scott v. Houk*, 127 Ohio St. 3d 317, 325 n.1, 2010-Ohio-5805, 939 N.E.2d 835 (2010), ¶ 34 (Brown, C.J., dissenting) (quoting Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 33 (1913)). "Black's Law Dictionary defines duty as '[a] legal obligation that is owed or due to another and that needs to be satisfied; *an obligation for which somebody else has a corresponding right.*'" *Id.* (emphasis in original) (quoting Black's Law Dictionary 580 (9th Ed.2009)). R.C. § 2901.12 (B) in this case plainly "impose[d] a *duty* upon" the (a) State not to institute this prosecution for aggravated murder in the Hamilton County Common Pleas Court because it lacked subject matter jurisdiction and (b) trial court

to insure that it had subject matter jurisdiction.

B. Trying the Case in Hamilton County Violated Wogenstahl's Common Law Right to Due Process, Protected by the Fourteenth Amendment

The due process clause of the Fourteenth Amendment also incorporates the protections of the common law at the time of the adoption of the constitution in 1791. *See, e.g., Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); *Apprendi v. New Jersey,* 530 U.S. 466, 479-82, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Subject Matter Jurisdiction was required by the common law at the time of the adoption of the Constitution and it is therefore part of the guarantee of due process of law. There can be no dispute that, under the common law, the situs of a murder was the place where the fatal blow was struck or the victim died. *See e.g., People v. Duffield,* 197 N.W.2d 25, 28-38 (Mich. 1972) (reviewing authorities); 1 Mathew Hale, History of the Pleas of the Crown, 426-427 (1736); 1William Hawkins, Treatise of the Pleas of the Crown 79-80 (2d ed. 1724); *See United States v. Cabrales*, 524 U.S. 1, 6-7, 118 S. Ct. 1772, 141 L. Ed. 2d 1 (1998) ("locus dilecti" of offense for venue purposes determined from nature of crime and "location of the act or acts constituting it. [citation]"). Consistent with this rule, the Due Process Clause of the United States Constitution, as interpreted by the Supreme Court, prohibits the State of Ohio from exercising jurisdiction over a homicide that occurred in another state.

C. Trying the Case in Hamilton County Violated the Sixth Amendment.

Territorial jurisdiction and venue in criminal proceedings are required by the Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law. . . .

The text of the federal constitution cannot be clearer that a person can only be convicted of an offense in the "State" where the offense was committed. The plain language of the Sixth Amendment text applies to the states and prevents them from obtaining jurisdiction over an offense that was not committed within their boundaries. It follows from the plain language of the Sixth Amendment that states are limited to trying those offenses over which they have jurisdiction:

> The fear of transportation to England for trial (the Declaration of Independence objected to "transporting us beyond the seas for pretended offenses") left its indelible imprint on the framers of our Constitution, the Bill of Rights and the Judiciary Act of 1789. Thus some limitations, such as trial outside the state in which the crime was allegedly committed, and such as trial by jurors drawn from the community outside that state, were included.

State of Maryland v. Brown, 295 F. Supp. 63, 80 n.12 (D. Mar. 1969) (holding that vicinage rights were not incorporated to apply to state prosecutions but finding that territorial jurisdiction limitations still apply).

D. Subject Matter Jurisdiction As Guaranteed by the Sixth and Fourteenth Amendments of the Federal Constitution Cannot Be Waived.

Any argument that Wogenstahl has waived or forfeited his constitutional rights as guaranteed by the Sixth and Fourteenth Amendments to be tried in the correct jurisdiction would be inconsistent with federal law and a violation of Wogenstahl's constitutional rights to substantive and procedural due process. Subject matter jurisdiction is not subject to be waiver, and jurisdiction cannot be conferred on courts by parties where it does not exist. *See e.g., Cotton,* 535 U.S. at 630 ("subject matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived."); *National Wildlife Federation,* 626 F.2d at 924 n.13 (D.C. Cir. 1980) (purported waiver of lack of jurisdiction "necessarily ineffective").

E. Conclusion, Proposition of Law No. III

Holding the trial in Hamilton County violated Wogenstahl's rights as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

Conclusion

For the foregoing reasons, this Court must reverse Wogenstahl's conviction for aggravated murder and vacate the attendant death sentence on the grounds that the evidence adduced at trial was insufficient to prove jurisdiction was proper in Ohio.

Respectfully submitted,

OFFICE OF THE
OHIO PUBLIC DEFENDER

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Certificate of Service

I hereby certify that a copy of the foregoing **Merit Brief of Appellant Jeffrey Wogenstahl** was served by U.S. mail addressed to Philip Cummings (0041497), Hamilton County Assistant Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 on this 1st day of August, 2016.

By: /s/ Kimberly S. Rigby
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Counsel for Appellant

In the Supreme Court of Ohio

STATE OF OHIO,	:	
Appellee,	:	**Case No. 1995-0042**
v.	:	
JEFFREY WOGENSTAHL,	:	**This Is A Capital Case.**
Appellant.	:	

APPENDIX TO MERIT BRIEF OF APPELLANT JEFFREY WOGENSTAHL

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FILED
MAY 4 2016
CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

State of Ohio

v.

Jeffrey A. Wogenstahl

Case No. 1995-0042

ENTRY

This cause came on for further consideration upon the filing of appellant's motion to vacate execution date and to re-open direct appeal, it is ordered by the court that the motion is granted. Appellant's execution date scheduled for September 13, 2017, is hereby stayed pending further order of this court.

(Hamilton County Court of Appeals; No. C930222)

Maureen O'Connor
Chief Justice

The Official Case Announcement can be found at http://www.supremecourt.ohio.gov/ROD/docs/

95-42

No. _____

In the

Supreme Court of Ohio

THE STATE OF OHIO,

Plaintiff-Appellee

vs.

JEFFREY WOGENSTAHL

Defendant-Appellant

FILED
JAN 09 1995
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

On Appeal from the Court of Appeals, Hamilton County,
First Appellate District, No. C 930222

NOTICE OF APPEAL FOR APPELLANT, JEFFREY WOGENSTAHL

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The State of Ohio

No._____

In the

Supreme Court of Ohio

THE STATE OF OHIO,

Plaintiff-Appellee

vs.

JEFFREY WOGENSTAHL,

Defendant-Appellant

Jeffrey Wogenstahl, through counsel, respectfully gives Notice of Appeal to the Supreme Court of Ohio from the judgment of the Court of Appeals for Hamilton County, First Appellate District of Ohio, entered in Court of Appeals case No. C 930222, decided on November 30, 1994.

This case raises a substantial constitutional question, involves a felony, is one of public or great general interest, and involves the affirmance of the death sentence, entitling Appellant to an appeal as of right to this Court, pursuant to Art. IV, § 2(B)(2)(a)(ii) of the Ohio Constitution.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal was served upon opposing counsel, Mr. William E. Breyer, Assistant Hamilton County Prosecutor, by leaving same at his office, 450 Courthouse, 1000 Main Street, Cincinnati, Ohio 45202 on the 27th day of December, 1994.

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Cocounsel for Defendant

THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

GJEI
judge: 109
form: B

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* ENTERED *
* DATE : 3-15-93 *
* IMAGE: 39 *
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Judge: NORBERT NADEL

NO. B 926287

THE STATE OF OHIO
VS.

JEFFREY A WOGENSTAHL

JUDGMENT ENTRY : SENTENCE:

INCARCERATION

Defendant was present in open Court with Counsel DALE G. SCHMIDT on the 15th day of March 1993 for sentence.
The court informed the defendant that, as the defendant well knew, after trial by jury, the defendant had been found guilty of the offense(s) of AGGRAVATED MURDER 2903.01 R.C. (WITH SPECIFICATION'S 1, 2 AND 3 TO COUNT 1; KIDNAPPING 2905.01 R.C. (AF1) COUNT 2 (WITH SPECIFICATION); AGGRAVATED BURGLARY 2911.11 R.C. (AF1) COUNT 3 (WITH SPECIFICATION).

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned in Department of Corrections
FOR A TERM OF DEATH ON COUNT 1;
FOR A TERM OF NOT LESS THAN FIFTEEN (15) YEARS ACTUAL INCARCERATION NOR MORE THAN TWENTY-FIVE (25) YEARS ON COUNT 2 TO RUN CONSECUTIVE TO COUNT ONE; FOR AN ACTUAL INCARCERATION OF NOT LESS THAN FIFTEEN (15) YEARS NOR MORE THAN TWENTY-FIVE (25) YEARS ON COUNT 3 TO RUN CONSECUTIVE TO COUNTS 1 AND 2.

95-0042

FILED
JAN 25 1995
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Defendant was notified of the right to appeal as required by Crim. R 32(A)(2)

FILED
MAR 22 1993
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

STATE OF OHIO	:	CASE NO. B-926287
Plaintiff	:	OPINION
-vs-	:	(Judge Norbert A. Nadel)
JEFFREY A. WOGENSTAHL	:	
Defendant	:	CC92-97

This case originated with the filing of an indictment on September 1, 1992, against Defendant Jeffrey A. Wogenstahl, charging him with Aggravated Murder in Count One of the indictment and charging him with three specifications of Aggravating Circumstances as to Count One, thus qualifying this case as a possible death penalty case under the laws of the State of Ohio. In addition, Defendant was charged with the following offenses:

In Count Two of the indictment, Defendant was charged with Kidnapping. In Count Three, Defendant was charged with Aggravated Burglary.

Also, in Counts Two and Three of the Indictment, Defendant was charged with a specification of having been previously convicted of Aggravated Burglary, an aggravated felony of the first degree.

(1)

This opinion deals only with the Aggravated Murder charge and the specifications pertaining to said murder. It is prepared and will be filed with the First District Court of Appeals and with the Supreme Court of Ohio in compliance with the requirements of O.R.C. 2929.03(F).

Since the date of the subsequent arraignment, the docket sheet reflects an extensive process of trial preparation. Numerous motions were filed before and during trial. They were heard and ruled upon during the course of the pretrial preparation, the guilt or innocence trial, and the sentencing proceedings. All rulings on said motions are reflected either on the docket sheet of the case or on the record.

GUILT OR INNOCENCE TRIAL

The guilt or innocence trial of Defendant Jeffrey A. Wogenstahl commenced on February 8, 1993, with the process of jury selection from a special venire of eighty-five (85). On February 10, 1993, the jury was impaneled and sworn. The jury finally selected consisted of twelve regular members and four alternates. On the regular panel of the jury there were nine women and three men. None of the alternates had to be used although they were kept intact and not discharged until after the verdict on the sentencing proceeding was read in open court and the regular panel discharged. The Court elected to retain the alternates until the regular panel was finally discharged in order to assure that no mistrial might have to be declared while the regular panel was deliberating on the sentencing

recommendation if then a member of the regular panel should become ill or need to be excused because of some other personal reason.

On February 11, 1993, the State commenced its case and produced evidence on the charge of Aggravated Murder as set forth in Count One of the indictment, evidence as to the specifications of Aggravating Circumstances as to Count One, and evidence on the other Counts in the indictment. During the course of the guilt or innocence trial, the State of Ohio presented thirty (30) witnesses and the defense rested after calling six (6) witnesses, including Defendant.

There was absolutely no doubt that Jeffrey A. Wogenstahl was the perpetrator of the murder of Amber Garrett as well as the other offenses charged in the Counts of the indictment.

After receiving instructions of law from the Court which were applicable to the guilt or innocence issue in the first trial and upon due deliberation, the trial jury did, on February 25, 1993, find Defendant guilty of Aggravated Murder as charged in Count One of the indictment and also found Defendant guilty of the specifications contained in the indictment as it pertains to Count One. In addition, the jury found Defendant guilty of the other Counts of the indictment as charged.

Before receiving and reading the jury's verdict in open court, the Court allowed the alternate jurors, who were sequestered separately, to fully examine the exhibits admitted into evidence. This was done in order to assure that the alternate jurors had seen and heard exactly the same evidence

that the regular jurors had before it in reaching their verdict, so that if an alternate juror had to be pressed into service in the sentencing proceeding, that alternate juror could join the deliberative process with exactly the same exposure to evidence as the regular jurors.

SENTENCING PROCEEDINGS

On March 2, 1993, the second phase of this matter, hereinafter referred to as the sentencing proceedings, commenced pursuant to O.R.C. 2929.03(D).

It should be noted that all of the jurors were sequestered during their deliberations on guilt or innocence and during their deliberations on the sentencing proceedings.

At the sentencing proceedings the Court reversed the traditional trial procedure ordering Defendant to proceed first. This reversal of procedure did not, in any way, alter the burden of proof placed upon the State as the instructions of the Court indicated. The original trial jury, still intact, heard additional testimony and the arguments of respective counsel relative to the factors in favor of and in mitigation of the sentence of death.

After receiving the instructions of the Court as to the applicable law in the sentencing proceedings and upon due deliberation, the trial jury, on March 3, 1993, returned its verdict and found unanimously that the State of Ohio proved by proof beyond a reasonable doubt that the Aggravating Circumstances which Defendant Jeffrey A. Wogenstahl was found guilty of committing were sufficient to outweigh the mitigating

factors in this case. The jury recommended in its verdict that the sentence of death be imposed as mandated by provisions of O.R.C. 2929.03(D)(2).

The Court then discharged all the jurors and continued the case until March 15, 1993, in order to personally review the numerous exhibits and testimony before imposing sentence.

IMPOSITION OF SENTENCE PROCEEDINGS

On March 15, 1993, the Court proceeded to impose sentence pursuant to O.R.C. 2929.03(D)(3). On that same date, the Court announced that its written opinion would be filed within fifteen (15) days as required by O.R.C. 2929.03(F).

The Court found by proof beyond a reasonable doubt upon a review of the relevant evidence at both trials and the arguments of respective counsel that the Aggravating Circumstances which Defendant Jeffrey A. Wogenstahl was found guilty of committing did outweigh the mitigating factors in the case and, therefore, on March 15, 1993, this Court imposed the sentence of death upon Defendant, Jeffrey A. Wogenstahl, ordering said execution to take place on June 14, 1993.

OPINION

The provisions of O.R.C. 2929.03(F) now require this Court to state in a separate opinion the Court's specific findings as to the existence of any of the mitigating factors specifically enumerated in O.R.C. 2929.04(B) or the existence of any other mitigating factors, and also requires the Court to state reasons why the Aggravating Circumstances that the offender was found guilty of committing were sufficient to outweigh the mitigating

factors, since that is what the Court has in fact found by imposing the death penalty. In other words, the Court must put in writing the justification for its sentence.

In meeting its responsibility under the statute, the Court will review all mitigating factors described in O.R.C. 2929.04(B) as well as any other mitigating factors raised by Defendant and will indicate what conclusions were reached from the evidence as to each. Those possible mitigating factors specifically set forth in the statute are as follows:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to other requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death, and

(8) The nature and circumstances of the offense, the history, character and background of the offender.

The Court will first, however, review the Aggravating Circumstances which Defendant has been found guilty of committing and will indicate why the jury's conclusions on these matters were correct.

AGGRAVATING CIRCUMSTANCES

The Aggravating Circumstances that Defendant, Jeffrey A. Wogenstahl, was found guilty of committing were:

(1) Defendant, Jeffrey A. Wogenstahl, committed the offense of Aggravated Murder of Amber Garrett while Jeffrey A. Wogenstahl was committing, attempting to commit, or fleeing immediately after committing the offense of Kidnapping, and Jeffrey A. Wogenstahl was the principal offender in the commission of the Aggravated Murder or if not the principal offender, committed the Aggravated Murder with prior calculation and design.

(2) Defendant, Jeffrey A. Wogenstahl, committed the offense of Aggravated Murder of Amber Garrett while Jeffrey A. Wogenstahl was committing or attempting to commit, or fleeing immediately after committing, or attempting to commit the offense of Aggravated Burglary, and Jeffrey A. Wogenstahl was the principal offender in the commission of

the Aggravated Murder or if not the principal offender, committed the Aggravated Murder with prior calculation and design.

(3) Defendant, Jeffrey A. Wogenstahl, committed the offense of Aggravated Murder of Amber Garrett for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by him, to wit: Kidnaping and/or Aggravated Burglary.

In deliberating upon its decision in this case as required by O.R.C. 2929.03(3)(D), the Court placed itself in the same position as if it were one of the members of the jury panel. The Court evaluated all of the relevant evidence raised at both trials and the arguments of respective counsel, all of which had been available to the jury in its deliberation at various stages of this case.

The principles of law which guided this Court are contained in the written jury instructions provided to the jury during the two trials and which are part of the transcript. The evidence and testimony were tested by the Court from the viewpoint of credibility and relevancy to the existence of Aggravating Circumstances along with their qualitative and quantitative measure.

In the guilt or innocence trial and in the sentencing proceedings, as well as in counsel's arguments to the jury, there was never a doubt in any respect that Defendant was the principal perpetrator of the offenses charged in Count One of the indictment. A complete review of the evidence pertaining to

Count One and the specifications of Aggravating Circumstances as to Count One and the other Counts reveals to this Court, beyond any doubt, that the murder of Amber Garrett, as well as the offenses charged in the other Counts of the indictment were committed by Defendant, Jeffrey A. Wogenstahl.

The evidence showed that during the early morning hours of November 24, 1991, Jeffrey A. Wogenstahl entered the small apartment of Peggy Garrett in Harrison, Ohio, where four of Mrs. Garrett's five children were present. The children there at that time were Eric Horn, age sixteen; Matt Garrett, age nine; Shanna Perkins, age four; and the victim, Amber Garrett, age ten. At that time Eric was acting as the babysitter for the other three small children.

Additionally, the evidence showed that Jeffrey A. Wogenstahl induced Eric into leaving the apartment, thus leaving the remaining small children home alone and unsupervised.

A short time later, Jeffrey A. Wogenstahl returned to the apartment and removed Amber Garrett. Having taken Amber, Wogenstahl then proceeded to beat and stab her numerous times. Wogenstahl then dumped her in a wooded area where her frozen, brutally beaten and stabbed body was found several days later.

It was therefore the Court's conclusion, upon a full and complete review of all the relevant evidence, that there was proof beyond a reasonable doubt that Defendant, as the principal offender, committed the offense of Aggravated Murder of Amber Garrett while Defendant was committing the offenses of Aggravated Burglary and Kidnapping.

It was also the Court's conclusion that Defendant committed the Aggravated Murder of Amber Garrett for the purpose of escaping detection, apprehension, trial, or punishment for the other offenses committed by him.

The Court also found from the evidence that there was proof beyond a reasonable doubt that Defendant, as the principal offender, committed the offense of Aggravated Murder of Amber Garrett while Defendant was committing the offenses of Aggravated Burglary and Kidnapping.

The Court further finds that Defendant's killing of Amber Garrett, a ten-year-old child and a fifth grade elementary school student who was kidnapped from her home with no way to defend herself, was a completely unnecessary and cold-blooded act. This killing evidenced the particularly cruel, calculating, and malicious outlook of Defendant.

MITIGATING FACTORS

The Court will now review all possible mitigating factors and indicate whether they were present, and if so, what if any consideration the Court gave to them. Those listed in O.R.C. 2929.04(B) are as follows:

(1) "Whether the victim of the offense induced or facilitated it." The Court finds absolutely no evidence whatsoever to suggest that Amber Garrett in any respect induced or facilitated the offense. This factor was not present.

(2) "Whether it is unlikely that the offense would have been committed, but for the fact that offender was under duress, coercion, or strong provocation." Again, the Court finds absolutely no evidence of any nature that would suggest that Defendant was under duress, coercion, or strong provocation. This factor was not present.

(3) "Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Again, the Court finds from the evidence that Defendant did not suffer from a mental disease or defect.

(4) "The youth of the offender." The Court finds that Defendant was, at the time of his trial, 32 years of age. There was no evidence to suggest that his age was a factor that should be taken into account in mitigation of the sentence of death.

(5) "The offender's lack of a significant history of prior criminal conviction and delinquent adjudications." The evidence in this case indicates that Defendant has at least two prior felony convictions as an adult. Therefore, the Court would deem it inappropriate to give Defendant any consideration pursuant to mitigating factor number five.

(6) "If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death

of the victim." The Court finds in this case that Defendant was the principal offender and, therefore, this mitigating factor was not present.

The Court now reviews the remaining possible mitigating factors enumerated in O.R.C. 2929.04(B). These two remaining possible mitigating factors are closely interrelated and will be reviewed as interrelated.

(7) "Any other factors that are relevant to the issue of whether the offender should be sentenced to death" and,

(8) "The nature and circumstances of the offense, the history, character and background of the offender."

The nature and circumstances of this offense appear clear to the Court. Therefore, it will not be this Court's intention to reiterate in this opinion each and every detail of the murder of Amber Garrett or the other offenses committed by Defendant.

Amber Garrett's life ended on November 24, 1991, a Sunday, in the early morning hours. Her life was what many people would consider tragic to some degree before then.

Amber, a fifth grade elementary student, lived in a fatherless home in Harrison, Ohio, in a very tiny apartment. Amber lived in this home with a variety of stepbrothers and stepsisters. Living at that address in November of 1991 were her mother, Peggy Garrett, her half brother Eric Horn, sixteen years old at the time, her half brother Justin Moore, fifteen years old at the time of this offense, her brother Matt Garrett, nine years

old at the time of this offense, and her half sister Shanna, four years old at the time of this offense. Amber, on November 24, 1991, was ten years old.

Amber's mother, Peggy, at one point specifically in 1983, had been convicted for selling drugs in Indiana and went to prison for a couple of years. These children all lived in that household with Peggy during October and November of 1991. Beginning in early October, 1991, that little place in Harrison began having a visitor, Jeffrey Wogenstahl, who was on parole for Aggravated Burglary.

Jeffrey Wogenstahl was a person whose life was spinning dangerously out of control, especially during the last six weeks before Amber's death. He was drinking alcohol; he was not attending his AA meetings as required under his parole release; he had recently been thrown out of his live-in girlfriend's home, a woman by the name of Lynn Courtney, herself a recovering alcoholic. He was forced to live in his own apartment where he engaged in repeated illicit drug usage.

On November 15, Defendant lost his job for failing a random drug test. On Friday, November 22, Defendant made one last-ditch effort to get back into the good graces of Lynn Courtney. She refused him. He asked that she at least go out with him the next evening, Saturday, November 23, when he would be celebrating his thirty-first birthday. She again said no. It was then that Wogenstahl, dejected, told Lynn Courtney that it would now be necessary that he return to his old lawless life-style.

On the afternoon of Saturday, November 23, 1991, at home in the Garrett household were Peggy, Eric, Amber, Matt, and Shanna. Brother Justin had been staying over a friend's house since Friday night and did not return until sometime later Sunday. Curiously, Defendant on this Saturday visited the Garrett household and inquired of Peggy if she was doing anything that evening, and she indicated she was not. She asked Defendant what he was doing and he said nothing much. They watched a movie and he left Saturday night, November 23.

Peggy was going out later with her friend Lynn Williams, who worked at a restaurant called PFC Harrison. PFC Harrison was on the corner of New Haven Road and Harrison Avenue.

Lynn got off work around midnight. Lynn owned a car, whereas the Garrett family did not. Peggy's plan this Saturday was the same as it was most Saturdays; that is, she would walk up to meet Lynn at her home, and then they would walk to the Escape Bar about two blocks from the Garrett house. Peggy's plan was to have Eric watch the children while she was out. It was not unusual for Peggy to do this. Eric, the sixteen year-old, usually stayed up through the night, and there was a curfew in Harrison. At Eric's age he was not allowed out between the hours of 11 p.m. to 5 a.m.

What usually occurred was that Peggy would go to a couple of bars, maybe close one or she would go with Lynn Williams to the Waffle House and return by 5 a.m. so that Eric could leave. From

there Eric walked to his grandfather's trailer where he slept throughout the morning and part of the afternoon. So that was the plan on Saturday, November 23, 1991.

It was very cold that evening, below freezing, and very windy. The Garrett apartment was small; upon entering, the first thing one would walk into was a small kitchen. Just beyond that was a little living-room area. Off the living room were the front bedroom and back bedroom, and a bathroom. This was the sum total of this apartment.

On Saturday, November 23, 1991, Peggy was in the living-room area and Eric, the sixteen year old-boy, was in the front bedroom watching television. Peggy put the children, Amber, Matt, and Shanna, to bed. All three were in the back bedroom at 10:30 that evening. Amber and Shanna were sleeping together on a bed and Matt was sleeping on a cot at the foot of the bed.

Amber was a very sound and deep sleeper. Also, Amber was almost totally blind without her glasses.

Eric was in the front bedroom by himself. Around 11:15, the door to the back bedroom was shut except for a tiny crack. At that time Peggy told Eric to come out to the living room and watch the children because she was going out. Peggy knew that when she left all three children were in the back bedroom. Eric, although he did not ask her and was not told, assumed that all three children were in the back bedroom. Peggy left on foot to meet Lynn Williams at the Escape Bar.

Lynn arrived and shortly thereafter, and Peggy and Lynn traveled to Miamitown which was about six miles from the Garrett home. They went to a place called Miamitown Lounge, also known as Hornsby's. It was there that, shortly after midnight, they encountered Defendant Wogenstahl for the first time.

That evening Jeffrey Wogenstahl was wearing a brown leather jacket, a recent gift from Lynn Courtney. While drinking mixed drinks, Wogenstahl invited Peggy and Lynn over, and they had drinks together. He then invited them out to the parking lot to smoke marijuana with him, which they did.

Shortly afterward all three agreed to go to another bar in Miamitown called the Flicker Inn. All three were riding in Lynn's car. After they had some drinks at the Flicker Inn, the bar closed about 2:30 a.m. They got back into Lynn's car and returned to the Miamitown Lounge/Hornsby's to retrieve Wogenstahl's car.

Wogenstahl asked them at this point if they were interested in smoking more marijuana at his apartment, and Peggy responded no, they were going to the Waffle House. Defendant then said he was just going to go home.

Jeffrey Wogenstahl did not, however, go home. Wogenstahl realized that Eric Horn was at the Garrett household watching the children. Eric was not a bright child; he was slow and impressionable. Jeffrey Wogenstahl went to the Garrett household after he knew that Peggy would not be there. It was 3 a.m., the bars were closed, he was familiar with who was at the Garret household, who was watching the children, and who would not be

there. With three young children in the back bedroom, Wogenstahl got the babysitter out of the house. Wogenstahl tricked Eric Horn out of the apartment by saying that Eric's mother needed him at Troy Beard's apartment. Eric locked the door, pulled it shut, checked it, and found it to be locked. The door could be opened easily with a knife or credit card. Wogenstahl and Eric walked together to Wogenstahl's car. Wogenstahl said "Oh, I forgot my lighter back there. Let me go back there." Eric said no and asked Defendant to take him to Beard's house so he could see what was wrong with his mother.

Eric got into Wogenstahl's car and they drove to Troy Beard's apartment, located three or four blocks away. Eric went upstairs and knocked on the door. Troy Beard answered it and obviously had been sound asleep. Eric asked for his mother and Troy said he did not now what Eric was talking about. Confused, Eric went back downstairs and assumed that Wogenstahl was there waiting for him. Eric waited a short time and decided Wogenstahl was not coming back, so he walked back home.

When Eric got home he noticed that the door was unlocked. He checked on the children at that point and noticed that Amber was not in the bedroom. When Peggy left Eric did not know how many children were there. Tragically, Eric assumed that Amber was staying at a friend's house, for at that moment Amber was probably fighting for her life.

At 5 a.m. the curfew was over and Eric left while Peggy was on her way back. They waved to each other and she knew Eric was going to the grandfather's trailer.

Peggy opened the door of the back bedroom, looked at the children, and saw some bodies in the beds, and thus she did not think anything was wrong. She laid on the couch in the living room and fell asleep.

The next morning when the other children got up, Peggy realized that Amber was gone. She had assumed that Amber, as she had done in the past, had gone to church this Sunday morning with some neighbors. However, when the church bus got back early Sunday afternoon, Amber was not on it. Around 3:30 or 4:00 that afternoon, Eric returned from his grandfather's trailer. Peggy related to him that Amber was missing. At that point, Eric related to his mother the strange activity of Wogenstahl.

At 4:00, Eric Horn, Peggy, and friends went to Wogenstahl's apartment and pounded on the door. They also went to get the police. Finally Defendant came to the door and was asked why he got Eric out of the house. Defendant responded, "Oh, I was just messing with Eric's head. You know I do that all the time."

The cities of Harrison and Cincinnati were in an uproar because Amber Garrett had been missing since the early morning hours of Sunday, November 24. There was a good deal of media attention about a child missing all of Sunday, all of Monday, and all of Tuesday.

A man named Harold Borgeman lived in a house on Jameson Road. Harold was worried about Amber too and was bothered by the fact that early Sunday morning he had gotten up to go to the bathroom and he saw a car parked in a pull-off area. It troubled

him for a couple of days while Amber was missing, and he began to worry that the car may have had something to do with Amber's disappearance.

He contacted Ken Greve, a policeman he knew on Wednesday, November 27, which was the day before Thanksgiving, 1991. There had been an extensive search for Amber by then which was fruitless at that point. Borgeman asked Ken Greve if he would check the area, as Borgeman was an elderly man and was worried about going down the hill.

Ken Greve did check the area and it was there that Amber's frozen body was found at noontime on Wednesday, November 27, the day before Thanksgiving. She had been stabbed and beaten to death.

This young girl disappeared during the time frame in which Defendant tricked the babysitter out of the house, and Wogenstahl changed his story repeatedly about why he got the babysitter out of the house.

Defendant said he went home and went to sleep after getting Eric out of the house. Approximately 3:30 a.m. a woman named Vickie Mozina who worked at the United Dairy Farmers saw Defendant's car on Jameson Road with a man and what she believed to be a child sitting next to him.

Two other witnesses not only identified Defendant's car as similar to the one pulled off on the side of that road, but those same two witnesses also said that Jeffrey Wogenstahl was the man they saw outside of that car as they viewed his face when they were driving by.

Vickie Mozina testified that after about a half hour after she saw this car go out Jameson Road, she saw the same car coming back into Harrison and pulling into her lot. She believed it to be suspicious as she thought the man might try to rob her.

Vickie Mozina identified Wogenstahl as the man who came into the United Dairy Farmers, disheveled and muddy, and bought cigarettes from her.

Defendant persisted in saying that all he did was go home and go to sleep after he got Eric Horn out of his house.

However, neighbors of Wogenstahl had seen him at 5:00 in the morning walking around the side of his apartment building from the area back where the dumpster was. Despite the cold weather, Defendant was not wearing a coat.

When Vickie Mozina got off work at 8:00 a.m. she saw Wogenstahl's car again, this time across the street at the car wash with all four doors open. He was cleaning and trying to purge himself and his car of the evidence of Amber Garrett's brutal murder.

However, Defendant did not commit the perfect crime. Diligent work by crime scene investigators demonstrated that his now-destroyed brown leather jacket contained thorns similar to the type of thorns that were found near the area where Amber Garrett's body was recovered.

Even with his trip to the car wash, the car contained a speck of blood. This speck of blood was sent to a laboratory that specialized in minute quantities and a blood-typing system with twenty-one different blood types, as opposed to the four-

type AB-O system. The speck of blood that was removed from Jeffrey Wogenstahl's car was thus matched to the same blood type as Amber Garrett's.

Finally, there was a very careful examination of the clothing Amber wore the night she was killed. That clothing was submitted to the FBI for further examination and trace evidence. A small single pubic hair was found on Amber's underwear, and it was matched as having the same characteristics as that of Jeffrey Wogenstahl.

The evidence was clear that the last moments in the life of little Amber Garrett, taken from her bed in the middle of the night and brutally beaten and stabbed, must have been filled with great horror and pain. The evidence further showed that Defendant later told a fellow prisoner that there was little evidence because Defendant was "too slick" and he covered up the evidence.

The proven facts of Aggravating Circumstances reveal a calculated, cruel, willful, and cold-blooded disregard for human life and values far beyond what this Court has seen in other cases.

At the sentencing hearing, Defendant's parents testified that their adopted son, Jeffrey A. Wogenstahl, was a "troubled youth." They also testified that when he got out of prison in 1991, he seemed to be doing better.

While the Court recognizes that Defendant was a "troubled youth," through no fault of his adoptive parents, the Court finds that there is no evidence to show that the childhood experiences

of Defendant resulted in any emotional scarring of Defendant which could manifest itself in later life and possibly explain his behavior on November 24, 1991.

And, finally, Defendant in his unsworn statement to the jury said, "I didn't do it."

The evidence is overwhelmingly contrary to this assertion by Defendant.

CONCLUSION

The sole issue which confronted the Court is stated as follows:

> DID THE STATE OF OHIO PROVE BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES WHICH THE DEFENDANT, JEFFREY A. WOGENSTAHL, WAS FOUND GUILTY OF COMMITTING, OUTWEIGH THE FACTORS IN MITIGATION OF THE IMPOSITION OF THE SENTENCE OF DEATH?

In this regard all of the statutory mitigating circumstances and all other possible mitigating factors raised by counsel have now been reviewed and discussed. The same has been done with the Aggravating Circumstances.

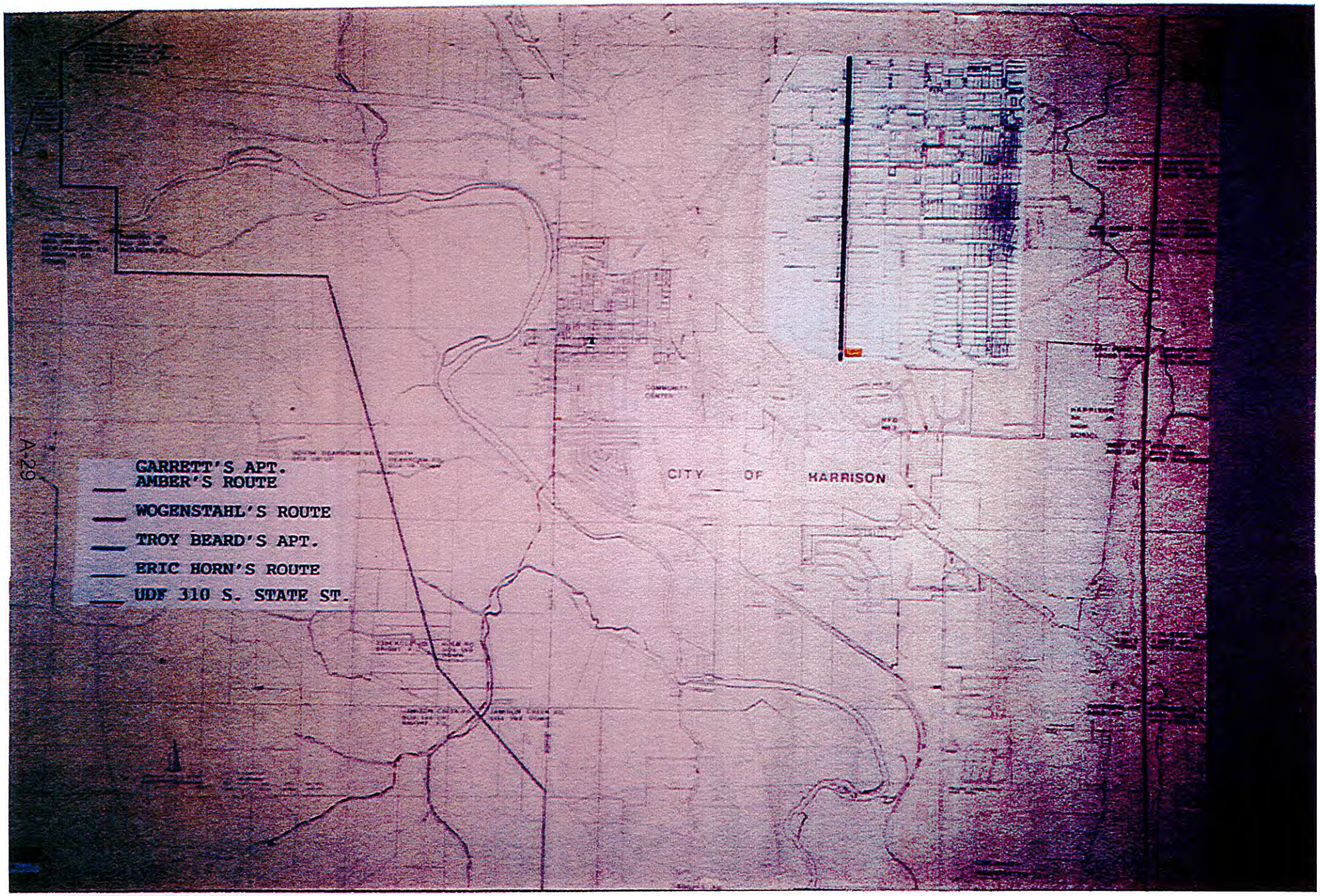
Upon full, careful, and complete scrutiny of all the mitigating factors set forth in the statute or called to the Court's attention by defense counsel in any manner, and after considering fully the Aggravating Circumstances which exist and have been proven beyond a reasonable doubt, the Court concludes that the Aggravating Circumstances do far outweigh all the mitigating factors advanced by Defendant, Jeffrey A. Wogenstahl, beyond a reasonable doubt as required by O.R.C. 2929.03(D)(3).

For all of the above reasons, the recommendation of the trial jury was adopted and the sentence of death was imposed upon Defendant, Jeffrey A. Wogenstahl, on March 15, 1993.

DATE: 3/19/93

Norbert A. Nadel

Norbert A. Nadel, Judge


GARRETT'S APT.
AMBER'S ROUTE
WOGENSTAHL'S ROUTE
TROY BEARD'S APT.
ERIC HORN'S ROUTE
UDF 310 S. STATE ST.
CITY OF HARRISON

> "You know, as she lay on that hillside and that tiny little heart beat it's last beat, and those little lungs drew that last breath of that cold November air, she would have nobody to hold her, no arms to wrap around her. All she had were the limbs of that Juniper Tree and the branches of that Blackberry Bush, both of which came into court and pointed the finger at that man through the trace evidence they left behind. She was a real person." (T.p. 2802)

Defendant argues that these comments, on the nature and circumstances were improper. They were not. They demonstrate that there is nothing mitigating about the facts, and they point out the facts of the aggravating circumstances. State v. Lorraine, 66 Ohio St.3d 414 (1993). There is nothing improper in the prosecutor's language. It is a mere straight forward recitation of the facts.

Defendant argues that the first quoted portion above reveals the prosecutor actually stating that the victim's suffering is an aggravating circumstance. This is obviously false. The prosecutor's only reference to the term "aggravating circumstance" in the quoted language is:

> "That is the kidnapping. That is the aggravating circumstance."

Clearly this is a correct statement. A killing during a kidnapping was one of the aggravating circumstances. Defendant also argues that the prosecutor's use of the phrase "think what went through her mind" is improper as somehow creating a non-statutory aggravating factor. This is simply rank speculation on counsel's part. The jury was properly charged on what the aggravating factors were, and that certainly was not one of them. This was merely a legitimate showing of the fact that there was nothing mitigating about the facts of the crime.

ORC SEC. 2901.11 CRIMINAL LAW JURISDICTION (1991)

(A) A person is subject to criminal prosecution and punishment in this state if any of the following occur:

(1) He commits an offense under the laws of this state, any element of which takes place in this state;

(2) While in this state, he conspires or attempts to commit, or is guilty of complicity in the commission of an offense in another jurisdiction, which offense is an offense under both the laws of this state and such other jurisdiction;

(3) While out of this state, he conspires or attempts to commit, or is guilty of complicity in the commission of an offense in this state;

(4) While out of this state, he omits to perform a legal duty imposed by the laws of this state, which omission affects a legitimate interest of the state in protecting, governing, or regulating any person, property, thing, transaction, or activity in this state;

(5) While out of this state, he unlawfully takes or retains property and subsequently brings any of such property into this state;

(6) While out of this state, he unlawfully takes or entices another and subsequently brings such other person into this state.

(B) In homicide, the element referred to in division (A)(1) of this section is either the act which causes death, or the physical contact which causes death, or the death itself. If any part of the body of a homicide victim is found in this state, the death is presumed to have occurred within this state.

(C) This state includes the land and water within its boundaries and the air space above such land and water, with respect to which this state has either exclusive or concurrent legislative jurisdiction. Where the boundary between this state and another state or foreign country is disputed, the disputed territory is conclusively presumed to be within this state for purposes of this section.

(D) When an offense is committed under the laws of this state, and it appears beyond a reasonable doubt that the offense or any element thereof took place either in Ohio or in another jurisdiction or jurisdictions, but it cannot reasonably be determined in which it took place, such offense or element is conclusively presumed to have taken place in this state for purposes of this section.

HISTORY: 134 v H 511. Eff 1-1-74. Analogous to former RC§2901.11 (133 v H 1). repealed 134 v H 511 §2, eff 1-1-74.

The effective date of H 511 is set by section 4 of the act.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE IV: JUDICIAL

§ 4 Common Pleas Court.

(A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. Any judge of a court of common pleas or a division thereof may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the Supreme Court.

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.

(Amended, effective Nov. 6, 1973; SJR No.30. Adopted May 7, 1968. Former § 4 repealed.)

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.