

PRACTICAL DEATH PENALTY CONCEPTS

and Related Motions

Death Penalty Seminar

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B.

HABEAS CONCEPTS THAT YOU MUST KNOW

1. Fairly Presented -

The habeas petitioner bears the burden of proving that he has exhausted available state remedies. **To demonstrate compliance, the petitioner must show that the claim he asserts in federal court has been "fairly presented" to the state courts.**

Picard v. Connor, 404 U.S. 270, 275, 30 L. Ed. 2d 438, 92 S. Ct. 509 (1971); *Ross v. Petsock*, 868 F.2d 639, 641 (3d Cir. 1989). To be "fairly presented," the federal claim must be the substantial equivalent of that presented to the state courts. *Picard*, 404 U.S. at 278; *Gibson v. Scheidemantel*, 805 F.2d 135, 138 (3d Cir. 1986). "We do not require word-for-word replication of the state claim in the *habeas corpus* petition in order to address the merits therein, only that the petitioner "fairly present" the substance of each of his federal constitutional claims to the state courts." *Carter v. Bell*, 2000 FED App. 0221P (6th Cir.), p.21; *Hannah v. Conley*, 49 F.3d 1193, 1196 (6th Cir. 1995).

In general, the petitioner must provide the state court with all of the facts necessary to give application to the constitutional principle upon which the petitioner relies. *Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir. 1958)

The state courts have been given a sufficient opportunity to hear an issue when the petitioner has presented the state court with the issue's factual and legal basis. See *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (legal basis); *Correll v. Stewart*, 137 F.3d 1404, 1411-12 (9th Cir. 1997) (factual basis). "However, new factual allegations do not render a claim unexhausted unless they fundamentally alter the legal claim already considered by the state courts." *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir. 1994) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986)).

The bottom line is that a claim for habeas corpus relief once heard by a state court is considered exhausted unless it "is so clearly distinct from the claims [the petitioner] has already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim." *Humphrey v. Cady*, 405 U.S. 504, 517 n. 18, 31 L. Ed. 2d 394, 92 S. Ct. 1048 (1972). This requires that the federal habeas corpus claim be the *substantial equivalent, not book and verse, of the earlier state court claim.* *Picard v. Connor*, 404 U.S. 270, 278, 30 L. Ed. 2d 438, 92 S. Ct. 509 (1971).

2. Liberty Interest

i. Example: voir dire - Witt v. Witherspoon See also - Victim-impact

Ohio's legislature has set a strict standard for the dismissal of prospective jurors for the views on capital punishment. The standard is based upon the United States Supreme Court's decision in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). This standard is codified in O.R.C. §2945.25(C). This section provides:

A person called as a juror in a criminal case may be challenged for the following causes: (C) In the trial of a capital offense, that *he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case.* A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard. (Emphasis added)

The Ohio Supreme Court has never sought to enact any authority that takes precedence over the Legislatively and statutory enacted *Witherspoon* standard that defines the voir dire process upon which Ohio has chosen to enable its citizens to participate in the death penalty process.

Once a state has established a liberty interest, it cannot be ignored. In *Hicks v. Oklahoma*, 447 U.S. 343, 346, (1980) the United States Supreme Court held as much. Specifically, *Hicks* found that where 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, cf. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. See *Vitek v. Jones*, 445 U.S. 480, 488-489, 100 S.Ct. 1254, 1261, 63 L.Ed.2d 552, citing *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935; *Greenholtz v. Nebraska Penal Inmates*, supra; *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484.

This Due Process protection has been recognized in the capital arena by our circuit. In *Fox v. Coyle*, 271 F.3d 658, 665 (6th Cir. 11-14-01), the Sixth Circuit specified that a defendant's due process rights may be infringed upon a state's failure to adhere to its own sentencing statute. The opinion cited *Hicks v. Oklahoma*, supra, in reaching this conclusion. In *Fox*, the Court found that the state's reliance on a sentencing factor outside of the Ohio statutory sentencing

scheme was impermissible. *Id.* 666.

The Sixth Circuit has acknowledged the importance of this interest and has therefore set standards for recognizing such an interest. In *Coe v. Bell*, 161 F.3d 320, 351-352 (6th Cir. 1998) the Court specified that to qualify as producing a state-created liberty interest:

a statute setting up procedures must put specific limits on official discretion. An implicit requirement recognized by the Supreme Court is including " 'explicitly mandatory language,' i.e., specific directives to the decision-maker that if the regulations' substantive predicates are present, a particular outcome must follow, in order to create a liberty interest." Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 463, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989) (promulgating those requirements in the context of prisons). (emphasis added)

Ohio's 'Witherspoon' statute meets this criteria. The statute places a clear limitation on the judicial and attorney (both prosecutor and defense counsel) discretion that can be utilized to exclude jurors from Ohio's capital punishment scheme.

Ohio's capital punishment scheme includes the greater protections in jury selections afforded by O.R.C. §2945.25(C). This statute has clearly established a liberty interest. Thus, although it is true that deference must be made to the trial court's discretion in dismissing a capital juror for cause due to their views on capital punishment, such deference is not permissible where the trial court clearly invoked an incorrect standard for the dismissal.

The Ohio courts invoked the wrong standard when determining the propriety of Juror Anderson's ability to serve as a capital juror. This failure to follow the legislative standard constitutes an unreasonable application of clearly established Federal law.

3. Separation of Powers

By ignoring the legislative mandate, the Ohio Supreme Court violated the Separation of Powers Doctrine. The court for all intents and purposes, overruled the legislature and imposed a lesser standard than required by O.R.C. §2945.25(C).

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," §U.S. Const., Art. I. In part, the separation of powers represents a conception of the role of the judiciary in a government which precludes interference by courts with legislative and executive functions.

The judiciary's role is confined "to a role consistent with a system of separated powers" and its purpose is to address disputes "which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 97, 88 S.Ct. 1942, 1951 (1968). Indeed, "the 'case or controversy' requirement of Article III defines, with respect to the Judicial Branch, the idea of separation of powers on which the Federal Government is founded." *Valley*

Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471- 76, 102 S.Ct. 752, 757-61 (1982).

As has often been expressed, "the central judgment of the Framers of the Constitution [was] that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." Mistretta v. United States, 488 U.S. 361, 380, 109 S.Ct. 647 (1989). The Framers intended that, as nearly as possible, each branch of government should confine itself to its assigned powers, and "that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments," THE FEDERALIST NO. 48, at 146 (James Madison) (Roy Fairfield 2d ed., 1981); see also INS v. Chadha, 462 U.S. 919, 951 (1983). Thus, "each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others." Humphrey's Executor v. United States, 295 U.S. 602, 629, 55 S.Ct. 869 (1935) (quoted in Mistretta, 488 U.S. at 380, 109 S.Ct. 647).

Actions of one branch which undertake directly a role reserved exclusively to another branch disrupt this constitutional balance of power. See e.g., Powell v. McCormack, 395 U.S. 486, 548-549, 89 S.Ct. 1944, 1978 (1969) (The traditional role accorded courts is to interpret the law, and "does not involve a 'lack of respect due [a] coordinate branch of government,' nor does it involve an 'initial policy determination of a kind clearly for non-judicial discretion.' Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 710."); Feres v. United States, 340 U.S. 13, 71 S.Ct. 153 (1949).

Because the utilization of the death penalty in Ohio is ultimately a political and a policy matter, any limitations placed upon the death process by the Legislature must be scrupulously followed by the Ohio courts. The United States Supreme Court has often deferred to the state legislatures for making those policy decisions. For example, in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), the Court acknowledged the importance of the growing societal consensus against mandatory imposition of the death penalty: "The history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid. The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society--jury determinations and legislative enactments--both point conclusively to the repudiation of automatic death sentences." *Id.*, at 292-293, 96 S.Ct., at 2985-2986. It is in this sense that the Legislature, as representative of the community at large, is given deference in both granting and defining the nature of those procedures that ultimately proceed to condemn a defendant to death.

So whereas matters concerning the practice of law are judicial in nature and primarily under the control of the judicial branch of the government, it remains the General Assembly that ultimately decides upon death penalty procedures. And, generally speaking, even though statutes enacted by the Legislature that directly affect judicial procedures have occasionally been interpreted as aids or guides to the judiciary, the Ohio Supreme Court has adopted no rule that supplants the Legislature's enactment of a statute that codifies the *Witherspoon* standard.

The Ohio Supreme Court has not addressed the separation issue directly. Its decisions on the issue of this juror dismissal issue have been haphazard at best. Originally, the court recognized that the legislature codified *Witherspoon* with O.R.C. §2945.25(C) in *State v. Jenkins*, 15 Ohio St.3d 164, 180 (1984). This decision was side-stepped in *State v. Rogers* (1985), 17 Ohio St.3d 174, where the Ohio court ignored its own holding of *Jenkins* and adopted the standard set in *Adams v. Texas* (1980), 448 U.S. 38 and *Wainwright v. Witt* (1985), 469 U.S. 412.

The Ohio Supreme Court later acknowledged the Ohio legislature's mandate on this standard. In *State v. Treesh*, 90 Ohio St.3d 460 (2001) the Court ruled:

In his eighth proposition of law, Treesh contends that the inclusion of juror Lynn Volke denied him his constitutional right to a fair and impartial jury due to Volke's "unbending position" in support of the death penalty. For the following reasons, we disagree. **R.C. 2945.25(C) provides that a prospective juror in a capital punishment case may be challenged for cause where "he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case.** A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard."

(Emphasis added)

The Ohio Supreme Court again switched gears. In *State v. Twyford*, 94 Ohio St.3d 340 (2002), the Court held the *Adams-Witt* standard prevailed.

It is the *Treesh* standard that is in line with the statute and in line with the Separation of Powers limitations. The Ohio court itself, through its rulings on the matter, has revealed its confusion. The resolution to the confusion is clear. The statute, which provides the capitally accused the *Witherspoon* Standard in the voir dire process, dictates. Under this latter standard, Juror Anderson was improperly dismissed for cause based upon her views on capital punishment.

Example 2- Victim-Impact

The rule against victim impact evidence being used to determine guilt dates back to *State v. White* (1968), 15 Ohio St.2d 146, syllabus paragraph 2. In *White*, this Court held that reliance on evidence of the victim's background or family by the state in its argument for the death penalty is improper and constitutes reversible error if relied upon in arriving at judgment. Because Ohio's rule barring victim impact evidence is based on independent state grounds, it survives the limitations of *Payne v. Tennessee* (1991), 501 U.S. 808. *State v. Post*, 32 Ohio St. 3d 280 (1987).

Notes here.

RING TRILOGY

Proposition of Law:

An indictment which fails to set forth each and every element of the charged offense is in violation of the Due Process Clause of both the State and Federal Constitution.

Under the Due Process Clause of the Fourteenth Amendment, a defendant in a criminal case is protected against conviction except upon proof beyond a reasonable doubt of every element necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364 (1970); Davis v. United States, 160 U.S. 469, 487-88 (1895). Thus, in order for a conviction to withstand Due Process scrutiny, a defendant must be charged in an indictment which includes each and every essential element of the offense within the specific charge, and the state must prove each of these elements beyond a reasonable doubt.

In the present case, the indictment was constitutionally deficient in numerous aspects. The charges of Aggravated Murder do not include the essential elements of the principle charge of the felony-murder specifications within the individual counts. Thus, the appellant was convicted of offenses that were deficiently charged. The five convictions for Aggravated Murder must fall.

The panel convicted the appellant in Counts Two through Six of Aggravated Murder. All five of these counts carried five capital specifications. Four of these specifications were in violation of R.C. §2929.04(A)(7). All such specifications were invalid as they did not include the specific elements of the offense. The fifth specification, R.C. §2929.04(A)(5) was properly indicted. (The three judge panel found the appellant not guilty of the element of prior calculation and design in count one. Therefore, the specifications in that count are moot).

For example, in Count Two, the principle charge is that the appellant purposely caused the death of another while committing . . . *Aggravated Burglary*. (Emphasis added) The charge lists the name of the offense only. Not a single actual element of the offense was listed by the grand jury. The statutory section is not listed.

This same procedure was invoked for all four capital specifications listed pursuant to R.C.§2929.04(A)(7). The third through fifth specifications list the offenses of Aggravated Burglary, Aggravated Robbery, Kidnapping, Rape and Aggravated Arson alternatively. The elements of these specifications are also not listed in the charges.

The same problem exists for counts Three through Six. The nature of the felony of the felony-murder in each of these counts is Aggravated Robbery (Count Three), Kidnapping (Count Four), Rape (Count Five) and Aggravated Arson (Count Six) is not addressed in these counts. The actual elements of these offenses are not listed. The grand jury did not find probable cause on each of the essential elements of these felonies in either the principle charge or the corresponding felony-murder specifications.

Finally, Count Eight charges the appellant with Aggravated Burglary. This count also fails to set forth all of the elements of R.C. §2911.11 in the count. Specifically, the indictment states in pertinent part that the appellant's intention was to commit "any criminal offense" without designating the offense the appellant intended to commit during the trespass.

Ring Trilogy

In Appendi v. New Jersey, 530 U.S. 466 (2000), the United States Supreme Court held that the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees require that any fact other than prior conviction that increases the maximum penalty

for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. Apprendi at 476, citing Jones v. United States, 526 U.S. 227 (1999). The Fourteenth Amendment commands the same answer when a state statute is involved. The historical foundation for these principles extends down centuries into the common law. While judges in this country have long exercised discretion in sentencing, such discretion is bound by the range of sentencing options prescribed by the legislature. Apprendi, supra.

Recently, the United States Supreme Court clarified the case in a capital setting in Ring v. Arizona, ___ U.S. ___, 122 S.Ct. 2428, 153 L.Ed.2d 556, 2002 U.S. LEXIS 4651 (2002). In Ring, the Court struck down a critical aspect of the Arizona capital sentencing procedure, which had allowed the judge rather than the jury to determine the existence of aggravating factors. Because the aggravating factors were held to be the “functional equivalent of an element of a greater offense,” only the jury could determine their existence. Ring, 122 S.Ct. at 4221, *quoting Apprendi*, 530 U.S. at 494 n.19.

This case concludes the so-called *Ring Trilogy*. It began with the Court’s decision in Jones, 526 U.S. at 229 n.6. As the result of these cases, it is clear, that the each and every element of an offense must be set forth in the indictment and found proven guilty beyond a reasonable doubt as found by the jury.

In Harris v. United States, ___ U.S. ___, 2002 WL 1357277 (June 24, 2002), the United States Supreme Court again noted that:

A crime was not alleged, and a criminal prosecution not complete, unless the indictment and the jury verdict included all of the facts to which the legislature had attached the maximum punishment. Any "fact that . . . exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone" the Court concluded, would have been, under the prevailing historical practice, an element of an

aggravated offense.

Id., quoting from Apprendi, 530 U.S. at 483. (emphasis added)

In the present case, the indictment did not include all the facts to which the legislature had attached the maximum punishment.

Ohio Application

The capital specification pursuant to O.R.C. §2929.04(A) elevates Aggravated Murder from a life sentence to a possible sentence of death. Under Ring, each and every element of the capital specification must included in the indictment.

In United States v. Hooker, 841 F.2d 1225 (4th Cir. 1988) (en banc), where an indictment cited the statute defining the federal RICO offense but failed to allege an essential element, that the enterprise had an effect on interstate commerce, the Fourth Circuit rejected the argument of the Government that it was enough that the defendant had actual notice of this element of the offense.

In the present case, the defendant somehow acquired notice of the nature of the offense [including the element not alleged]. But even if we were to assume that this notice emanated from the indictment (as assumption not justified under the authorities in our opinion) we would still be left with a document which did not contain any part of one element of the offense, and thus did not satisfy the Fourth Amendment requirement that all elements of the offense have been considered and found by the grand jury. . . .

Hooker, 841 F.2d at 1230. The absence of the allegation of one of the elements in an indictment citing the applicable statute was held to require vacating the conviction. "Neither instructions nor a petit jury verdict can satisfy after the fact the Fifth Amendment right to be tried upon charges found by a grand jury." Id. at 1232.

The Fourth Circuit reached the same conclusion in another case decided the same day in a case where the indictment cited the statutes making it a crime to possess and distribute cocaine but failed to allege the scienter element (that the defendants acted "knowingly and intentionally"). United States v. Pupo, 841 F.2d 1235, 1239 (4th Cir. 1988) (en banc).

[T]he district court . . . held that scienter was adequately charged if the indictment also cited the statute itself. That position is contrary to our own precedents as well as the law in the majority of the circuits. . . . We hold that a mere citation to the applicable statute does not give the defendant notice of the nature of the offense. An indictment that must rely on a statutory citation does not "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *Hamling v. United States*, 418 U.S. 87, 117, 41 L.Ed.2d 590, 94 S.Ct. 2887 (1974). Furthermore, a statutory citation does not ensure that the grand jury has considered and found all essential elements of the offense charged. It therefore fails to satisfy the Fifth Amendment guarantee that no person be held to answer for an infamous crime unless on indictment of a grand jury.

Pupo, 841 F. 2d at 1239. That same result was reached by a number of other federal circuits based on the same rationale that a mere citation to the statute fails to show that the grand jury considered and found the element of the offense not explicitly alleged in the indictment. *See, United States v. Spinner*, 180 F.3d 514, 516 (3d Cir. 1999) (failure to explicitly allege the element of effect on interstate commerce):

[N]otice alone cannot form a sufficient basis to validate a jurisdictionally deficient indictment. In *United States v. Hooker*, 841 F.2d 1225 (4th Cir. 1988) (en banc), the Fourth Circuit Court of Appeals held that "an effect on interstate commerce" was an essential element of a RICO offense without which an indictment was insufficient. It further held that notice alone was insufficient to validate the indictment. "The inclusion of all of the elements . . . derives from the Fifth Amendment, which requires that the grand jury have considered and found all elements to be present." *Id.* at 1230.

Spinner, 180 F.3d at 516. *See United States v. Du Bo*, 186 F.3d 1177, 1179-1180 (9th Cir. 1999).

Du Bo's conviction requires reversal because his indictment fails to ensure that he was prosecuted only "on the basis of the facts presented to the grand jury" *United States v. Rosi*, 27 F.3d 409, 414 (9th Cir. 1994). At common law, "the most valuable function of grand jury was . . . to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony" *Hale v. Henkel*, 201 U.S. 43, 59, 50 L.Ed. 652, 26 S.Ct. 370 (1906). . . . Failing to enforce this requirement would allow a court to "guess at what was in the minds of the grand jury at the time they returned the indictment" *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979) (citing *Russell v. United States*, 369 U.S. 749, 770, 8 L.Ed.2d 240, 82 S.Ct. 1038 (1962)). Such guessing would "deprive the defendant of a basic protection that the grand jury was designed to secure," by allowing a defendant to be convicted "on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him." *Id.* (citing *Russell*, 369 U.S. at 770). We may only guess whether the grand jury received evidence of, and actually passed on, Du Bo's intent. We may never know if the grand jury would have been willing to ascribe criminal intent to Du Bo. *See Stirone v. United States*, 361 U.S. 212, 217, 4 L.Ed.2d 252, 80 S.Ct. 270 (1960) (no court may "know" what the grand jury "would have been willing to charge"). Refusing to reverse in such a situation would impermissibly allow conviction on a charge never considered by the grand jury. *See id.* at 219; *United States v. Miller*, 471 U.S. 130, 139-140, 85 L.Ed.2d 99, 105 S.Ct. 1811 (1985).

Du Bo, 186 F.3d at 1179-1180. *See United States v. Zannger*, 848 F.2d 923, 925 (8th Cir. 1988).

Finally, it does not matter if the felonies alleged in the indictment included the necessary elements. Each charge or count must be viewed independently of the other counts. United States v. Yefsky, 994 F.2d 885, 894 (1st Cir. 1993). The convictions of Aggravated Murder pursuant to R.C. §2903.01(B) under counts Two through Six, and the felony-murder specifications pursuant to R.C. §2929.04(A)(7) are invalid.

Ohio Grand Jury Requirement

Ohio has provided an independent and distinct right requiring the grand jury to find probable cause on each and every element of an offense charged. It is unequivocal that the trial court may not amend an indictment to supply essential elements of the crime. State v. Ahedo (1984), 14 Ohio App.3d 254. Where an essential element of the offense is not listed in the

indictment, the remedy is to go back to the grand jury and re-indict if possible. State v. Dilley (1989), 47 Ohio St.3d 20. In Dilley this Court amended the indictment with a sentencing specification pursuant to R.C. §2941.143 without presenting to specification to the grand jury. Although, the failure to include this specification did not alter the possible defense to the charge this Court held that:

[t]he state may not avoid the clear mandates of R.C. §2941.143 and circumvent the grand jury process, as was done in this case.

Dilley, 47 Ohio St.3d at 22-23.

It is also unarguable that this Court requires strict adherence to the grand jury review requirement where the subject matter in question is a material element of the offense. In State v. Headley (1983), 6 Ohio St.3d 475, the Ohio Supreme Court ruled:

Section 10 of Article I of the Ohio Constitution provides that "...no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury..." This provision guarantees the accused that the essential facts constituting the offense for which he is tried will be found in the indictment of the grand jury. (Citations omitted)

Headley, 6 Ohio St.3d at 477 (emphasis added)

The Headley case cited the general precedent from its earlier reasoning in State v. Wozniak (1961), 172 Ohio St. 515. This Court held here that:

Where one of the vital elements identifying the crime is omitted from the indictment, it is defective and cannot be cured by the court as such procedure would permit the court to convict the accused on a charge essentially different from that found by the grand jury.

Wozniak, 172 Ohio St. at 520.

Thus, the convictions and sentence of death in this matter are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Section 10, Art.

I of the Ohio Constitution.

A.

SCHAD

A jury verdict of guilty must be based upon a unanimous finding of proof beyond a reasonable doubt as to each element of the charged offense. Where the jury is encouraged to find either one of two distinct acts as the basis for the particular element, a subsequent conviction is invalid.

It is axiomatic that the jury must find that the state proved its case against a defendant beyond a reasonable doubt as to each and every element of the offense charged. In order that this may be accomplished, the charges must set forth circumstances with sufficient specificity that allow the jury to find the requisite standard of proof. Where the indictment, bill of particulars, argument of the state and jury charge allows that jury to base its verdict on alternative factual theories rather than upon a single incident, the resultant verdict is not unanimous. Richardson v. United States, 526 U.S. 813, 119 S. Ct 1707, 143 L. Ed 2d 985 (1999).

An example of the above occurred in the cross-appellant's case. There are two separate and distinct incidents that may have formed the basis for the grand jury charge. Both sets of facts occurred on the same date and near in time to the underlying charged sexual allegation, but are factually distinctive. The first occurred when the cross-appellant allegedly carried a sleeping Justin Brewer upstairs for the purposes of performing a sexual act upon him. The second distinct act occurred after the alleged act had occurred, and Justin attempted to leave the bed. The cross-appellant allegedly grabbed his hand to prevent him from leaving the bed, although Justice was released momentarily.

The problem arises because a segment of the jury may have found sufficient proof under the former scenario and not the second. The remainder of the jury may have found the opposite

to be true. Thus, although all twelve jurors found that the cross-appellant had committed the offense, the verdict was not unanimous as to any of the individual incidents. Thus, the cross-appellant should have been acquitted of the kidnapping charge.

Prosecutor's Close

It appears that even the prosecutor was confused as to the basis of the kidnapping charge. At the close of the state's case, the prosecutor stated that there were actually two kidnappings as defined by statute. In his closing argument:

“Now the final element is that it's not his spouse. The perpetrator of this who's touching him for the purpose of sexual gratification is not his spouse. Well that's obvious. He claims that he never had a spouse.

Kidnapping: Kidnapping is not snatching babies from Lindbergh and holding them up for ransom all the time. That certainly is one form of kidnapping. The elements of kidnapping in this case is that the State has to prove beyond a reasonable doubt that by force, threat, or deception – now, in this case, ladies and gentlemen, there's been testimony of force.

Force is any exertion against something else. You know, pushing open a door is force. *Grabbing someone's arms, that's force.* He's not – he's restraining his liberty. That's the next element. By force, either remove from the place found. Now, we could also argue that lifting him off up off of that couch while unconscious, asleep, bringing him up to his bedroom, that's *also* kidnapping. *Grabbing his arms and not letting him go is restraining his liberty.”*

(Emphasis Added)

The prosecutor argued to the jury that there were actually two incidents of kidnapping. The use of the term “also” clearly imparts this meaning to the jury. Thus the jury was free to utilize the facts from either act as the basis for the kidnapping. A jury may; 1) not have believed that the cross-appellant actually carried Justin upstairs from the couch, 2) believed that such an act was not force under the law, or 3) believed that there was no restraint of liberty at this time as Justin admitted that he knew it was the cross-appellant and did not attempt to fight. He actually

went back to sleep. Thus, a juror could have determined that there was no restraint of liberty at this time.

Later, the next morning, the cross-appellant did grab his wrist. This could have formed the basis for the restraint of liberty, although it occurred after the alleged offense. Thus, this restraint could not have been for the purpose of committing a sex offense. The trial court also believed that it was legally acceptable for either factual scenario to form the base of the kidnapping offense.

If Justin is found credible by the jury there has been evidence on all the elements of kidnapping, such that they could find kidnapping to have existed at either the carrying Justin up to the bedroom or holding of his wrists,

Under the prosecutor's argument and the court's interpretation of the law and subsequent jury instruction, a juror could have easily been misled into concluding that necessary elements of kidnapping could be supplied by the facts from either or both incidents.

Due Process Violation

In the cross-appellant's case, the jury was allowed to find the element of "restraint of liberty," without unanimously finding which factual scenario formed the basis of the offense. It is understood that there are some statutory schemes in which a jury need not decide unanimously which of several possible sets of underlying facts the defendant committed to make up a particular element the crime. Schad v. Arizona, 501 U.S. 624, 631-632, 115 L. Ed. 2d 555, 111 S. Ct. 2491 (1991) (plurality opinion). In reviewing such cases, it must therefore be determined whether the statute in question creates an acceptable "series" of facts, in which the jury may choose as noted above, or whether the statute creates a single element, in which unanimity is required. United States v. Richardson, 526 U.S. at 817-818. In the present case, the two

incidents of force, which the court and the prosecutor believed may have formed the basis of two separate kidnaping charges, may have occurred hours apart, possibly on different dates. This would impermissibly permit a conviction where unanimity does not exist as to the presence of the restraint of liberty element. Schad v. Arizona, 501 U.S. at 632-633 (plurality opinion).

This Court has addressed this issue. In State v. Johnson (1989), 46 Ohio St. 3d 96, the Court held:

...if a single count can be divided into two or more "distinct, conceptual groupings," the jury must be instructed specifically that it must unanimously conclude that the defendant committed acts falling within such grouping in order to reach a guilty verdict.

Johnson, at 104.

Because the jury was not instructed that it must unanimously conclude which act of the cross-appellant formed the basis of the element of "restraint of liberty," the conviction of kidnapping must fall.

B. PROSECUTOR MAY NOT USE DIVERGENT THEORIES

The prosecutor may not use divergent and inherently inconsistent theories in charging and prosecuting a criminal defendant. In Smith v. Goose, 205 F.3d 1045 (8th Cir. 2000), the Eighth Circuit considered a case in which a prosecutor had used two different, conflicting statements by a co-defendant at successive trials to convict the petitioner at the first trial and a second individual at a second trial. The Eighth Circuit held that "the use of inherently factually contradictory theories violates the principles of due process." Id. at 1052. The court found that in order to amount to a due process violation, an inconsistency in the prosecutor's theories "must exist 1] at the core of the prosecutor's case against defendants for the same crime." Id. This

constitutes a due process violation because it renders convictions unreliable, given that "the state's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth." Id. at 1051.

Other circuits have followed suit in finding that the use of inconsistent, irreconcilable theories to secure convictions against more than one defendant in prosecutions for the same crime violates the due process clause. *See, e.g., Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997) (en banc), *vacated on other grounds*, 523 U.S. 538, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998); *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985) (en banc) (Clark, J., specially concurring); *cf. Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995).

This circuit had joined in establishing the above due process principle. In *Stumpf v. Mitchell*, 367 F.3d 594 (6th Cir. 2004), this Circuit found a due process violation for using divergent theories to convict co-defendants. (The United States Supreme Court granted certiorari *Mitchell v. Stumpf*, 2005 U.S. LEXIS 620 (U.S., Jan. 7, 2005))

C. NON-STATUTORY AGGRAVATORS

Although a prosecutor may argue that the aggravating circumstances the defendant was found guilty of outweigh the mitigation evidence, any use of the term "aggravating circumstances" must be limited to statutory aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8) that have been charged and proved beyond a reasonable doubt. State v. Wogenstahl (1996), 75 Ohio St.3d 344, 662 N.E.2d 311, paragraph one of the syllabus.

Wogenstahl Error Now Equates to Automatic Structural Error?

See Brown v. Sanders, ___ U.S. ___, 126 S. Ct. 884 (2006) per Scalia.

An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

DUE PROCESS

Use federal due process instead of state evidentiary rules, or minimally, in addition to state rules.

Wardius v. Oregon, No. 71-6042, SUPREME COURT OF THE UNITED STATES, 412 U.S. 470; 93 S. Ct. 2208; 37 L. Ed. 2d 82; 1973 U.S. LEXIS 56, January 10, 1973, Argued, June 11, 1973, Decided, As Amended.

Regarding Wardius and the balance of forces: other Supreme Court decisions involve this consideration as an element of the deciding rationale: The Court in Wardius gave three examples of the "balance of forces" with which due process is concerned: In Re Winship, 397 U.S. 358, 361-364 (1970), Gideon v. Wainwright, 372 U.S. 335, 344 (1963) and Washington v. Texas, 388 U.S. 14, 22 (1967). Its reference to Winship invokes the "beyond a reasonable doubt" burden of proof designed to protect against wrongful conviction. Its reference to Washington and Gideon invoke the right to compulsory process and counsel; the reasoning in each case emphasized the unfairness of denying to criminal defendants these basic implements of litigation which are invariably available to the prosecution. Wardius makes clear that it is based on a general principle of balance of forces rather than a narrow rule about pretrial discovery. See, Morgan v. Illinois, 504 U.S. 719, 728 -734 (1992)[Principle that disqualifies prospective jurors in capital cases who are unalterably opposed to death penalty also disqualifies those who would impose death penalty in any event; voir dire requirement to permit discovery of former must be extended to permit discovery of latter]. Also Webb v. Texas [striking statute allowing codefendants to be prosecution but not defense witnesses], especially Harlan's concurrence comes to mind.

MISCELLANEOUS MOTIONS
IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO : CASE NO. CR
Plaintiff, : JUDGE
-vs- :
:
Defendant.

**DEFENDANT’S MOTION TO ALLOW DEFENSE COUNSEL TO DIRECT THE
DEFENDANT IN HIS UNSWORN STATEMENT IN THE MITIGATION PHASE**

Now comes the defendant, , through undersigned counsel and respectfully moves that this Court allow the defendant to be directed by counsel during his unsworn statement pursuant to R.C. §2929.03(D)(1) in the mitigation phase of trial. The denial of this motion would constitute the deprivation of the effective assistance of counsel and be in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

COUNSEL FOR DEFENDANT

MEMORANDUM IN SUPPORT

Under Ohio law, a capitally indicted Defendant is provided the right to address the jury with an unsworn statement during the penalty or mitigation phase of trial. R.C. §2929.03(D)(1) provides in pertinent part that "[i]f the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation." This section grants the defendant in a capital proceeding the right to make an unsworn statement at the penalty stage. State v. Depew, 38 Ohio St.3d 275 (1988).

Traditionally in this state, the trial courts have restricted the ability of the defendant's counsel to assist his client in the presentation of the defendant's unsworn. The defendant has been limited to providing an unsworn "statement" in the narrowest sense of the word. That is, the defendant turns to the jury and makes a narrative to the jury, as best as he or she can remember to do so. The requirement of the defendant to provide the unsworn statement without the assistance questioning from counsel in providing relevant information is in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

If a state provides a defendant the right to make an unsworn statement, it may not additionally restrict defendant counsel from assisting the defendant in presenting that statement. In Ferguson v. Georgia, 365 U.S. 570 (1960), the United States Supreme Court found that such a restriction violated the Fourteen Amendment. Specifically, the court found that the specific Georgia statute could not deny the defendant "the right to have his counsel question him to elicit his statement." Id. 595.

Ferguson relied upon the rational Powell v. Alabama, 287 U.S. 45 (1932). The Ferguson Court noted at p.594 that:

The tensions of trial for an accused with life or liberty at stake might alone render him utterly unfit to give his explanation properly and completely. Left without the "guiding hand of

counsel,” (Powell v Alabama, p.69), he may fail properly to introduce, or to introduce at all, what may be a perfect defense.

The opinion also quoted the Michigan Supreme Court in *Annis v. People*, 13 Mich. 511, 519-520.

But to hold that the moment the defendant is placed upon the stand, he shall be debarred of all insistence from his counsel, and left to go through his statement as his fears and his embarrassment may enable him, in the face of the consequences which may follow from imperfect or unsatisfactory explanation, would in our opinion make, a trap into which none but the most cool and self-possessed could place himself with much prospect of coming out unharmed.

* * *

. . . and if he is unlearned, unaccustomed to speak in public assemblies, or to put together his thoughts in consecutive order any where, it will not be surprising is incoherent, or if it overlooks important circumstances.

Nowhere is the above reasoning more applicable than the unsworn statement during the penalty phase of a capital trial. Even the most polished of public speakers would have a difficult time placing their thoughts in order when discussing typical subjects of an unsworn statements; such as family dysfunction, substance abuse, sexual abuse, prior convictions and remorse. When one is requesting that the jury preserve his very existence, the defendant ought not to be deprived of the assistance of counsel.

In *State v. Lynch* 98 Ohio St.3d 514, 530, 2003-Ohio-2284, the Ohio Supreme Court erroneously found that a capital defendant did not have an absolute right to a question and error presentation of the unsworn statement with his attorney. This is erroneous, as the opinion did not mention *Ferguson*, *supra*. Nevertheless, the *Lynch* court found that a capital defendant has "great latitude in a sentencing hearing under R.C. 2929.04(C), and technical rules of evidence cannot be used to exclude otherwise proper mitigating evidence." *State v. Grant* (1993), 67 Ohio St.3d 465, 479, 620 N.E.2d 50; see, also, *Green v. Georgia* (1979), 442 U.S. 95, 97, 99 S.Ct. 2150, 60 L.Ed.2d 738. Thus, concluded the court, a trial court does *not* abuse his or her

discretion by allowing the assistance of counsel. In light of Ferguson, the wise move would be to allow the assistance.

Ohio is a single juror state. This means that if only one juror believes that the prosecution has not proven beyond a reasonable doubt that death is the appropriate penalty, the jury must find a life option. Death is precluded as a possible sentence. State v. Brooks, 75 Ohio St.3d. 148 (1996); State v. Madrigal, 87 Ohio St.3d 378 (2000). In as noted in Ferguson, supra, a defendant trying to find the words that may literally save his or her life, may not be able to remember or properly dictate the information that may sway the opinion of at least on juror who might otherwise have found that death was not the appropriate sentence.

Thus, the preclusion of counsel to assist in the presentation of the unsworn statement by directing the defendant with questions acts to prevent the jury from considering and giving effect to relevant sentencing information. Hitchcock v. Dugger, 481 U.S. 393 (1987); Penry v. Lynaugh, 492 U.S. 302 (1989).

Wherefore, it is respectfully requested that this permit undersign counsel to direct the defendant during the presentation of his unsworn statement during the penalty phase of trial.

Respectfully submitted,

Attorneys for Defendant

B. RE-ADMITTANCE OF EVIDENCE INTO PENALTY PHASE

State v. Gapen, 104 Ohio St.3d 358, 2004-Ohio-6548]

Instructions on readmitted evidence. In proposition of law X, Gapen contends that the trial court erred by instructing the jury: "For purposes of this proceeding, only that evidence admitted in the trial phase that is relevant to the aggravating circumstances and to any of the mitigating factors is to be considered by you." However, Gapen did not object to this instruction and thus waived any objection but plain error. See *State v. Childs* (1968), 14 Ohio St.2d 56, 43 O.O.2d 119, 236 N.E.2d 545, paragraph three of the syllabus.

{¶¶ 109} To the extent that the jury might have interpreted the trial court's instructions as allowing them to determine relevancy, the trial court erred. It is "the trial court's responsibility to determine the admissibility of evidence." *State v. Getsy* (1998), 84 Ohio St.3d 180, 201, 702 N.E.2d 866. However, much of the guilt-phase evidence was relevant to the aggravating circumstances, the nature and circumstances of the offense, and the mitigating factors. Additionally, overwhelming evidence properly admitted during the penalty phase supports the jury's findings that the aggravating circumstances outweighed the mitigating factors as to the aggravated murder of Young. See *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶¶ 208. Thus, the trial court's misstatement did not result in plain error. Thus, proposition X is overruled.

C.

DISCOVERY LETTER

February 22, 2005

Assistant Cuyahoga County Prosecutor
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, OH 44113

RE: State of Ohio v. Andre Allen
Case No. CR 419248A

Dear Mr. Dever:

Pursuant to Rule 16(A) of the Ohio Rules of Criminal Procedure, counsel for the defense requests that the following information be made available for inspection, and that copies be provided thereof:

1. Any statement of whatever kind or description within the possession of the state made by the defendant and/or any co-defendants.
2. Written summaries of any and all oral statements made by defendant or any co-defendants in addressing an agent of the state.
3. Any recorded testimony made by the defendant or any co-defendants before the Grand Jury.
4. A history of all the defendant's past criminal record.
5. Any books, papers, photographs, recordings, tangible objects or copies thereof available to or within the possession, custody or control of the state, and which are material to the preparation of the defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant.
6. Any results or reports of physical or mental examination; and of scientific tests or experiments made in connection with this case or copies thereof, available to or within the possession, custody or control of the state; the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney.
7. A written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witnesses which record is within the prosecuting attorney.

8. All evidence known, or which may become known to the prosecuting attorney, favorable to the defendant, and material to guilt or punishment.
9. Copies of all statements by any witnesses signed or unsigned, acquired by whatever form and material to or bearing on the merits of this case; including, but not limited to, the statements of the investigating officers, and which are in the custody and/or control of the prosecuting attorney or her staff, or subject to and available at his discretion or order, or at the direction or order of her staff or agents.
10. The precise nature and conditions of any and all promises, considerations, agreements and/or inducements or any description; and of any discussions held or made between any state witness and the prosecuting attorney, police officials, and/or any other state or government officials, which might tend to influence that witness' testimony at trial.

In addition, the defendant is requesting that the state provide all materials that are either exculpatory, lessen the defendant's culpability, or are relevant to a finding that the appropriate penalty is a sentence less than death. Brady v. Maryland, 373 U.S. 83 (1963). This includes all impeaching materials than are available to either your office or an investigating agency. Kyles v. Whitley, 115 S.Ct. 1555, 1567 (1995)

Sincerely,

D. ORAL STATEMENT OF DEFENDANT

Ohio Rule of Criminal Procedure 16, which covers discovery and inspection of evidence, allows, upon written demand, disclosure of evidence by the prosecuting attorney. Subsection (B)(1) allows that the prosecution shall provide written summaries of any oral statement, or copies thereof, made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer. State v. Gooden (1983), 16 Ohio App.3d 153.

Where the state fails to comply with the rule, the trial court is permitted to grant a continuance, prohibit the party from introducing into evidence the material not disclosed, or make such other orders as the court deems to be just under the circumstances. Crim.R. 16(E)(3).

The Ohio Supreme Court has demanded strict compliance with the requirement of written summaries being provided to defense counsel upon request. In State v. Bidinost (1994), 71 Ohio St. 3d 449, the court found that even verbally informing defense counsel of an alleged oral statement of the defendant is not compliance with the rule's requirement for a written summary to be provided to the defense. To comply with discovery requests, an alleged oral statement of the defendant must be reduced to writing and provided to defense counsel.

The rules of discovery are designed to safeguard the party's rights during trial. It is designed to prevent trial by surprise or ambush. It is therefore requested that this Honorable

Court order the prosecutor to consult with his witnesses, particularly those who are involved with law enforcement to determine, prior to trial, whether the defendant made an oral statement. The prosecution is ultimately responsible for disclosing matters in discovery even where the police failed to disclose the evidence to that office. Kyles v. Whitley 115 S.Ct. 1555 (1995). This request is supported by the Ohio Rules of Criminal Procedure and the defendant's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution.

Wherefore, it is respectfully requested that this Court order the prosecutor to interview all law enforcement officials who took part in the investigation of this case to determine if the defendant made an unsworn statement in that officials presence. If such a statement was made, it must be reduced to writing and provided to defense counsel in this matter forthwith.

Respectfully submitted,

E.

SELF DEFENSE

**DEFENDANT'S BRIEF IN SUPPORT
OF PROPOSED JURY INSTRUCTION**

Ohio's placing the burden of proof upon the defendant to establish self-defense constitutes an unconstitutional burden switching.

Ohio is the lone hold-out, that is it is the only state in the United States that still applies the burden of proof for self defense on the defendant. The other 49 states require the prosecution to prove that the defendant's actions were not justifiable. In view of the above and recent United States Supreme Court decisions, it is clear that the present statutory requirement of placing the burden of proof on the defendant constitutes a burden shifting that violates both the Eight Amendments requirement for heightened reliability in a capital sentence and the Sixth Amendment's jury trial guarantees, both made applicable to the states by the Fourteenth Amendment.

Under R.C. 2901.05(A), and *State v. Robinson* (1976), 47 Ohio St.2d 103, a criminal defendant has the burden of going forward with "evidence of a nature and quality sufficient to

raise the issue of self-defense, whereas the state retains the burden of proof or persuasion of proving each and every element of the offense with which that defendant is charged beyond a reasonable doubt. *Robinson*, supra, at 111, 112.

On the other hand, the Due Process Clause requires the government to prove beyond a reasonable doubt every element of the crime with which the defendant is charged. *In re Winship* (1970) 397 U.S. 358, 364. Indeed, a defendant must be acquitted when the court omits from the jury instructions any element that the prosecution must prove beyond a reasonable doubt. *United States v. Gaudin* (1995), 515 U.S. 506, 522-523.

While the states have the authority to define elements that constitute criminal conduct, there are “constitutional limits beyond which the states may not go” in defining the elements of a crime. *Patterson v. New York* (1977) 432 U.S. 197, 210. Indeed, the Due Process Clause and the Eighth Amendment’s prohibition against cruel and unusual punishment may circumscribe the state’s authority.

A. Ohio’s current system violates the Eighth Amendment as it varies from all other states, thus violates evolving standards of decency and fails to comport with the Eighth Amendment’s need for heightened reliability where one’s life is at stake.

The death penalty is cruel and unusual punishment where the defendant in a capital case must shoulder the burden of proof regarding the absolute defense of self-defense. Indeed, evolving standards of decency demand that the have been found responsible for recent changes in the capital litigation landscape, consistent with tighter scrutiny in capital cases. See, *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002)(death penalty cannot be imposed on those with mental retardation). In this light, and in view of other recent Supreme Court pronouncements, placing the burden of proof on a defendant will not longer pass constitutional muster.

Due process requires this court to make a distinction between defenses of mitigation and those of justification – such as claims of self-defense. Defenses of mitigation such as heat of passion and duress form the basis for the distinction between murder and manslaughter. Whereas self-defense is a complete defense that absolves the defendant of all guilt. See, *United States v. Corrigan* (10th Cir. 1977), 548 F.2d 879, 883 (“... The defense of self defense is directed toward negating the element of criminal intent”).

Because the prosecution’s burden is always to prove guilt (including the element of criminal intent) beyond a reasonable doubt, that burden is diluted unless the prosecution is required to prove the existence of such intent. Undeniably then, the criminal intent of any felonious homicide is irreconcilable with self-defense. This being so, it follows that requiring one to disprove criminal intent offends fundamental criteria. *Issac v. Engle* (6th Cir. 1980) 646 F.2d 1129, 1136.

As currently implemented in Ohio, a defendant in a capital case must prove his innocence by a preponderance of the evidence where he/she acted in self-defense. Where the weight of the evidence is equally balanced, a juror is obligated to find that the defendant did *not* act in self-defense. As such, this court is presented with a scenario where a man may be sent to his death based on a fifty-fifty chance that he may have acted out of self-defense. By definition, preponderance of the evidence simply means by the greater weight of the evidence, or a greater than fifty percent chance. For the jurors to determine that the defendant did *not* act in self-defense, by a preponderance of the evidence, the jury could believe that it is equally likely that the defendant *did* act in self-defense. Indeed, a fifty percent chance that the defendant is *not guilty* falls remarkably short of the “Eighth Amendment’s heightened need for reliability” where one’s life is at stake. *Caldwell v. Mississippi* (1985), 472 U.S. 320, 340.

As detailed below, Ohio is the only state that places the burden of proving self-defense on the shoulders of the defendant. See, *Martin v. Ohio*, infra. Consequently, this court is constitutionally obliged to have the State of Ohio prove, beyond a reasonable doubt, the absence of self-defense in the case sub judice.

- B. In cases involving capital murder, self-defense is an element of the crime rather than an affirmative defense.**
- C. A failure to instruct the jury that the State must prove the absence of self-defense beyond a reasonable doubt violates the Sixth Amendment and Fourteenth Amendments to the United States Constitution.**

GRAND JURY REQUEST

(whose the principle offender or what theory did GJ find?)

The Ohio Supreme Court has recognized a limited exception to the general rule in favor of grand jury secrecy, holding that an accused is not entitled to review the transcript of grand jury proceedings "unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy." (Emphasis added.) *State v. Greer* (1981), 66 Ohio St.2d 139, 20 O.O.3d 157, 420 N.E.2d 982, paragraph two of the syllabus.

"Whether particularized need for disclosure of grand jury testimony is shown is a question of fact; but, generally, it is shown where from a consideration of all the surrounding circumstances it is probable that the failure to disclose the testimony will deprive the defendant of a fair adjudication of the allegations placed in issue by the witness' trial testimony."

Id., paragraph three of the syllabus.

Thus, where it a defendant needs the testimony to establish a defense or that a due process violation occurred in the proceedings, a particularized need has been shown. For instance, in *State v. Sellards* (1985), 17 Ohio St.3d 169, 173, the accused demonstrated a particularized need to inspect relevant portions of grand jury testimony because inspection was necessary to prove the accused's claim that the prosecution intentionally withheld specific material information from the defense-a claim itself borne out by trial testimony. *Sellards*, 17 Ohio St.3d at 173.

Present Case

The defendant has been capitally charged with the so-called felony-murder specification pursuant to R.C. §2929.04(A)(7). As pointed out in the defendant motion or a more specific bill of particulars, although the indictment did include the essential elements, the indictment did not

specify if the defendant was being prosecuted as the principal offender or actual killer. Ohio does not permit the jury to find a capital charged defendant to be an aider and abettor to the principal. Ohio v. Rayvon Taylor (1993), 66 Ohio St. 3d 295. Therefore, it is essential for the defense to know if the defendant is being charged as the principal offender as opposed to committing the offense with prior calculation and design under the felony-murder specification. Because the indictment charged in the disjunctive, it is impossible to determine the state's theory of the case without clearly determining the grand jury's intent in this matter. The indictment does not read in the conjunctive "and" when addressing the A(7) specification. Therefore, it can only be determined through the evidence presented to the grand jury the intent of the grand jury in bringing the charges. The failure to produce the minutes of the grand jury testimony will deny the defendant his federal protections under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In the alternative, if this court does not order the production of the grand jury testimony, it is requested that the minutes of the testimony be produced and placed under seal for the preservation of the record for possible appellate review.

Respectfully submitted,

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO : CASE NO. 04CR066543
Plaintiff, :
-vs- : JUDGE CHRISTOPHER R. ROTHGERY
: :
JASON CHARLES : **MOTION FOR DISCOVERY**
: **AND TO EXAMINE EXCULP-**
: **ATORY AND MITIGATORY**
: **MATERIAL PURSUANT TO**
: **ROMPILLA V. BEARD**

(Hearing Requested)

Now comes the defendant, by and through undersigned counsel and having previously requested discovery from Dennis Will, Lorain County Prosecutor, and moves this Honorable Court pursuant to the recent United States Supreme Court holding in Rompilla v. Beard, ___ U.S. ___, 125 S. Ct. 2456 (2005), and State v. Filiaggi (1999), 86 Ohio St.3d 230, for copies of all documents relating to the defendant in the position of the prosecutor. This includes police reports for this case and all previous cases involving Mr. Charles.

The motion will be more fully explained in that attached Memorandum in Support.

Respectfully submitted,

MEMORANDUM IN SUPPORT

It is acknowledged that Rule 16 of the Ohio Rules of Criminal Procedure do not require the release of police reports to the defense. However, as this is a death penalty case, the above United States Supreme Court case now requires the defense to have access to and review all relevant police reports and related materials for the purpose of mitigation preparation. Rompilla is consistent with the Ohio Supreme Court's decision in Fillagi, where the court found a state expert to be more credible than a defense expert because the state expert had access to and reviewed the police reports in the case.

Review of Rompilla

This summer, the United States Supreme Court reiterated and emphasized the requirement of counsel to engage in a complete investigation and presentation of all available evidence in mitigation. In Rompilla v. Beard, ___ U.S. ___, 125 S. Ct. 2456 (2005), the Supreme Court established stringent duties that must be followed by capital litigators in their duty to their client.

These duties included reviewing all materials in police files which may contain possible mitigation or may suggest that a sentence of less than death is appropriate.

In Rompilla, during the penalty phase, the prosecutor sought to prove that the murder was committed in the course of another felony, by torture, and that petitioner had a significant violent felony conviction history. The Supreme Court held that counsel had a duty to make all reasonable efforts to learn what they could about the offense, *including obtaining the prior conviction file to discover any mitigating evidence and to anticipate the aggravating details. Id.*

2464 Given that defense counsel had notice of the death penalty, the conviction file showed prior

rape and assault convictions, and the file was a readily accessible public document, the lawyers were deficient in failing to examine that file.

The Supreme Court found that without this information, a convincing residual doubt argument – the defense theory in mitigation – was impossible. The Court concluded that the Commonwealth courts were objectively unreasonable in concluding that counsel could reasonably decline to make any effort to review the file. Moreover, the file also included mitigation leads that no other source suggested and would have prompted further investigation. The undiscovered mitigating evidence might well have influenced the jury's appraisal of the petitioner's culpability.

The Court, citing ABA standards as to how reasonable capital counsel should perform, found that it is the “duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.” 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.). Rompilla at 2466.

Had defense counsel fully investigated the case, *including the police files*, evidence of a severely dysfunctional family would have been discovered. This evidence included an alcoholic mother who was gone from the home extended periods, a filthy home, and the defendant's organic brain damage which may have been caused by fetal alcohol syndrome. The jury never considered any of these pieces of the mitigation puzzle.

As the Court's holding found that the failure to investigate the prior police files constituted ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984), and Wiggins v. Smith, 539 U.S. 510, 534, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (2003).

The failure to provide the police files to the defense may render the defense ineffective.

In Filaggi, in deciding the weight to assign the respective psychologists, the court found the state's to be more credible because:

In preparing for his testimony, Dr. Resnick spent five and a half hours with defendant and another two and three-quarter hours with him another day. Dr. Resnick interviewed defendant's mother, father, and girlfriend. ***He reviewed detailed police reports, witnesses' reports, police records regarding earlier charges***, and deputies' accounts of assault made by defendant. He reviewed a response to a motion to compel the production of records, the indictment, reports of Drs. Bodkin, Markovitz, Pagano, and Coccaro, reports of the hospital dietician, and various other medical reports.

Filaggi at 243. (Emphasis added)

Here, the Ohio Supreme Court acknowledged the importance of a thorough review of the available records including the police records, are essential to the presentation of evidence in a death case. Thus, the availability of police reports to state witnesses would constitute a denial of equal protection under the federal constitution unless the same reports were made available to defense witnesses.

Any evidence that is relevant to the inappropriateness of death as the ultimate result of this case. It should be noted that Brady v. Maryland, 397 U.S. 742 (1970), which forms the basis of the discovery rules, was in fact a death penalty case involving evidence material to sentencing. In Brady the court held specifically that the prosecution must turn over any evidence which might be relevant to a finding of a life sentence by a jury. In other words, any mitigating evidence known to the state must be turned over to the defendant. As pointed out in Rompilla,

much of this information is contained in police reports. Therefore, it is requested that the police reports from this and all cases relating to the defendant be provided to the defense.

Pursuant to Kyles v. Whitley, 115 S.Ct. 1555, 1567 (1995), the United States Supreme Court held that it is the cumulative effect of exculpatory evidence withheld by the prosecution, and not the significance of any one piece of it, which is determinative of the evidences' materiality when assessing a claim under Brady v. Maryland, 397 U.S. 742 (1970) and United States v. Bagley, 473 U.S. 667, 682 (1985). Whitley also specifically held that what is known to the police or the agents of the state is attributable to the prosecutor. This includes impeaching evidence, such as the aforementioned mental health records of one of the alleged victims in this matter. Therefore, it is additionally requested that the state review the files of the various officers involved in this matter to determine whether exculpatory evidence for either the finding of culpability or the appropriateness of penalty exists.

The failure to allow such discovery is violative of the federal Due Process and Equal Protection clauses.

Respectfully submitted,

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO : CASE NO. 04CR066543
Plaintiff, :
-vs- : JUDGE CHRISTOPHER R. ROTHGERY
JASON CHARLES : MOTION TO DISMISS
Defendant : CAPITAL SPECIFICATION
(Evidentiary Hearing Requested)

Now comes the defendant, Jason Charles, by and through undersigned counsel, and respectfully moves this Honorable Court to dismiss the capital specification in the above-captioned case. The dismissal is required because of governmental interference into the attorney- client relationship which has adversely affected counsel's ability to work with Mr. Charles for purposes for preparing the defense in both phases of trial. Counsel relied upon a plea offer from the prosecution and presented the offer to the client. This same offer was presented to the client's family. After working to persuade Mr. Charles to accept the offer, with the backing of his family, the prosecutor informed counsel that the wrong terms of the pleas had been offered. Mr. Charles refuses now to accept any deal and has expressed his extreme mistrust for counsel and the system as a whole.

The trust in counsel by Mr. Charles' family has also been damaged. Should this case require a penalty phase, counsel's ability to work with the family in presenting mitigation has been severely compromised.

Therefore, because of counsel's reliance upon the prosecutor's misrepresentation, the attorney-client relationship has been severely damaged. A sentence of death under the current circumstances would be in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The capital specification should be dismissed.

The reasons in support of this motion are set out in the accompanying memorandum.

Respectfully submitted,

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May also apply to spoliation cases, detective burning his notes of oral statement.

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO : CASE NO. 04CR066543
 :
 Plaintiff : JUDGE CHRISTOPHER R. ROTHGERY
 :
 -vs- :
 :
 JASON CHARLES :
 :
 Defendant : (ORAL HEARING REQUESTED)

DEFENDANT’S MOTION TO REDUCE BIAS IN THE ANNUAL JURY LIST

Pursuant to Ohio Rev. Code §§2313.08 and 2313.09, the Defendant respectfully asks this Court to order the jury list to be supplemented with the names of licensed drivers, along with registered voters, so as to protect the Defendant’s rights to a fair cross-section of the community in his venire and his right to equal protection of the law under Sixth and Fourteenth Amendments to the United States Constitution. Reasons in support for this motion is set out in the accompanying memorandum.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

The defendant in a criminal case is entitled to a petit jury comprised of a fair cross-section of the community in which the trial will be had. Duren v. Missouri, 439 U.S. 357 (1979). Traditionally in Ohio the jurors are chosen from the list of registered voters of a community. But in order to fully effect the right to a fair cross-section of the community, the General Assembly enacted legislation permitting this Court to order the Jury Commissioner in this County to supplement the annual jury list with the names of licensed drivers. Ohio Rev. Code §2313.08. This supplemental list is to be used in conjunction with the names of registered voters in the County and may be used by the Court to create the jury pool for this trial. Ohio Rev. Code §§2313.08; 2313.09. To protect the Defendant's right to a jury reflecting a fair cross-section of the community, the Defendant respectfully requests this Court to adopt this supplementation practice as sanctioned by the General Assembly.

The requirement that juries be assembled from a list representative of the community derives from the Sixth Amendment right to a fair trial and the Fourteenth Amendment right to equal protection. Holland v. Illinois, 493 U.S. 474 (1975); Alexander v. Louisiana, 405 U.S. 625 (1972). A jury that includes as diverse a range of the community as is eligible to serve ensures the fairness of a trial, particularly in a capital case where the socioeconomic status and personal characteristics of the accused are often offered for consideration by the jury in the mitigation phase of the trial. Davis v. Zant, 721 F.2d 1478, 1482 (11th Cir.1983) on rehearing en banc 752 F.2d 1515 (11th Cir. 1985).

To ensure that such a representative group is drawn the Ohio Supreme Court requires a random selection of jurors from each community. State v. Puente, 69 Ohio St. 2d 136, 139, 431 N.E.2d 987, 989 (1982). As a matter of general practice, Ohio courts use a random process to select the members of a defendant's venire from voter registration lists. Although randomness is a

component of a fair representation, it is not the final yardstick by which the Sixth Amendment guarantee is measured. Rather, violation of the fair cross-section requirement occurs when the jury pool lacks a fair representation of a distinctive group in the community and the underrepresentation results from a systematic exclusion of the group in the jury selection process. Duren, 439 U.S. at 364.

Racial and ethnic minorities are a distinctive group under the Duren analysis. Davis, 721 F.2d at 1481-82. The use of registered voters as the exclusive source of jurors has been long and consistently criticized as resulting in an underrepresentation of minorities and other groups on juries. See Seltzer et al, Fair Cross Section Challenges in Maryland: An Analysis and Proposal, 25 U. Balt. L. Rev 127 (1996); Domitrovich, S., Jury Source Lists and the Community's Need to Achieve Racial Balance on the Jury, 33 Duq. L. Rev. 39 (1994); Note, Jury Source Representativeness and the Use of Voter Registration Lists, 65 N.Y.U.L. Rev. 50 (1990).

In Ohio, racial minorities are consistently underrepresented on voter registration lists. The 1996 Census data indicates that in Ohio 70.5% of white residents were registered to vote; in contrast 56.8% of black residents reported that they had registered to vote. U.S. Bureau of the Census, Reported Voting and Registration by Race, Hispanic Origin, and Age (Released August 17, 1998). Thus 29.5% of white persons were necessarily excluded from jury service whereas 43.2% of blacks were excluded from the jury pool. These stark and simple numbers indicate that 13.7% more blacks are banned from the jury pool than whites by the use of voter registration lists. Thus the use of voter registration records will always result in a jury that unfairly represents the community in which the defendant will be tried. The fact that no impediment exists to blacks registering to vote so as to equate these numbers is irrelevant to the Sixth Amendment claim because the focus in the fair cross-section requirement is on the defendant's right to a jury composed a fair representation of the

community--not the equal protection right of blacks to register to vote. See Seltzer, et. al, 25 U. Balt. L. Rev. at 157-59.

This type of overall disparity in the number of minorities available for jury service prompted the United States District Court for the Northern District of California to institute a pilot program in 1989 using motor vehicle records to supplement jury pools previously drawn from voter registration lists. Bilecki, D., Program Improves Minority Group Representation on Federal Juries, 77 *Judicature* 221 (1994). All minority groups experienced greater representation on federal juries through the use of motor vehicle records. This result prompted the conclusion that a “compelling justification” exists for the use of additional sources for jury pools other than voter registration records. Id. at 222. “The additional cost and administrative burdens associated with their use are not significant enough to outweigh the benefits of opening jury pools to select minority groups that have been underrepresented in the past.” Id. Because it did significantly increase the number of minorities available for jury duty, this study also shows that the use of voter registration lists does systematically exclude otherwise eligible jurors from participation in jury pools, thus satisfying the third prong of the Duren test.

The exclusion of ethnic minorities is not the only consequence of the use of voter registration for jury pools. In a capital trial, assuming guilt is established, the jury decides whether the defendant should live or die. Ohio Rev. Code §2929.03. The decision to grant life or death to a defendant is based upon the establishment of various mitigating factors, including the background and personal characteristics of the accused. Woodson v. North Carolina, 428 U.S. 280, 304 (1976). It is no secret that most of the capital defendants in Ohio are indigent and have lived their lives in the lower socioeconomic classes. But according to the Census, voter registration is significantly higher among higher income groups. In a survey conducted in November 1994 the percentage of people self-reporting that they were registered to vote increases gradually and steadily with each

income increment. Starting at incomes below \$5000, 40.6% reported that they were registered to vote, rising to a rate of 76.8% for people with incomes above \$50,000. U.S. Bureau of the Census, Characteristics of the Voting-Age Population Reported Having Registered or Voted: November 1994 (Release date September 1996). This disparity can result in fewer people from the defendant's socioeconomic class being seated for jury duty.

Given the issues debated in the mitigation phase of a capital trial, it is especially important that the jury constitute a fair cross-section of the entire community. Davis, 721 F.2d at 1482 . The exclusion of the majority of the poor from the people available for jury duty through the use of voter registration lists is constitutionally impermissible and “[t]o disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.” Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946) (holding that it was unconstitutional for a jury commission to systematically exclude the non-moneyed classes). Trial by jury should not be an “instrument of the economically and socially privileged.” Id. at 223-24.

In an effort to meet these concerns regarding the exclusion of groups from the venire, and meet the Sixth Amendment's promise of a fair cross-section requirement, the General Assembly enacted legislation allowing this Court to supplement the jury pool with licensed drivers as well as registered voters. Ohio Rev. Code §2313.08. The Defendant asks this Court to use this statute to augment the jury pool with driver's license records to protect the Defendant's right to a fair cross-section of the community under the Sixth and Fourteenth Amendments to the United States Constitution.

Defendant requests an evidentiary hearing with discovery so that this court may be presented with the evidence to determine this issue. It is requested that the jury commissioner be called as a witness and bring with him the statistics in relation to the minority population, including

African Americans and Latinos who live in Lorain County. This needs to be compared with the percentage of same minorities in the jury pool over the last ten years.

Respectfully submitted,