In the Supreme Court of Ohio

State of Ohio,	
Plaintiff,	**Case No. 2023-0945**
v.	
Jeffrey Wogenstahl,	
Defendant.	**This Is A Capital Case.**

On Appeal From The First District Court of Appeals
Case No. C-930222

Merit Brief of Appellant Jeffrey Wogenstahl

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STATEMENT OF CASE AND FACTS

Wogenstahl was tried and convicted of the murder of Amber Garrett and was sentenced to death on March 15, 1993. The First District Court of Appeals and this Court affirmed his convictions and capital sentence.[1] During that first appeal of right, Wogenstahl's direct appeal counsel failed to raise multiple meritorious issues, including whether R.C. 2901.11(D) was unconstitutional, and whether trial counsel were ineffective for failing to challenge it as such.

In 1991, the jurisdictional statute required the State to prove beyond a reasonable doubt that "either the act that causes death, or the physical contact that caused death, or the death itself" occurred in Ohio. R.C. 2901.11(B). In 2017, this Court addressed the question of whether Ohio lacked subject matter jurisdiction under R.C. 2901.11(D). *State v. Wogenstahl*, 150 Ohio St.3d 571, 2017-Ohio-6873, 84 N.E.3d 1008 (2017). In that proceeding, this Court found that the State had not and cannot establish that any part of the offense occurred in Ohio. *See id.* at ¶ 47 ("We find that it cannot be determined whether Amber was murdered in Ohio or Indiana."); *see also* Appendix at A-4, A-11 (which further demonstrate that the homicide could not have taken place in Ohio). Thus, there is reasonable doubt that this offense was committed in Ohio.

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[1] *See State v. Wogenstahl*, 1st Dist. Hamilton No. C-930222, 1994 WL 686898 (Nov. 30, 1994); *State v. Wogenstahl*, 75 Ohio St.3d 344, 662 N.E.2d 311 (1996). On October 9, 2015, Wogenstahl filed a *Motion to Vacate His Execution Date and to Reopen His Direct Appeal* in the Ohio Supreme Court. This Court granted the Motion and reopened Wogenstahl's direct appeal on May 4, 2016. *State v. Wogenstahl*, 145 Ohio St.3d 1455, 2016-Ohio-2807, 49 N.E.3d 318 (2016). After briefing and oral argument, this Court affirmed Wogenstahl's conviction and sentence. *See State v. Wogenstahl*, 150 Ohio St.3d 571, 2017-Ohio-6873, 84 N.E.3d 1008.

On May 2, 2018, Wogenstahl filed a *Motion for Order or Relief Pursuant to Supreme Court Rule of Practice 4.01* in the Ohio Supreme Court. This Court declined to hear that motion on August 1, 2018.

On August 10, 2018, Wogenstahl filed a *Motion to Reopen His Direct Appeal to Challenge the Constitutionality of Ohio Revised Code §2901.11(D) As Written in 1991* in this Court. This Court declined to hear that motion on October 24, 2018.

However, despite that finding, this Court upheld Wogenstahl's conviction, reasoning that the 1991 statute allowed for the State to conclusively presume that the offense occurred in Ohio. *Id*. At the time, R.C. 2901.11(D) provided:

> 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.

(Emphasis added).

Thus, this Court found, "under R.C. §2901.11(D), the offense is conclusively presumed to have taken place in Ohio. Accordingly, we hold that Ohio had jurisdiction over the aggravated-murder charge." *Wogenstahl* at ¶ 47. At that time, the Court did not rule on the constitutionality of this mandatory presumption. The constitutionality of R.C. 2901.11(D) is still an open question. *Id*. at ¶ 48 (French, J., concurring).

Though Wogenstahl does not completely endorse this Court's view of the evidence—he contends that the evidence shows that the victim had to have been murdered in Indiana—he accepts this Court's conclusion that there is not sufficient evidence to determine whether the murder occurred in Ohio or Indiana. This appeal addresses the constitutionality of R.C. 2901.11(D) as written in 1991.

ARGUMENT

The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on a criminal appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Appellate counsel is duty-bound to advocate and support the cause of their client to the best of their ability, raising all non-frivolous issues for review. *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

Wogenstahl's direct appeal counsel were ineffective for failing to raise two meritorious Propositions of Law relating to the constitutionality of R.C. 2901.11(D), as written in 1991. Because there is a genuine issue as to whether Wogenstahl was deprived of effective assistance of counsel on appeal by the failure to raise the following two Propositions of Law, this Court must reverse and remand this case to the First District Court of Appeals with instructions that his Application for Reopening be granted. App.R. 26(B); *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992).

Proposition of Law No. 1

As written in 1991, R.C. 2901.11(D) created a mandatory presumption which violated a defendant's constitutional rights to a fair trial and due process. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. Art. I, §§ 2, 9, 10, and 16; *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Johnson*, 24 Ohio St. 3d 87, 494 N.E.2d 1061 (1986).

I. The mandatory presumption created by R.C. 2901.11(D), as written in 1991, was unconstitutional, as it violated the Due Process Clause of the United States Constitution.

It is well-settled that a state law that creates a mandatory presumption relieving the State of its burden of proof of an element of an offense is unconstitutional. *Francis v. Franklin*, 471 U.S. 307, 314, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). As Justice French wrote, "There is at least a colorable argument that the conclusive presumption of jurisdiction in R.C. 2901.11(D) violates the

Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Wogenstahl*, 150 Ohio St.3d 571, 2017-Ohio-6873, 84 N.E.3d 1008, ¶ 50 (French, J., concurring).

"A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." *Francis* at 314. A mandatory presumption is either conclusive or rebuttable – either relieving the State of the burden of proof or shifting the burden of proof to the defendant. *Id*. at fn. 2; *Wogenstahl* at ¶ 50 (French, J., concurring).

Here, the mandatory presumption is in plain terms in section R.C. 2901.11(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.

(Emphasis added).

The State was required to prove every element of the offense, including jurisdiction. *See State v. Neguse*, 71 Ohio App.3d 596, 602, 594 N.E.2d 1116 (10th Dist.1991); *State v. Wooldridge*, 2nd Dist. No. 18086, 2000 Ohio App. LEXIS 4639 (Oct. 6, 2000). It failed to do so. The statute's mandatory presumption absolved the State of its burden of proof in violation of Wogenstahl's constitutional right to due process.

A crime scene expert and a forensic pathologist both concluded that the forensic evidence in this case completely contradicts the State's theory of the case at trial. *See* Appendix at A-4, A-11. According to these experts, Wogenstahl did not kill Amber in his car (as the State claimed at trial); he also did not kill her in his apartment or in some other undisclosed location because he could not have transported her in his car after she was already injured.

This Court agreed. *Wogenstahl*, 150 Ohio St.3d 571, 2017-Ohio-6873, 84 N.E.3d 1008, ¶ 47. This Court found that the evidence presented at trial does not support that the offense occurred

in Ohio or Indiana – thus, this Court has found that the State failed to prove jurisdiction beyond a reasonable doubt.

The statute's mandatory presumption usurped the jury's factfinding duty, essentially allowing the State a "free pass" to prosecute an offense without establishing that it even had jurisdiction. This is blatantly unconstitutional, as it violates established United States Supreme Court case law prohibiting mandatory presumptions. *Francis v. Franklin*, 471 U.S. 307, 314, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

II. Appellate counsel were ineffective for failing to raise the issue the constitutionality of R.C. 2901.11(D).

A defendant is entitled to effective assistance of counsel in his direct appeal as well as at his criminal trial. *Franklin v. Anderson*, 434 F.3d 412, 429 (6th Cir. 2006). The *Strickland* test of deficient performance and prejudice applies to claims of ineffective assistance of appellate counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Were*, 120 Ohio St. 3d 85, 896 N.E.2d 699 (2008). Thus, the applicant must prove that counsel was deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal. *Id*. at 88, citing *State v. Sheppard*, 91 Ohio St. 3d 329, 330, 744 N.E.2d 770 (2001). In seeking reopening, the appellant bears the burden of demonstrating that there is a "genuine issue" as to whether he has a "colorable claim" of ineffective assistance of appellate counsel. *Id*., citing *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

The Sixth Circuit in *Mapes v. Coyle*, 171 F.3d 408, 427-28 (6th Cir 1999), listed several factors to consider when adjudicating an ineffective assistance of appellate counsel claim, saying "this list is not exhaustive, and neither must it produce a correct score." This list includes inquiries such as the strength of an omitted issue, whether "clearly stronger" issues were passed by for

weaker issues, and whether omitted issues were preserved at trial. *Id*. at 427-28. Other factors include inquiries into appellate counsel's strategy and discussions with the client. *Id*.

"In addition to the Mapes factors, [A reviewing] court may also consider prevailing norms of practice as reflected in American Bar Association standards and the like." *Franklin* at 429 (internal citations omitted). According to those norms, "Counsel who decide to assert a particular legal claim should present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.8(B)(1), p. 88 (2003). Here, Wogenstahl's appellate counsel were ineffective when they failed to raise this cogent Proposition of Law.

Subject matter jurisdiction is a necessary prerequisite for a criminal conviction. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11. The scant evidence presented by the State should have been a red flag to appellate counsel to further investigate the legal avenues for relief; had appellate counsel done proper research, they would have identified the unconstitutional mandatory presumption in R.C. 2901.11(D). Direct appeal counsel were ineffective for their failure to identify this sound Proposition of Law.

III. Wogenstahl has demonstrated "good cause" for pursuing this Application for Reopening at this time.

Jurisdiction is the crux of a court's power to adjudicate the merits of a case, 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.E.2d 860 (2002); *Natl. Wildlife Fedn. v. United States*, 626 F.2d 917, 924 n.13 (D.C. Cir.1980). Further, the parties cannot confer jurisdiction on courts where it does not exist. *Kontrick v. Ryan*, 540 U.S. 443, 456-57, 124 S.Ct. 906, 157 L.E.2d 867 (2004). "When a court lacks subject matter jurisdiction, the issue of jurisdiction cannot be waived or forfeited and may be asserted at

any time." *State v. Mbodji*, 129 Ohio St.3d 325, 2011-Ohio-2880, 951 N.E.2d 1025, ¶ 10. Thus, this issue should be able to be asserted at any time.

That said, generally, "[r]es judicata applies to bar relitigation of the issue of subject matter jurisdiction." *King v. King*, 4th Dist. Adams No. 04CA786, 2006-Ohio-183, ¶ 14, citing *Citicasters Co. v. Stop 26-Riverbend, Inc.*, 147 Ohio App. 3d 531, 2002-Ohio-2286, 771 N.E.2d 317 and *Goeller v. Moore*, 10th Dist. Franklin App. No. 04AP-394, 2005-Ohio-292, P5. Here, the appellate court barred relief on the doctrine of res judicata: "Once [a] jurisdictional issue has been ***fully litigated*** and determined by a court that has authority to pass upon the issues, said determination is res judicata in a collateral action and can only be attacked directly by appeal. *State v. Stowers*, 1st Dist. Hamilton No. C-150095, 2015-Ohio-4846, ¶ 11." Appendix at A-2 (emphasis added). However, this was an erroneous application of res judicata, as the constitutionality of R.C. 2901.11(D) has never been fully litigated—no court has yet to decide this claim on the merits.

Moreover, the First District has held that appellate courts may review constitutionality challenges that are not preserved in the trial court on a case-by-case basis if the error is obvious, palpable, and fundamental; further, "it must only occur in exceptional circumstances where the appellate court acts in the public interest because the error affects 'the fairness, integrity or public reputation of judicial proceedings.'" *State v. Craft*, 52 Ohio App.2d 1, 7, 367 N.E.2d 1221 (1st Dist.1977). "The determination of its constitutionality, therefore, turns on a careful balancing of state and individual interests, together with an analysis of whether the statute gives fair notice of an ascertainable standard upon which an individual's conduct will be judged criminal, or whether it grants unfettered discretion to enforcement personnel." *Id*.

Here, the error is obvious and substantial. After this Court corrected the jurisdictional error in a substantially similar case, the Ohio General Assembly amended R.C. 2901.11 in response.

State v. Yarbrough, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845; Sub.S.B. No. 20, 151 Ohio Laws, Part I, 10.

There is a significant state interest in avoiding the execution of an individual when the state does not have jurisdiction. Should the State be permitted to convict and execute an individual where it has no jurisdiction, public confidence in the judicial system is greatly diminished.[2]

Further, the individual interest is monumental. Wogenstahl faces death at the hands of the State. Death penalty cases must be afforded special considerations: "death is a different kind of punishment from any other which may be imposed in this country." *Gardner v. Florida*, 430 U.S. 349, 357, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). "[W]here the state is prepared to take a man's life," courts must "apply a heightened concern for fairness." *Douglas v. Workman*, 560 F.3d 1156, 1194 (10th Cir.2009).

IV. Conclusion to Proposition of Law No. 1.

The version of R.C. 2901.11(D) in effect at the time of Wogenstahl's trial created a mandatory presumption of jurisdiction, in violation of the Due Process Clauses of the United States and Ohio Constitutions. Appellate counsel were clearly ineffective, to Wogenstahl's prejudice, for failing to raise this meritorious Proposition of Law in his direct appeal of right. This Court should reverse and remand this case to the First District Court of Appeals with instructions that his Application for Reopening be granted.

[2] There should be even less public confidence herein, where there is no credible evidence supporting Wogenstahl's involvement in Amber's murder. A wealth of information, previously undisclosed by law enforcement, was uncovered that suggested Amber's mother and brother were implicated in her disappearance. *See In re Wogenstahl*, 902 F.3d 621 (6th Cir.2018). Further, there is no substantial physical evidence that connects Wogenstahl to the crime. *See* Appendix at A-4, A-11. New evidence casts significant doubt on Wogenstahl's conviction and sentence.

Proposition of Law No. 2

Trial counsel are prejudicially ineffective when they fail to challenge the constitutionality of a statute that unconstitutionally confers subject matter jurisdiction on the trial court. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. Art. I, §§ 2, 9, 10, and 16; *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Johnson*, 24 Ohio St. 3d 87, 494 N.E.2d 1061 (1986).

I. Trial counsel performed deficiently, prejudicing Wogenstahl.

To establish ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient and that he was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Here, trial counsel's failure to raise the issue of jurisdiction was not strategic – trial counsel moved for judgment of acquittal at the end of the State's case based solely upon venue. (Tr. 2198). Trial counsel knew that the State needed to prove that the offense occurred in Hamilton County, Ohio, and that it had failed to do so – yet failed to raise a jurisdictional challenge. Specifically, trial counsel should have challenged the court's finding that, per R.C. 2901.11(D), the offense occurred in Ohio.

Trial counsel were ignorant of the law, constituting deficient performance. *See Hinton v. Alabama*, 571 U.S. 263, 274, 134 S.Ct. 1081, 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).

The prejudice from counsel's failure is evident. Subject matter jurisdiction is a "condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void." *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806

N.E.2d 992, ¶ 11 (internal citations omitted). Thus, had trial counsel raised the issue, Wogenstahl's conviction would not have stood.

II. Appellate counsel were ineffective for failing to raise the issue of trial counsel's ineffectiveness for failing to challenge the constitutionality of R.C. 2901.11(D).

Appellate counsel provided inadequate assistance. They failed to raise this issue on direct appeal, further depriving Wogenstahl of his constitutional right to effective assistance of counsel. Wogenstahl was guaranteed effective assistance of counsel on his appeal as of right in accordance with the Due Process Clause of the Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Wogenstahl was denied this guarantee when his counsel failed to raise the foregoing issue of ineffectiveness of trial counsel.

III. Wogenstahl has demonstrated "good cause" for pursuing this Application for Reopening at this time.

For the same reasons as argued in Proposition of Law No. 1, Section III, Wogenstahl also demonstrated good cause for raising this claim of trial counsel ineffectiveness at this time.

IV. Conclusion to Proposition of Law No. 2.

Trial counsel were ineffective for failing to challenge the constitutionality of R.C. 2901.11(D) as it existed at the time of Wogenstahl's trial, since it unconstitutionally conferred subject matter jurisdiction to the trial court. Appellate counsel were then also ineffective to Wogenstahl's prejudice for failing to raise this meritorious Proposition of Law in his direct appeal of right. This Court should reverse and remand this case to the First District Court of Appeals with instructions that his Application for Reopening be granted.

CONCLUSION

Because the trial court erroneously relied on an unconstitutional statutory provision, it did not have any legitimate authority to convict and sentence Wogenstahl for this offense. Allowing this conviction and death sentence to stand is a clear miscarriage of justice. Reversal "is necessary to preserve the integrity of the criminal-justice system in Ohio." *Wogenstahl,* 150 Ohio St.3d 571, 2017-Ohio-6873, 84 N.E.3d 1008, ¶ 54 (O'Connor, J., dissenting). This is the exceptional case where relief is warranted.

Jeffrey Wogenstahl has shown that there are genuine issues regarding whether he was deprived of effective assistance of counsel on direct appeal. Wogenstahl requests that this Court reverse and remand this case to the First District Court of Appeals with instructions that his Application for Reopening be granted.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Merit Brief of Appellant Jeffrey Wogenstahl** was sent via electronic mail to Philip Cummings, Assistant Hamilton County Prosecutor, at *Phil.Cummings@hspros.org* on this 24th day of October 2023.

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In the Supreme Court of Ohio

State of Ohio,		
Plaintiff,	**Case No.**	2023-0945
v.		
Jeffrey Wogenstahl,		
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On Appeal From The First District Court of Appeals
Case No. C-930222

Appendix to

Merit Brief of Appellant Jeffrey Wogenstahl

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO, PLAINTIFF-APPELLEE,	:	APPEAL NO. C-930222 TRIAL NO. B-9206287
V.	:	
JEFFREY WOGENSTAHL, DEFENDANT-APPELLANT.	:	*ENTRY DENYING DELAYED APP.R. 26(B) APPLICATION FOR REOPENING.*

We consider this cause upon defendant-appellant Jeffrey Wogenstahl's delayed App.R. 26(B) application to reopen this appeal.

In March 1993, Wogenstahl was convicted upon jury verdicts of aggravated murder, kidnapping, and aggravated burglary. The victim was ten-year-old Amber Garrett, who was abducted from her home in Harrison, Ohio, and whose body was discovered in Bright, Indiana. The trial court imposed a sentence of death for the aggravated-murder charge. Wogenstahl unsuccessfully challenged his convictions in appeals to this court, the Ohio Supreme Court, and the United States Supreme Court. *State v. Wogenstahl*, 1st Dist. Hamilton No. C-930222, 1994 Ohio App. LEXIS 5321 (Nov. 30, 1994), *aff'd*, 75 Ohio St3d 344, 662 N.E.2d 311 (1996), *cert. denied*, *Wogenstahl v. Ohio*, 519 U.S. 895, 117 S.Ct. 240, 136 L.Ed.2d 169 (1996).

Now, nearly 29 years later, Wogenstahl applies to this court to reopen his direct appeal, alleging that his appellate counsel was ineffective "for failing to raise the issue of lack of subject matter jurisdiction in violation of defendant's constitutional rights to fair trial and due process" and "for failing to raise the issue of ineffective assistance of trial counsel for failing to challenge the constitutionality of Ohio Revised Code 2901.11(D) as written in 1991."

An application to reopen an appeal must be filed within 90 days of the date on which the court of appeals journalized its judgment, unless the appellant can show good cause for applying at a later time. App.R. 26(B)(1) and 26(B)(2)(b). The Ohio Supreme Court requires intermediate appellate courts to strictly enforce the 90-day deadline. *See State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861; *State v. Lamar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970.

Wogenstahl, noting that a challenge to subject-matter jurisdiction cannot be waived or forfeited and may be raised at any time, argues that he has demonstrated good cause for his years-long filing delay, because he is now challenging the trial court's subject-matter jurisdiction over his aggravated-murder charge. We are unpersuaded. While a first-time challenge to subject-matter jurisdiction may constitute good cause to reopen a direct appeal, *see State v. Wogenstahl,* 150 Ohio St.3d 571, 2017-Ohio-6873, 84 N.E.3d 1008, ¶ 27 (Ohio Supreme Court granted motion to reopen direct appeal because defendant was raising a challenge to subject-matter jurisdiction for the *first* time), a court's jurisdiction may not be repeatedly attacked. "[O]once [a] jurisdictional issue has been fully litigated and determined by a court that has authority to pass upon the issues, said determination is res judicata in a collateral action and can only be attacked directly by appeal." *State v. Stowers*, 1st Dist. Hamilton No. C-150095, 2015-Ohio-4846, ¶ 11, citing *State ex rel. Acres v. Ohio Dept. of Job and Family Servs.*, 123 Ohio St.3d 54, 2009-Ohio-4176, 914 N.E.2d 170.

Here, the record demonstrates that in 2016 the Ohio Supreme Court granted Wogenstahl's motion to reopen his direct appeal to that court to review Wogenstahl's challenge to the trial court's jurisdiction over his aggravated-murder charge. *See State v. Wogenstahl*, 145 Ohio St.3d 1467, 2016-Ohio-2956, 49 N.E.3d 1310 (granting motion to reopen direct appeal). In the reopened appeal, the Ohio Supreme Court again affirmed Wogenstahl's capital-murder conviction, holding that "[the] Ohio [trial court] had [subject-matter] jurisdiction over the aggravated-murder charge under

R.C. 2901.11(D)." *Wogenstahl*, 150 Ohio St.3d 571, 2017-Ohio-6873, 84 N.E.3d 1008, at ¶ 2, *reconsideration denied*, 151 Ohio St.3d 1477, 2017-Ohio-9111, 87 N.E.3d 1273, *cert. denied*, *Wogenstahl v. Ohio*, 138 S.Ct. 2576, 201 L.Ed.2d 298 (2018). One year later, the Ohio Supreme Court denied Wogenstahl's second motion to reopen his direct appeal before that court. *State v. Wogenstahl*, 153 Ohio St.3d 1502, 2018-Ohio-4288, 109 N.E.3d 1258. Because the issue of the trial court's subject-matter jurisdiction over Wogenstahl's aggravated-murder charge has already been litigated and decided by the Ohio Supreme Court, a court with authority to determine that issue, Wogenstahl's current challenge to the trial court's jurisdiction is barred by res judicata. Given that this is not Wogenstahl's first challenge to the trial court's subject-matter jurisdiction, we cannot say that Wogenstahl has demonstrated good cause to reopen his direct appeal.

Accordingly, we deny Wogenstahl's delayed App.R. 26(B) application to reopen this appeal as it is untimely and because Wogenstahl has not demonstrated good cause to excuse his years-long filing delay.

To the clerk:

Enter upon the journal of the court on JUN 15 2023.

By: _____ **Presiding Judge** **(Copies sent to all counsel)**

REPORT

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State of Ohio vs. Jeffrey A. Wogenstahl

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REPORT OF FINDINGS

STATE OF OHIO VS. JEFFREY A. WOGENSTAHL

INTRODUCTION

Please find a current copy of my curriculum vitae and a list of my courtroom and deposition testimony attached to this report in accordance with Rule 26 of Federal Rules of Civil Procedure pertinent to general provisions regarding discovery and duty of disclosure.

QUALIFICATIONS

I, Gary A. Rini, am an independent police procedures and forensic science consultant, based in the Cleveland, Ohio area. I provide a critical case review and evaluation of police procedures in homicide and shooting incident cases which includes: critical events analysis and physical evidence correlation; shooting incident reconstruction; crime scene evidence evaluation; bloodstain pattern analysis; crime scene reconstruction; crime scene investigation and police officer performance audits and expert witness testimony for both prosecution and defense attorneys in criminal cases and plaintiff and defense attorneys in civil cases, as well as providing those services to Government and Trial Defense Service JAG Officers (Military Attorneys) in UCMJ (Uniformed Code of Military Justice) cases.

I began my professional career in 1975, serving in small, mid-size and large police agencies. During the course of my career, I served as a Patrol Officer, a police department SWAT team member, a multi-agency police SWAT team member, Police Agent, Crime Scene Investigator, Crime Laboratory Detective, PEER Support Counselor, Patrol Sergeant, Assistant Tactical Firearms Instructor, Forensic Services Manager and Police Commander of Criminal Investigations. I also served as lead forensic consultant on two Chicago-area major crime task forces. I received my graduate education from **The George Washington University** in Washington, D.C., and from **DePaul University** in Chicago, Illinois. I am a graduate of the **Police School of Staff and Command** from **Northwestern University's Public Safety Institute**.

I am a graduate of the **Ohio State Highway Patrol Basic Police Academy** (serving as class leader), **The Lakewood (CO) Police Academy** (class leadership award and commencement speaker) and the **Denver (CO) Police Department Police Academy** (commencement speaker). I received advanced specialized training from the Federal Bureau of Investigation, United States Secret Service, Smithsonian Institution, the Armed Forces Institute of Pathology, Saint Louis University Medical School, University of New Mexico Medical School, Case-Western Reserve University's Law-Medicine Center, Northwestern University's Public Safety Institute, Henry C. Lee Institute of Forensic Science, the Institute of Police Technology and Management and other nationally recognized professional organizations.

I have designed and taught college police science courses, as well as police science training courses for judges, attorneys, law enforcement officers, nursing and allied health specialists, first responders and other police agency professionals. I am a member of a number of scientific professional organizations, including the American Academy of Forensic Sciences, the International Association for Identification, the International Association of Bloodstain Pattern Analysts, the Association for Crime Scene Reconstruction, the International Homicide Investigator's Association and other professional organizations, where I have held leadership positions as Board Member, Vice-President, President, Chairman-of-the-Board, Training Conference Chairman and Regional Representative for a number of those organizations.

I served on the **National Institute of Justice's Technical Working Group** that established the national **Guidelines for Crime Scene Investigators**, and have been bestowed the designation of **Visiting Professor of Law** by the Francisco Marroquin University School of Law, Guatemala City, Guatemala. I am a **Vietnam-era Veteran** of the **United States Air Force** and **Ohio Air National Guard**, where I served as an emergency room (trauma) medical corpsman. I am a **NRA Certified Firearms Instructor** and a **NRA Certified Range Safety Officer**. I have in excess of 500 hours of dedicated firearms training, in addition to quarterly, semi-annual and/or annual range qualifications with police service firearms.

PUBLICATIONS

A list of my previous publications is contained in my attached CV.

COMPENSATION

The hourly rate charged for my services is three-hundred dollars ($300.00) per hour, plus expenses. The total number of hours spent on this project to date is 10 hours. Compensation as of the date of this report is $3000.00.

TESTIMONY

As of this date, I have provided expert testimony in a deposition or trial on 124 occasions. (See attachment)

ASSIGNMENT

I was tasked with rendering an opinion on the following issues:

- Procedures used by investigators in gathering and preserving evidence in this case,
- An evaluation of the validity of the presumptive blood tests used in this case, and what conclusions could be drawn from the results of those presumptive blood tests,
- Whether bleach, as the state argued, would have cleaned-up the blood evidence preventing forensic scientists from finding blood,
- The effect bleach would have on blood and luminol testing,
- Whether cat urine would cause a reaction with luminol,
- The likelihood that the victim was killed or transported in the car,
- The likelihood the victim was killed in Wogenstahl apartment,
- The significance of the pubic hair evidence,
- The potential value of the use of other forensic experts at the scene,
- The State's explanation of the way the victim was killed.

MATERIALS EVALUATED

In order to perform this task, I evaluated the following materials:

I.) Witness Testimony

- William Dean
- Douglas Deedrick
- Dr. Robert Webster
- Dr. Michael Kenny
- Charles Lindsey
- Steve Mathews
- Edward Bettinger
- Norman Koopman
- Jeffrey Schaefer
- Donald Stone
- Brian Wraxall

II.) Documents

- Analysis, testing records
- Blood testing notes (Exhibit C)
- Blood testing notes (Exhibit D)
- Blood testing notes (Exhibit E)
- Canine records
- Crime lab report
- Fingerprint testing records
- Investigation records
- Luminol testing
- Autopsy report from Hamilton County Coroner's Office
- Autopsy photos
- Crime scene photos
- Crime scene video
- Affidavit of Carl J. Schmidt, M.D., M.P.H.
- Hamilton County Laboratory Reports and Bench Notes (157 pages)

REFERENCE MATERIAL CONSULTED

I referred to the following material to support my observations and/or conclusions:

- Scientific Working Group on Bloodstain Pattern Analysis (Terminology)
- Gross AM, Karas, KA, Kaldun, GI. **The effect of luminol on presumptive tests and DNA analysis using the polymerase chain reaction**, J. of Forensic Sci 1999; 444 (4): 837-840
- Harris KA, Thacker CR, Ballard D, Syndercombe Court D. **The effects of cleaning agents on the DNA analysis of blood stains deposited on different substrates**, International Congress Series 1288 (2006) 589-591.
- Jakovich Cathy J. **STR analysis following blood detection by luminol, fluorescein and bluestar**, Journal of Forensic Identification 57 (2), 2007 \ 193.
- Gimeno Fred E, Rini Gary Alan. **Fill flash photo luminescence to photograph luminol blood stain patterns**, Journal of Forensic Identification 39 (3), 1989 \ 149.
- Gebreth, Vernon J., ***Practical Homicide Investigation***, 3rd ed. Boca Raton: CRC Press, Inc., 1996.
- Gebreth, Vernon J., ***Sex-Related Homicide and Death Investigation***, 2nd ed. Boca Raton: CRC Press. Inc. 2010.
- James, Stuart H, Kish, Paul E, Sutton, T. Paulette, ***Principles of Bloodstain Pattern Analysis***, Boca Raton: CRC Press, Inc. 2005.
- Fisher, Barry A.J., ***Techniques of Crime Scene Investigation***, 5th Ed. New York: Elsevier, 1991.
- Spitz, Werner U and Spitz, Daniel J., ***Medicolegal Investigation of Death***, 4th ed. Springfield: Charles C. Thomas Publishers, 2006.

OPINION/CONCLUSION

Based on a review and evaluation of the above-cited materials, I offer the following opinions/conclusions:

- The procedures used by crime scene investigators did not meet the standards reflected in contemporary crime scene-related texts (see Fisher) regarding the planning, searching, documentation, protection and evidence collection of homicide-related scenes. Among these deficiencies, one finds that there was not a demonstrated plan to search the scene in a structured manner which may have resulted in the failure to

discover evidence at the scene; Failure to limit and control access to the scene to only those needed to process the scene increased the possibility of the loss, destruction or contamination of potential evidence by curious on-lookers; Failure to employ the services, or seek the advice of, forensic specialists (e.g. bloodstain pattern analysts, forensic botanists, forensic geologists or forensic entomologists) at the time of the crime, could have contributed to the potential loss of associated forensic evidence which could have been discovered through the use or consultation with those specialists; Failure to provide sufficient scene photographs in number and context (long-range, mid-range and close-up photographs) and the ground underneath the body (once the body was removed) could have resulted in the lost opportunity to discover additional evidence, or limit an objective crime scene analysis by an independent third-party expert.

- No photographic documentation of the luminol test or other presumptive tests was presented for evaluation. Therefore, one needs to rely on the written documentation of the individuals involved in the application of these testing methodologies for accuracy of test results. Many results were reported as "negative" in the documentation reviewed by this analyst. That indicates no blood was present. However, some results were presented as positive, but when tested further, no blood was found. In addition, it is not uncommon for inexperienced investigators to misinterpret the results of certain presumptive tests for blood.

  For instance, when applying luminol to an area suspected of containing occult blood, the inexperienced investigator may note a "glowing" of the area once the ***luminol*** is applied. However, in many instances, the uninformed and inexperienced investigator will misinterpret the appearance of the luminol when exposed to air (the "glowing" of the chemical) as a positive reaction to the presence of blood.

  In the case of the use of ***phenolphthalein*** as a presumptive test for blood, a positive reaction is indicated by an immediate appearance of a "pink" color on the filter paper used to collect a sample from a suspected bloodstain once the phenolphthalein chemicals are applied to the filter paper. However, if the filter paper is exposed to air, even on filter papers without immediate pink (negative for blood) reactions will eventually turn pink over time. The inexperienced investigator may interpret this as a positive test for the presence of blood when, in fact, it is not.

  In both of these examples, these errors in the interpretation of test results can be avoided by the utilization of pre-testing control samples in which the investigator applies luminol and phenolphthalein to known blood samples to observe the actual appearance of positive reactions of these tests to known blood samples.

  It should be noted that any positive test results obtained from these presumptive tests only indicate the presence of blood. These tests do not discriminate between human and non-human blood, nor are they able to identify to whom the blood belongs.

- Bleach will not prevent the scientists from locating blood. The luminol-bleach reaction is very specific, and to an experienced analyst, blood is easily recognizable. The luminol-bleach-blood reaction will

appear "wiped-up" but the luminol chemical reaction will have a unique "flash" characteristic to its appearance. Subsequent presumptive tests such as the use of phenolphthalein will still test positive in the presence of blood, after applying bleach to the blood in an attempt to "wipe the blood away.

- The application of bleach to blood as a masking agent will not necessarily preclude subsequent detection of blood through the use of luminol detection techniques, nor will it absolutely preclude the detection of DNA from a collected blood sample.

- Cat urine will not cause a reaction to the application of luminol, as the luminol reacts to a specific component contained in blood (hemoglobin) which is not present in cat urine.

- Due to the lack of the volume of blood one would expect inside a closed space (such as a vehicle) that would have been generated from the victim's injuries, and due to the lack of any transfer evidence of the murder weapon onto the interior of the vehicle, it is highly unlikely that the victim was killed or transported in the suspect's vehicle.

- The lack of detection of blood, or indications of blood clean-up, within Wogenstahl's apartment make it highly unlikely that the victim was murdered inside Wogenstahl's apartment. It appears that crime scene investigators removed the plumbing from Wogenstahl's bathroom to examine the contents of the drain pipes for evidence of blood. If blood had been present, it would have been found in the drain pipes. The lack of blood in the drain pipes indicates that no blood was present, nor was there any evidence of the use of any cleansing agents that would have removed any traces of blood.

- Hair that cannot be linked to a victim or suspect is irrelevant if a link between suspect and victim cannot be established. Any hair that may have been found may very well have been deposited as a result of cross-contamination during the handling of the evidence by the various individuals who had custody of the material during the course of the examination and/or testing of the clothing evidence. Testimonial evidence revealed that there was no accounting of the actual number of hairs collected as evidence.

- The scene investigators could have benefited from the expertise offered by forensic geologists, forensic entomologists and bloodstain pattern experts at the scene. There were not enough photographs taken of the scene around and underneath the victim's body to adequately assess the degree and expanse of the bloodstain patterns present around the body. Had these photographs been taken, it would have enabled an independent third party bloodstain pattern analyst an opportunity to assess the degree of blood loss and distribution patterns of the blood in order to support or refute the determination of the outdoor scene as the location of the physical assault that lead to the victim's death.

- The State's contention that the victim was murdered elsewhere, or in Wogenstahl's car, which was then used to transport the victim to the scene, is not supported by the physical evidence in the car, at the scene or on the victim. As was previously mentioned, there was no evidence of bloodstains and weapon transfer evidence detected in the vehicle that would support the determination of a violent confrontation inside the vehicle; there was no documentation of bloodstain transfers along the path from the roadway

to the body dump site that would support the determination that the body was transferred (dead) from another location and "dumped" at the site at which the victim was found. Other than the lack of the amount of blood that one would expect to be present after a violent confrontation,, there were no fingerprints, hairs, fibers or any other physical evidence recovered which would connect the victim to Wogenstahl's apartment or car (in which they specifically vacuumed for trace evidence that resulted in their failure to discover any trace evidence linking the victim to the car). In addition, to this lack of evidence, there was semen found on the comforter upon the bed on which the victim slept that was never identified (linked) as to its source.

- My informed opinion is that the victim was killed very close to the dump site, then dragged (as indicated by Dr. Schmidt's description of the drag marks present on the victim), and placed where she was discovered. However, due to the lack of a thorough crime scene investigation, the exact location where the victim was murdered is impossible to determine after the passage of twenty years.

- In my nearly forty years of experience in law enforcement and forensic investigation, it is my opinion that the investigation of this case was so deficient in its thoroughness and adherence to established procedures of professional competence that it rates in the top 10% of the most troublesome cases that I have reviewed, or personally have been involved with, since I began my law enforcement career in 1975.

BASIS FOR OPINION/CONCLUSION

These opinions and conclusions are based on knowledge drawn from nearly 40 years of investigative and practical law enforcement experience, police and forensic science training and practical research, actual case evaluations and published standards. They are consistent with the standards and practices currently employed in the review and evaluation of death scene investigations.

Submitted this 13th day of March, 2015

Gary A. Rini, M.F.S.
Forensic Science Consultant
North Olmsted, Ohio 44070

THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	CASE NO. B 9206287
Plaintiff-Respondent,	:	JUDGE NADEL
vs.	:	
JEFFREY WOGENSTAHL,	:	Death penalty case
Defendant-Petitioner.	:	

Affidavit of Carl J. Schmidt, M.D., M.P.H.

State of Michigan)
) ss:
County of Monroe)

1. I am a licensed physician in the States of Ohio and Michigan with a subspecialty in forensic pathology. My curriculum vitae is attached.

2. I reviewed the materials related to the death of Amber Nicole Garrett, which included a video taken of the scene, scene and autopsy pictures, the autopsy report (Hamilton County Coroner Number OC-249-91), and the court testimony of Dr. Michael Kenney in the criminal trial of Jeffrey Wogenstahl.

3. The victim suffered multiple blunt trauma, mainly to the left side of the head, and multiple stab wounds. I created body diagrams (attached to this affidavit) to more easily demonstrate the wide distribution of injuries on the victim's body.

4. There was multiple blunt trauma seen on the victim. Much of the blunt trauma was concentrated to the left side of the head, with multiple contusions and lacerations. Aside from extensive subcutaneous hemorrhage, there was one larger laceration on the left temple with comminution (i.e. crushing) of the skull and exposure of the brain and soft tissue. There was no external or internal evidence of sexual injury, and none was documented.

5. There were multiple stab wounds, concentrated on the left neck and left chest and shoulder. One of the stab wounds to the neck punctured blood vessels in the supraclavicular region, the pleural cavity and the left lung. One of the wounds to the chest punctured the pericardium, diaphragm and liver.

6. The autopsy report states that there was 1000 ml of blood in the left chest as a result of the stab wounds. It is my opinion to a reasonable degree of medical certainty that this is an overestimate of the amount of blood in the victim's chest cavity. Unless a precise measurement is taken, which was not indicated in the materials I reviewed, it is very difficult to accurately estimate the amount of blood based merely on observation. Overestimates are common and I have seen them frequently throughout my career. My reasoning for this opinion is that the report mentions that the deceased weighed 78 lbs, or about 35 kg. Assuming a circulating blood volume of 75 ml / kg of body weight, this means that the intravascular volume was about 2659 milliliters. Hence, 1000 ml would represent 37% of that circulating blood volume. After about a loss of 15% of blood volume there is a significant drop in blood pressure; this loss does not include that suffered from other trauma, such as the head injuries. And as will be explained, it is my opinion that the head injuries were inflicted close in time, but before, the other injuries. Extensive blood loss would have occurred from those injuries as well.

7. All of the injuries would have caused at least some external bleeding. A large amount of blood and tissue splatter would have been present in the location where these injuries occurred. Based on the amount of bleeding from the head seen in the photographs, it is my opinion that the head injuries in this case likely took place prior to the stab wounds. The wounds to the head showed profuse bleeding and brain matter protrusion. These injuries in particular would have caused a significant amount of blood and tissue splatter as they were being inflicted. The stab wounds sustained to the arm would have caused both internal and external bleeding. Although not specifically stated in the coroner's report or testimony I assume he is referring to the subclavian / axillary / brachial artery and vein when he is referring to the major vessels in the arm that were severed (the three names for the artery and vein reflect the region of the body in which they are found, but they are the same blood vessels). This injury was the source of the internal bleeding described in the autopsy report but it is likely there would also have been some external bleeding when it was inflicted because the artery is such a large blood vessel that originates directly from the aorta, which in turn originates from the heart. Had the head injuries occurred after this injury I don't think there would have been as much bleeding in the head as was documented.

8. To a reasonable degree of medical certainty, my opinion is that the injuries could not have been inflicted in the vehicle shown in the pictures. It is practically impossible that the victim was in the car when these injuries were sustained, as the physical space needed by the assailant to inflict those injuries is much greater than that (this means the space needed to swing an arm wielding a weapon). Further, in order to cause the injuries sustained by the victim here, an assailant would need a significant amount of energy, and repeated blows, to injure the soft tissues of the head and cause the comminuted, depressed skull fractures described in the autopsy report. The fractures span much of the left side of the skull and brain tissue was exposed. The fracture lines extended to the floor of the skull and

included the left orbital plate. There was also injury to the brain. The blows needed to cause them would have generated at least some spread or splatter of soft tissue and blood at the place where the injuries were inflicted. The injuries to the head were caused when the head was supported against a firm surface, such as the ground, with the right side of the head in contact with it. This is also supported by the bruising seen on the right ear and the right temple, which could have been caused when victim's head was against a hard, irregular surface such as the ground outside. These injuries could not have occurred while the victim was sitting up, such as she would have been in the front passenger seat of the car. Had she been in a sitting position the head would have swung like a pendulum moving back forth, a process which dissipates energy and would have resulted in a different pattern of injury, instead of that seen here, where there is much more severe injury to the left side of the head in comparison to the right side. Injuries are remarkably absent from the right side of the brain.

9. Also of note in the picture is the large laceration on the left temple. This wound would have resulted in in a fair amount of tissue spattering and blood loss. The hair was also matted with blood, which would also have left some kind of bloody residue and, unless the head was completely covered, would also have spread blood and tissue when the body was moved. There is a picture of the face that shows a thin layer of blood on the left side before the face was cleaned; I don't believe you could move the body without some of this blood being left behind if it contacted any surface while being moved. Even if the body had been wrapped in some manner the body would have been leaking a large amount of fluid (including blood, saliva, brain matter, water, etc.) from the injuries incurred, and it is unreasonable to believe that a significant portion of this fluid would not have leaked in the transportation of the body. It would be extremely hard to thoroughly clean up this blood and fluid, particularly in a small space, such as a car that includes absorbent materials like carpeting.

10. It is not possible to ascertain what kind of instrument was used to inflict the blunt injuries because no discernible pattern was present on soft tissue or bone. With injuries this extensive, it is usual to find blood and other tissue residue on the instrument. This is also true of the knife. There is mention of a pocket knife in original trial testimony, but, unless there is tissue present on the knife it would be difficult to match a particular knife to a stab wound other than to say that the weapon had a single edge or a double edge if the shape of the wound reflects this.

11. The body was found outdoors; it was partially frozen. This would slow decomposition and help preserve the body. It also makes estimating a postmortem interval impossible because freezing prevents the usual lividity and rigidity from developing at the rate they would at a higher temperature. Hence, in this case, my opinion, to a reasonable degree of medical certainty, is that an estimate of a postmortem interval cannot be established.

12. The multiple, mainly parallel scratches to the back, buttock and thighs were postmortem. It's not possible to say when they occurred relative to the time of death. I believe they were caused by dragging through a place like the wooded area where the body was found. The cross-hatch pattern indicates there may have been a directional change at some point while the body was being dragged.

13. There is a mention of a stab wound to the left wrist and an incised wound to the base of the left thumb. These were described as defensive injuries, i.e., sustained as the deceased was trying to defend herself. Although this is possible, these kinds of injuries tend to be more numerous and widely distributed along areas such as the back of the forearms than is seen here. It is also possible they happened as the stab wounds to the chest were being inflicted and the hand was in the way (interposed between the knife and the chest wall as when the hand is resting on the chest). If the latter happened after the head injuries, my opinion to a reasonable degree of medical certainty is that the deceased would have been unconscious because of the injuries to the brain.

14. In conclusion, my opinion to a reasonable degree of medical certainty is that the victim in this case was killed outside of the car seen in the pictures that I reviewed. The injuries were likely inflicted while the body, and the head, were lying on an irregular surface, such as the ground outside, with the right side of the head in contact with it. Due to the amount of bleeding and blood loss, my opinion to a reasonable degree of medical certainty, is that the injuries to the head were sustained first, rendering the victim unconscious within seconds to minutes, while the stab wounds were inflicted. If the victim had not been alive when the head injuries occurred, I don't think you would have seen bleeding as extensive as was documented within and outside of the head. Death would have occurred quickly, perhaps within minutes of the injury to the blood vessels of the chest wall because of the large caliber of those blood vessels and their direct connection to the aorta.

Carl J. Schmidt, M.D., M.P.H.

Sworn to and subscribed before me on this 13th day of February, 2015.

NOTARY PUBLIC

WILLIAM K. KASPER
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Nov 7, 2015
ACTING IN COUNTY OF Wayne.

THE STATE OF OHIO, APPELLEE, *v.* WOGENSTAHL, APPELLANT.

[Cite as *State v. Wogenstahl*, 150 Ohio St.3d 571, 2017-Ohio-6873.]

Reopened direct appeal of capital-murder conviction—Ohio trial court had jurisdiction over aggravated-murder charge under R.C. 2901.11(D) because the victim was killed in either Ohio or Indiana and it cannot reasonably be determined in which state the murder took place—Judgment affirmed.

(No. 1995-0042—Submitted April 4, 2017—Decided July 25, 2017.)

REOPENED APPEAL from the Court of Appeals for Hamilton County, No. C-930222.

KENNEDY, J.

{¶ 1} Appellant, Jeffrey Wogenstahl, was convicted of the 1991 kidnapping and murder of ten-year-old Amber Garrett. Her body was discovered in a wooded area in Bright, Indiana. We reopened Wogenstahl's direct appeal of his capital-murder conviction to consider a single question: Did the trial court have jurisdiction over Wogenstahl's aggravated-murder charge? *See* 145 Ohio St.3d 1455, 2016-Ohio-2807, 49 N.E.3d 318; 145 Ohio St.3d 1467, 2016-Ohio-2956, 49 N.E.3d 1310.

{¶ 2} We now answer that question in the affirmative. Because we find that it cannot be determined whether Amber Garrett was murdered in Ohio or Indiana, we hold that Ohio had jurisdiction over the aggravated-murder charge under R.C. 2901.11(D).

{¶ 3} Wogenstahl asserts three propositions of law: (1) "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," (2) "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," and (3) "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." Because we determine, in addressing the first proposition of law, that the evidence shows that the trial court did have jurisdiction here, the second and third propositions of law are moot.

Evidence at trial

{¶ 4} Amber Garrett lived in Harrison, Ohio, with her mother, Peggy, and four siblings. On the night of November 23, 1991, Peggy Garrett asked her 16-year-old son, Eric, to babysit for Amber and two of her siblings. Peggy left home after 11:00 p.m. to meet her friend, Lynn, at a nearby bar.

{¶ 5} Sometime later that night, Peggy and Lynn drove to a second bar, the Miamitown Lounge, where they saw Wogenstahl. Peggy had known Wogenstahl for about six weeks.[1] At the Miamitown, she told him that her son Justin was gone for the weekend and that Eric was home with the other children.

{¶ 6} Peggy, Lynn, and Wogenstahl left the bar to smoke marijuana together in Wogenstahl's car, and when they went back in, the bar was closing. They went to another bar, the Flicker Inn, for a drink. Peggy estimated that they arrived around 2:20 a.m.

{¶ 7} When the Flicker Inn was closing, Wogenstahl invited the women back to his apartment to smoke more marijuana. They declined. Peggy and Lynn

[1] It is unclear how well Wogenstahl knew the Garrett family, but there are indications that they were on friendly terms. For example, Peggy testified that on the afternoon of November 23, Wogenstahl had "dropped by" the apartment to ask Peggy if she planned to do anything that night.

parted from Wogenstahl and went to a Waffle House, arriving around 3:00 or 3:15 a.m.

{¶ 8} Meanwhile, around 3:00 a.m., Wogenstahl knocked on the door of the Garretts' apartment. He told Eric that Peggy needed him at Troy Beard's apartment, which was three blocks away. It took Eric five or ten minutes to dress, after which he left the house with Wogenstahl, locking the door behind him.

{¶ 9} According to Eric, Wogenstahl drove him to within a block of Beard's apartment but would not drive any closer because he did not want Peggy to see him giving Eric a ride. He promised to pull around the block and wait for Eric. But when Eric reemerged from Beard's apartment building, after discovering that Peggy had not been there all evening, Wogenstahl was gone.

{¶ 10} After looking around a few minutes, Eric walked home. He arrived to find the door closed but unlocked. Concerned, he checked on the children, and he discovered that Amber was not there. However, he thought that maybe she had never been in the bedroom at all that night, that "maybe she spent the night with one of her friends," and that he had just assumed all night she was sleeping in the bedroom.

{¶ 11} According to Eric, it was 3:10 a.m. when he arrived at Beard's apartment. And it was "close to 3:30" when he returned to the Garretts' apartment and found that Amber was gone.

{¶ 12} Wogenstahl admitted going to the Garretts' apartment at 3:00 a.m. Initially, he told police that he was playing a prank, alleging that he and Eric "always mess with each other." At trial, he testified that he had gone to the apartment to buy marijuana from Eric. He told the jury, "Eric had asked me would I give him a ride down to where Peggy was so he could give her a quarter ounce of reefer." He claimed that after driving Eric to a spot near Beard's apartment, he went home to bed.

{¶ 13} The town of Harrison, where Amber Garrett lived, sits on the Ohio-Indiana border. State Street is the dividing line between Harrison, Ohio, and West Harrison, Indiana; the state line runs down the middle of the street. To get from Harrison to Bright, Indiana, one follows State Street south until it curves and crosses fully into Indiana, at which point it becomes Jamison Road. The distance from Harrison, Ohio, to the place where Amber's body was found is approximately four miles.

{¶ 14} At 3:15 a.m. on November 24, an employee working at a United Dairy Farmers ("UDF") store on State Street in Harrison saw a car drive past on State Street, headed toward Bright. The driver was a man. As it passed the UDF, the interior of the car was illuminated by the headlights of another vehicle, and she was able to see two people inside. She later testified:

> A: * * * I seen a male silhouette and what looked like to be a young girl sitting in the seat. First I could not tell until she had moved.
>
> Q: Did you see some movement in the car?
>
> A: Yes.
>
> Q: What did you see?
>
> A: I seen what looked like they were getting up and stretching and then laying back on the car door asleep.
>
> Q: Were both people in the front seat of the car?
>
> A: Yes, they were.

{¶ 15} Four miles away, a resident on Jamison Road awoke in the middle of the night to use the restroom. On the way, he noted that the time on his digital clock was 3:13 a.m. Sometime after he returned to bed, he heard an automobile driving up the road. Looking out the window, he saw a car driving slowly down

Jamison Road in the direction of Harrison, as if coming from Bright. When the car reached a curve in the road near his home, he saw it pull off to the side of the road, and he saw the headlights go out. On direct examination, he testified that he had heard the car "maybe five minutes or longer" after returning to bed from using the restroom, but on cross-examination, he indicated that he had fallen "partially asleep" and could not say what time it was when he heard the car.

{¶ 16} Three people testified that they had passed the stopped car on Jamison Road that night. At "right around 3:38, 3:39, 3:40," a female motorist drove down Jamison Road, traveling from her job in Harrison to her home in Bright. She saw a car on the side of the road with its headlights off and a man standing by the rear door on the driver's side of the car.

{¶ 17} At approximately 3:40 a.m., a male motorist passed a car stopped on the roadside with its headlights off and its trunk open. He saw a man at the back of the car near the open trunk.

{¶ 18} Finally, also around 3:40 a.m., a second male motorist saw the car parked on the side of the road. He was driving from Bright toward Harrison and came upon the vehicle. As he drove past, someone in the car turned the headlights on, but he did not see the car pull back onto the road.

{¶ 19} Shortly thereafter, around 3:45 or 4:00 a.m., the UDF employee again saw the car she had seen drive past earlier in the direction of Bright. It was parked at a self-serve car wash cater-cornered from the UDF. The car then pulled into the UDF lot, and the driver came in to buy cigarettes. She testified that he had what looked like blood and dirt under his fingernails. He then left and drove up State Street in the direction away from Bright.

{¶ 20} The UDF employee, the first male motorist, and the female motorists each identified Wogenstahl as the man they had seen that night, and all three, and the second male motorist, agreed that a photograph of Wogenstahl's car matched his or her memory of the car he or she had seen that night.

{¶ 21} Peggy Garrett reported her daughter missing on the afternoon of Sunday, November 24. Police searched for Amber for three days without success. Then on Wednesday, November 27, the Jamison Road resident directed police to the spot where he had seen the car pull off along Jamison Road. Police discovered Amber's body down a steep embankment, in an area overgrown with prickly bushes and weeds, not far from the spot where witnesses had seen the car parked on Jamison Road.

{¶ 22} The cause of death was multiple stab wounds and blunt trauma to the head. The deputy coroner testified that the stab wounds alone would have been fatal and that the head trauma alone would have been fatal. Amber had 11 stab wounds to her neck, shoulder, chest, and armpit, as well as defensive wounds on her forearms. The blunt-trauma injuries were consistent with having been caused by an automobile jack handle. In the trunk of Wogenstahl's car, police found a jack with a missing handle.

{¶ 23} The state presented evidence that the murder had not occurred in the area where Amber's body had been found. The deputy coroner testified that it was reasonable to conclude that she had been carried through the thorny area after she was killed. He based this conclusion on two observations. First, the multiple thorn scratches on her body "appear[ed] to be postmortem injuries." Second, her bare feet were clean and unscratched, suggesting that she had not walked through the area.

{¶ 24} Amber's body was discovered in Bright, Indiana. But the state offered no theory as to where she had been murdered.

Procedural background

{¶ 25} Count 1 of the indictment against Wogenstahl alleged that he purposely caused the death of Amber Garrett in Hamilton County, Ohio. In closing argument at trial, the state took the position that *venue* was proper in Ohio so long as the kidnapping occurred here and that it was therefore unnecessary for the state

to prove where the murder occurred. But the question of *jurisdiction* was never directly raised.

{¶ 26} Wogenstahl was convicted of aggravated murder (with three capital specifications), kidnapping, and aggravated burglary and was sentenced to death. His convictions and capital sentence were affirmed on direct appeal. 1st Dist. Hamilton No. C-930222, 1994 WL 686898; 75 Ohio St.3d 344, 662 N.E.2d 311 (1996).

{¶ 27} On October 9, 2015, he filed a motion to stay his execution and reopen his appeal, alleging that the trial court had lacked jurisdiction over the aggravated-murder charge. Because a challenge to subject-matter jurisdiction cannot be waived or forfeited and may be raised at any time, *State v. Mbodji*, 129 Ohio St.3d 325, 2011-Ohio-2880, 951 N.E.2d 1025, ¶ 10, this court granted the motion and agreed to review the case to determine whether the trial court had properly exercised jurisdiction over the aggravated-murder charge. 145 Ohio St.3d 1455, 2016-Ohio-2807, 49 N.E.3d 318; 145 Ohio St.3d 1467, 2016-Ohio-2956, 49 N.E.3d 1310.

Analysis

{¶ 28} At the time of Amber's murder and until 2005, R.C. 2901.11, Ohio's criminal-law jurisdiction 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 in this state.

Am.Sub.H.B. No. 565, 147 Ohio Laws, Part II, 4493, 4498 (effective March 30, 1999 through July 12, 2005); Am.Sub.H.B. No. 511, 134 Ohio Laws, Part II, 1866, 1893-1894 (in effect at the time of Amber's murder). In *State v. Yarbrough* (decided after Wogenstahl's conviction), this court construed the statute to mean that "a murderer acting alone who plans his crime in Ohio and carries it out in another state cannot be tried in Ohio for his or her crime." 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 55. Yarbrough kidnapped two people in Steubenville, Ohio, then drove them across the state line to Washington County, Pennsylvania, where he shot them. *Id*. at ¶ 6-10. This court reversed Yarbrough's aggravated-murder convictions because the trial court had lacked subject-matter jurisdiction, but it affirmed his convictions for robbery, burglary, and kidnapping. *Id*. at ¶ 1.[2]

{¶ 29} In *Yarbrough*, there was no dispute that the fatal shots occurred in Pennsylvania and that the victims died there. In this case, the location of the murder is in dispute. Wogenstahl contends that the evidence at trial proved that Amber was killed in Indiana. But the state claims that the evidence supports a theory that Amber was killed in Wogenstahl's Ohio apartment. Under R.C. 2901.11(D), which is the same now as it was at the time of the murder, the trial court had jurisdiction if the evidence establishes that the murder occurred in Ohio or if the evidence is insufficient to say with confidence in which state the murder occurred. R.C. 2901.11(D) provides:

[2] In 2005, the General Assembly amended R.C. 2901.11 prospectively in response to *Yarbrough*. Sub.S.B. No. 20, 151 Ohio Laws, Part I, 10.

> 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, the offense or element is conclusively presumed to have taken place in this state for purposes of this section.

{¶ 30} Although we find that the evidence does not support the state's theory that Amber was murdered in Wogenstahl's apartment, we also find that it does not prove, as Wogenstahl asserts, that she was murdered in Indiana.

Evidence that the state asserts supports its theory that the murder occurred in Wogenstahl's apartment

{¶ 31} In its brief, the state asserts the theory that Amber was murdered in Wogenstahl's apartment in Ohio. Describing Wogenstahl's bathroom as "littered with blood smears and stains," the state contends that it is reasonable to conclude that the act that caused Amber's death occurred in Wogenstahl's Ohio apartment. But the state has overstated the probative value of the blood evidence.

{¶ 32} Two towels with small bloodstains were recovered from Wogenstahl's apartment. Testing of one towel indicated that the blood was from a human but was not from Amber. Testing of the other towel was inconclusive as to whether the blood was from a human or an animal. This is significant because Wogenstahl testified that just days before Amber's murder, his cat fell off the shower-curtain rod, knocking out a tooth and bleeding on the side of the tub and the toilet. Police also recovered a paper napkin "with a single drop of what appeared to be blood on it." However, the serology report does not indicate that a napkin was tested for blood.

{¶ 33} Finally, investigators recovered "very small amounts" of blood from the outside of Wogenstahl's bathtub. But the blood from the bathtub was never

typed. In fact, contrary to the state's description of a room "littered with blood smears and stains," the reason the blood found in the bathroom was not tested to determine whether it was human blood is that the specimens were so small that such testing would have consumed the entire sample.

{¶ 34} In summary, there is no evidence to support the theory the state advances in its brief because there was no evidence that Amber's blood was found in Wogenstahl's apartment. To the contrary, she was affirmatively excluded as the source of at least one stain. The evidence at trial never eliminated Wogenstahl as the source of the small amount of blood found in his own bathroom. And the quantities of blood found were quite small, although Amber was stabbed at least 11 times.

{¶ 35} In addition to the blood evidence, the state asserts that the fact that gum wrappers were found in Wogenstahl's apartment indicates that she was murdered there. The gum wrappers are significant, the state argues, because the deputy coroner testified that he had found a wad of chewing gum in Amber's esophagus and concluded that Amber either swallowed it just prior to her death or partially regurgitated it near the time of her death.

{¶ 36} The gum wrappers suggest, at most, that Amber may have been in Wogenstahl's apartment at some time. But no testimony matched the type of gum in her esophagus to the wrappers in the apartment. And even if the gum did match the wrappers, it would not prove that she was stabbed or bludgeoned in the apartment.

{¶ 37} Finally, the state relies on the testimony of Bruce Wheeler, a jailhouse informant. Wheeler offered an ambiguous account of the crime based on the details that Wogenstahl allegedly confessed to him.

> Q: So he took her out of this house. Did he say where he went with her?

A: No. He didn't say where but he said he took her in his car.

According to Wheeler, Wogenstahl raped Amber twice,[3] and on the second occasion, she fought back, which is when Wogenstahl stabbed her.

Q: Did he tell you what he did with Amber Garrett's body after he had taken her life?

A: Yeah. He told me *she was in his car* and he told me he took her somewhere to dump her * * *. * * *

* * *

Q: Now you said that he took her out in the car and he played with her?

A: Yes.

(Emphasis added.) Although far from dispositive, Wheeler's account suggests that the entire sequence of events occurred in the car, not in Wogenstahl's apartment. His testimony does not establish whether the car was in Ohio or Indiana at the time of the murder.

{¶ 38} Elsewhere in his testimony, Wheeler, describing the evidence that Wogenstahl got rid of after the crime, said, "He told me he threw the key [to the Garretts' apartment][4] in the woods earlier and he said some towels or sheets or one of the two or some kind of wrapping that he wrapped her in at one time." The state seizes on this statement as proof that Amber must have been in Wogenstahl's

[3] Wheeler's testimony regarding the rapes was contradicted by the coroner, who testified there was no evidence of sexual abuse.

[4] Wheeler's testimony that Wogenstahl used a stolen key to enter the Garretts' apartment is at odds with the state's theory that the intruder picked the lock.

apartment at the time of the attack. According to the state, if he killed Amber in the car, then "it is illogical that he would then take the time to wrap her in some towels or sheets he conveniently had in his car before taking her body the short distance into those bushes."

{¶ 39} The state's argument assumes more facts than Wheeler supplied. Wheeler never said that Wogenstahl wrapped Amber's *body* in a sheet or towel. The night she was abducted, in late November, the weather was cold and windy, with temperatures possibly below freezing. When her body was found, Amber was wearing a lightweight dress and no coat. Wheeler's ambiguous testimony about "some kind of wrapping that he wrapped her in at one time" may have referred to a sheet that Wogenstahl used to keep her warm when he first kidnapped her, which could have come from Amber's home. And the state's theory that Wogenstahl stabbed Amber multiple times in his apartment, wrapped her body in a sheet, and carried her to his car is difficult to reconcile with the testimony of the UDF employee, who saw a girl sitting upright in the car and stretching.

{¶ 40} The state has also pointed to the blood drop on a door handle inside Wogenstahl's car as a basis for Ohio to assert jurisdiction. But even assuming that the blood came from Amber,[5] Wogenstahl's car could have been in either jurisdiction when the blood was deposited on the handle.

{¶ 41} Moreover, the timeline established by the evidence further erodes the state's theory that Wogenstahl took Amber back to his apartment after abducting her. Even viewing the evidence in a light most favorable to the

[5] The evidence at trial did not establish that the spot of blood, about 1/25 the size of a dime, came from Amber. A forensic serologist testified that the white-blood-cell allotypes in the sample were consistent with Amber's blood and appear in about 5 percent (1 in 19) of the Caucasian population. He testified, "I can say that [the blood] is similar to hers, but I cannot say whether it is hers or not." In fact, he could not even testify that the bloodstain was recent, conceding that it may have been as much as ten years old.

prosecution, a rational trier of fact could not have concluded that Amber was killed in Wogenstahl's apartment.

Evidence that Wogenstahl asserts proves
that the murder occurred in Indiana

{¶ 42} Wogenstahl contends that the evidence proves that the murder occurred in Indiana. His argument is founded almost entirely upon the UDF employee's testimony that she saw Amber alive at 3:15 a.m. in a car headed out of state. Because the state line bisects State Street, the vehicle was actually in Indiana at the moment the UDF employee, standing in Ohio, saw it pass. And as Wogenstahl correctly points out, at no point south of the UDF does the Indiana side of State Street veer back into Ohio before becoming Jamison Road, which is entirely in Indiana. Therefore, according to Wogenstahl, since Amber was alive at 3:15 a.m., her murder must have occurred in Indiana.

{¶ 43} There are two problems with Wogenstahl's argument. First, although the Indiana side of State Street itself does not enter Ohio, there are side streets that intersect State Street that do lead into Ohio, and Wogenstahl could have turned down one of them before returning to Indiana. Second, and more importantly, R.C. 2901.11(B) would allow Ohio to assert jurisdiction if the victim's death occurred in Ohio *or* if the fatal act occurred in Ohio, even if death ultimately occurred in another jurisdiction. The UDF employee's testimony may establish that Amber was *alive* at 3:15, but it does not show that she was *unharmed*. The fatal injuries may have been inflicted earlier. Therefore, Wogenstahl has not shown that Ohio does not have jurisdiction.

{¶ 44} Wogenstahl also asserts that we found in our earlier opinion in this case that the murder occurred in Indiana. In support of this assertion, he quotes the following language from that opinion:

> 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.

75 Ohio St.3d at 367, 662 N.E.2d 311. In isolation, this sentence could be read to suggest that Amber was alive when the pair crossed the state line. But the *very next sentence* in the opinion reads,

> *At some point*, appellant killed Amber when he realized that he could not return her to the apartment without being identified as the perpetrator of the aggravated burglary and/or kidnapping offenses.

(Emphasis added). *Id*. Plainly, we took no position as to when in the sequence of events the murder occurred.

{¶ 45} Finally, Wogenstahl asserts that at trial, the state alleged that the murder had occurred in Indiana. In closing argument, the prosecutor described Amber dying under the juniper tree where she was found. However, as the trial judge instructed the jurors, closing arguments are not evidence. *State v. Maurer*, 15 Ohio St.3d 239, 269, 473 N.E.2d 768 (1984). Moreover, as discussed above, Ohio can claim jurisdiction if the fatal blow was struck in Ohio, even if she survived long enough to die in Indiana.

{¶ 46} The evidence does not establish that the murder occurred in Indiana.

{¶ 47} We find that it cannot be determined whether Amber was murdered in Ohio or Indiana. Therefore, under R.C. 2901.11(D), the offense is conclusively presumed to have taken place in Ohio. Accordingly, we hold that Ohio had jurisdiction over the aggravated-murder charge.

Judgment affirmed.

O'DONNELL, CARR, and GALLAGHER, JJ., concur.

FRENCH, J., concurs, with an opinion.

O'CONNOR, C.J., dissents, with an opinion joined by O'NEILL, J.

DONNA J. CARR, J., of the Ninth Appellate District, sitting for Fischer, J.

EILEEN T. GALLAGHER, J., of the Eighth Appellate District, sitting for DeWine, J.

FRENCH, J., concurring.

{¶ 48} I agree with the majority's conclusion that the location of Amber Garrett's murder cannot be determined and that jurisdiction is therefore proper in Ohio under R.C. 2901.11(D). I write separately because I believe that there is a reasonable question as to the constitutionality of that statute and that this court should have invited the parties to brief the issue before determining whether to uphold Wogenstahl's capital conviction.

{¶ 49} The version of R.C. 2901.11(D) in effect at the time of the murder, which is substantially similar to the current version, provided:

> 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.

Am.Sub.H.B. No. 511, 134 Ohio Laws, Part II, 1866, 1893. Applying the statute to the facts of this case, since the state proved that a murder occurred but was unable to prove whether it occurred in Ohio or Indiana, the trial court and the jury had to

conclusively presume that it occurred in Ohio for purposes of determining jurisdiction.

{¶ 50} There is at least a colorable argument that the conclusive presumption of jurisdiction in R.C. 2901.11(D) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. A conclusive presumption is one type of mandatory presumption, the other type being a rebuttable presumption:

> A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted.

Francis v. Franklin, 471 U.S. 307, 314, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), fn. 2. A mandatory presumption violates the Due Process Clause if it relieves the state of the burden of persuasion as to an element of an offense, either by creating an irrebuttable presumption or by shifting the burden of proof to the criminal defendant. *Id*. at 325; *Sandstrom v. Montana*, 442 U.S. 510, 523-524, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

{¶ 51} By its plain terms, R.C. 2901.11(D) creates a mandatory presumption of jurisdiction: the jurisdiction of the Ohio courts is "conclusively" presumed. It appears, then, that R.C. 2901.11(D) violates the rule of *Francis* and *Sandstrom if* jurisdiction is an element of the offense that the state bears the burden of proving. This court has not directly addressed that question. I note, however, that this court has held that *venue* is an element of the crime that the state must

prove beyond a reasonable doubt. *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324, ¶ 1-2, 22.

{¶ 52} The foregoing should not be read to suggest any final conclusion as to the constitutionality of the statute, only that the issue is worthy of consideration. And because counsel for the defendant failed to raise the issue, I believe that the court should have asked the parties to brief the constitutionality of R.C. 2901.11(D). A challenge to subject-matter jurisdiction cannot be waived or forfeited and may be raised at any time, *State v. Mbodji*, 129 Ohio St.3d 325, 2011-Ohio-2880, 951 N.E.2d 1025, ¶ 10, even by this court sua sponte, *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 10.

{¶ 53} But presuming the constitutionality of the statute, I agree with the majority's disposition of Wogenstahl's appeal.

O'CONNOR, C.J., dissenting.

{¶ 54} The jurisdictional error in this case bears a remarkable resemblance to the one we unanimously corrected in *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845. Here, as in *Yarbrough*, our duty compels an outcome that is regrettable because of the grief it would cause the family and friends of the victim. But it is an outcome that is necessary to preserve the integrity of the criminal-justice system in Ohio. As we stated in *Yarbrough*, one expects diligence by those participating in the prosecution of a defendant subject to the ultimate penalty of death; failing to ensure that this state has jurisdiction in such a case is a tremendous error and is a disservice to the citizens of Ohio and the victims of violent crime. *Id.* at ¶ 4. We cannot ignore our duty to correct such an error.

{¶ 55} The majority correctly finds that the evidence does not support the state's theory that Amber Garrett was killed in appellant Jeffrey Wogenstahl's apartment in Ohio. But I disagree with the majority's conclusion that there is proof

beyond a reasonable doubt that the murder could have occurred in Ohio. Based on the chronology of events established by the testimony of the state's own witnesses, it can reasonably be determined that Amber was murdered in Indiana. Thus, the statutory presumption in R.C. 2901.11(D) permitting Ohio to exercise jurisdiction over Wogenstahl's aggravated-murder charge does not apply. Accordingly, I respectfully dissent.

{¶ 56} The majority holds that "a rational trier of fact could not have concluded that Amber was killed in Wogenstahl's apartment," which is in Ohio, in part because "the timeline established by the evidence * * * erodes the state's theory." Majority opinion at ¶ 41. That same timeline makes it impossible for a rational trier of fact to conclude that she was killed *anywhere* in Ohio.

{¶ 57} The state's witnesses established a clear and consistent timeline. Eric, Amber's sibling who was babysitting Amber on the night she disappeared, testified that Wogenstahl arrived at their apartment around 3:00 a.m. Eric's estimate of Wogenstahl's arrival time is consistent with the testimony of Amber's mother, Peggy Garrett, who stated that she was with Wogenstahl at the Flicker Inn from approximately 2:20 a.m. until she left for Waffle House, which she reached around 3:00 or 3:15 a.m. Taken together, the testimony of Eric and Garrett establish that the events that led to Amber's murder began, at the *earliest*, around 3:00 a.m.

{¶ 58} According to Eric's testimony, Wogenstahl spent "five or ten minutes" in the Garretts' home before departing with Eric on the pretextual trip to Troy Beard's apartment. Here again, Eric's testimony sets the time parameters: it was 3:10 a.m. when Wogenstahl dropped him off a block away from Beard's apartment and "close to 3:30" by the time Eric walked back home to find the door unlocked and Amber gone. Thus, the testimony established that Amber was abducted no earlier than 3:10 a.m. and no later than 3:30 a.m.

{¶ 59} The UDF employee's testimony was consistent with and further narrowed this timeline. She testified that she saw Wogenstahl and a young female

passenger drive past the UDF, heading south on the Indiana side of State Street at 3:15 a.m. The critical detail in the employee's testimony is that the passenger, who must have been Amber, was alive at the moment the car passed the UDF.

> I seen what looked like they were getting up and stretching and then laying back on the car door asleep.
>
> * * *
>
> * * * All I could tell from the silhouette [of the passenger] was that when the person moved that there was a little bit of hair that moved forward and then it was brushed back a little bit and they laid back down.

{¶ 60} This fact merits emphasis: the UDF employee saw Wogenstahl's vehicle traveling south on State Street (i.e., moving from right to left past the employee standing in front of the UDF store and facing State Street). The state line runs down the middle of State Street. So when the UDF employee saw Amber alive at 3:15 a.m., Wogenstahl and his victim had *already* crossed over into Indiana.

{¶ 61} As the majority concedes, the west side of State Street, the southbound lane, does not reenter Ohio. Majority opinion at ¶ 42. Instead, State Street becomes Jamison Road, which runs southwest entirely in Indiana.

{¶ 62} Twenty-five minutes after Wogenstahl passed the UDF store, multiple witnesses saw him and/or his parked car along the side of Jamison Road in Indiana, at a spot roughly four miles from Harrison. Three of the witnesses were drivers of passing cars, and they each testified that Wogenstahl's car was at the Jamison Road location in Indiana at approximately 3:40 a.m. Amber's body was discovered in the vicinity where the witnesses saw Wogenstahl's car stopped on the side of Jamison Road.

{¶ 63} Amber died from multiple stab wounds and from blunt trauma to her head; either would have been fatal. One passing motorist testified that he saw Wogenstahl's car with its trunk open by the side of Jamison Road in Indiana at approximately 3:40 a.m. And as he passed the car, the witness saw a man who "looked like [he] was getting something out of the trunk maybe." Police later found an automobile jack in the trunk of Wogenstahl's car that was missing its handle. And the deputy coroner testified that the blunt-trauma injuries to Amber's head were consistent with having been caused by a jack handle. Taken together, the testimony of the motorist and the coroner strongly support the conclusion that the assault that caused these injuries occurred by the side of Jamison Road in Indiana. By "around 3:45 or 4 o'clock," according to the UDF employee, Wogenstahl was back in Harrison, where the UDF employee saw him at the self-serve car wash.

{¶ 64} Thus, the evidence reasonably suggests that Amber was alive when she was taken from Ohio, that she was seen alive in Wogenstahl's vehicle in Indiana, that the vehicle in which she was traveling did not return to Ohio with her in it, that she was assaulted in Indiana, and that she died in Indiana.

{¶ 65} Rather than draw the obvious conclusion from the evidence, the majority holds that Ohio had jurisdiction based on the supposition that "[t]he fatal injuries may have been inflicted earlier" than 3:15 a.m., when Amber was seen alive in Wogenstahl's car in Indiana. Majority opinion at ¶ 43. But the evidence does not support this conjecture, and in fact, the evidence presented at trial does not allow for this possibility.

{¶ 66} If Wogenstahl inflicted the fatal injuries in Ohio earlier than 3:15 a.m., then he took only *five minutes* to drive from where he dropped Eric off near Beard's apartment (which he did at 3:10 a.m.) to the Garretts' home, break in, abduct Amber, inflict the fatal injuries, then drive with Amber on the Indiana side of State Street (where he was seen driving past with Amber at 3:15 a.m.).

{¶ 67} But there is no *evidence* that this hypothetical scenario occurred. Investigators found no blood in Amber's home, and the blood found in Wogenstahl's apartment did not indicate Amber as the source.[6] The UDF employee did not testify that the girl in the car was bloody or appeared to be in distress. And the only blood evidence found in the car—a spot measuring 1/25 the size of a dime on the rear, driver-side interior door handle—was inconclusive and may have been as much as ten years old.

{¶ 68} In the alternative, the majority adopts the state's suggestion that after passing the UDF at 3:15 a.m., Wogenstahl may have diverted back into Ohio before the motorists saw him on Jamison Road in Indiana at 3:40 a.m. The majority states, "[T]here are side streets that intersect State Street that do lead into Ohio, and Wogenstahl *could have* turned down one of them before returning to Indiana." (Emphasis added.) Majority opinion at ¶ 43. The state nominates Sunset Avenue and Whitewater Drive as possible routes back into Ohio. What is the basis for this conjecture?

{¶ 69} The UDF is on the corner of State and Sunset.[7] The UDF employee testified that when she saw Wogenstahl's car at 3:15 a.m., it "was going too fast" to turn into the UDF and it "kept on going by." This testimony precludes any possibility that Wogenstahl turned onto Sunset Avenue. And the prosecution's timeline makes it a virtual impossibility that Wogenstahl had time for a side trip by turning east on Whitewater Drive.

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[6] Although the majority does not adopt the theory, the state suggests that the blood evidence is relevant to permit a finding of jurisdiction in Ohio under R.C. 2901.11(B), which provides that a victim's death is presumed to have occurred in Ohio if any part of the victim's body is found in the state. But the blood was not conclusively linked to Amber. And the suggestion that blood would be considered "any part of the body" under the statute is a novel theory that would be inappropriately adopted here given the absence of any link between the blood and the victim.

[7] https://www.google.com/maps/@39.2552694,-84.8191324,19.55z.

{¶ 70} Thus, although there is evidence that the fatal injuries and the death both occurred in Indiana, there is *no* evidence that either the injuries or the death occurred in Ohio. Nonetheless, the majority asserts that either scenario is equally likely so it cannot reasonably be determined in which state the murder took place. I disagree. Conjecture cannot establish beyond a reasonable doubt that the offense could have taken place in Ohio.

{¶ 71} Based on the record, it is not reasonably ambiguous where the fatal injuries or death occurred. The evidence points to Indiana. As a result, the state of Ohio had no jurisdiction pursuant to R.C. 2901.11 over Wogenstahl's murder charge. Thus, his aggravated-murder conviction is void and should be vacated. Wogenstahl's remaining convictions for kidnapping and aggravated burglary, crimes that the state did demonstrate occurred in Ohio, would not be disturbed by this holding.

{¶ 72} Because Wogenstahl's Ohio conviction for aggravated murder is void for lack of jurisdiction, double jeopardy would not bar his retrial in Indiana. *See, e.g., In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207, ¶ 14 (noting that a claim of former jeopardy cannot be based on a void judgment); *Montana v. Hall*, 481 U.S. 400, 402, 107 S.Ct. 1825, 95 L.Ed.2d 354 (1987), quoting *United States v. Scott*, 437 U.S. 82, 90-91, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) ("It is a 'venerable principl[e] of double jeopardy jurisprudence' that 'the successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, * * * poses no bar to further prosecution on the same charge' " [brackets sic]). And any purported uncertainty as to the location of the murder will not benefit Wogenstahl a second time. Under current Indiana law, "[i]f the body of a homicide victim is found in Indiana, it is presumed that the result occurred in Indiana."[8] Ind.Code 35-41-1-1(c). This

[8] The Indiana statute makes clear that, in homicide cases, "result" refers to "either the death of the victim or the bodily impact causing death." Ind.Code 35-41-1-1(c).

jurisdictional provision has been substantively unchanged since it was enacted in 1976. *See* Ind. Acts 1976, Pub.Law No. 148-1976, section 1. Therefore, it appears that Wogenstahl will not be able to escape the jurisdiction of the Indiana courts.[9]

{¶ 73} As we recognized in *Yarbrough*, "[t]he General Assembly has not authorized an Ohio court of common pleas to exercise jurisdiction over the prosecution of a defendant for the crime of aggravated murder when, as here, the killing occurred in another state." 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, at ¶ 1. Pursuant to the version of R.C. 2901.11 in effect at the time of this crime, the state of Ohio had no jurisdiction to try Wogenstahl for murder. His aggravated-murder conviction is void and should be vacated, and Wogenstahl should be tried in Indiana for the murder.

{¶ 74} For these reasons, I dissent.

O'NEILL, J., concurs in the foregoing opinion.

Joseph T. Deters, Hamilton County Prosecuting Attorney, and Philip R. Cummings and Sean M. Donovan, Assistant Prosecuting Attorneys, for appellee.

Timothy Young, Ohio Public Defender, and Kimberly Rigby and Elizabeth Arrick, Assistant Public Defenders, for appellant.

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[9] I note that Indiana law permits imposition of the death penalty in cases of felony murder predicated on kidnapping, Ind.Code 35-50-2-9(b)(1)(E), as well as for the murder of a person under the age of 12, Ind.Code 35-50-2-9(b)(12). The same provisions were in effect in November 1991, at the time of the crime. *See* Ind. Acts 1990, Pub.Law No. 1-1990, section 354.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§2 EQUAL PROTECTION AND BENEFIT

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I. BILL OF RIGHTS

§ 9 BAIL; CRUEL AND UNUSUAL PUNISHMENTS

All persons shall be bailable by sufficient sureties, except for capital offences where the proof is evident, or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 10 [Trial of accused persons and their rights; depositions by state and comment on failure to testify in criminal cases.]

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 16 REDRESS FOR INJURY; DUE PROCESS

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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 VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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 or 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.

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.

Rule 26. Application for reconsideration; Application for en banc consideration; Application for reopening.

(A) Application for reconsideration and en banc consideration

(1) Reconsideration

(a) Application for reconsideration of any cause or motion submitted on appeal shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing as required by App.R. 30(A).

(b) Parties opposing the application shall answer in writing within ten days of service of the application. The party making the application may file a reply brief within seven days of service of the answer brief in opposition. Copies of the application, answer brief in opposition, and reply brief shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(c) The application for reconsideration shall be considered by the panel that issued the original decision.

(2) En banc consideration

(a) Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

(b) The en banc court may order en banc consideration sua sponte. A party may also make an application for en banc consideration. An application for en banc consideration must explain how the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions.

(c) The rules applicable to applications for reconsideration set forth in division (A)(1) of this rule, including the timing requirements, govern applications for en banc consideration. Any sua sponte order designating a case for en banc consideration must be entered no later than ten days after the clerk has both mailed the judgment or order in question and made a note on the docket of the mailing as required by App.R. 30(A). In addition, a party may file an application for en banc consideration, or the court may order it sua sponte, within ten days of the date the

clerk has both mailed to the parties the judgment or order of the court ruling on a timely filed application for reconsideration under division (A)(1) of this rule if an intra-district conflict first arises as a result of that judgment or order and made a note on the docket of the mailing, as required by App.R. 30(A). A party filing both an application for reconsideration and an application for en banc consideration simultaneously shall do so in a single document.

(d) The decision of the en banc court shall become the decision of the court. In the event a majority of the full-time judges of the appellate district is unable to concur in a decision, the decision of the original panel shall remain the decision in the case unless vacated under App.R. 26(A)(2)(c) and, if so vacated, shall be reentered.

(e) Other procedures governing the initiation, filing, briefing, rehearing, reconsideration, and determination of en banc proceedings may be prescribed by local rule or as otherwise ordered by the court.

(B) Application for reopening

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) Appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) Impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to App.R. 9 and 10 shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

Effective Date: July 1, 1971
Amended: July 1, 1975; July 1, 1993; July 1, 1994; July 1, 1997; July 1, 2010; July 1, 2011; July 1, 2012

Staff Note (July 1, 2010 Amendment)

App.R. 26(A) has now been subdivided into two provisions: App.R. 26(A)(1) governs applications for reconsideration (former App.R. 26(A)), while App.R. 26(A)(2) is a new provision governing en banc consideration.

The amendment to former App.R. 26(A) (now App.R. 26(A)(1)) contemplates a future amendment to the Supreme Court Practice Rules that will extend the time to appeal to the Supreme Court if a party has filed a timely application for reconsideration in the court of appeals. It also ensures a responding party's full ten-day response period, even if that party does not receive the application on the day it is filed. Because the ten-day response period now begins to run from the date of service, a party served by mail now has an extra three days to file an opposition. See App.R. 14(C). Finally, the amendment permits the moving party a reply in support of the application within seven days of service of the opposition; this clarification avoids any ambiguity about the right to file a reply in support of a motion under App.R. 15(A).

The addition of App.R. 26(A)(2) is designed to address the Supreme Court's decision in *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672 and, in particular, the holding that "if the judges of a court of appeals determine that two or more decisions of the court on which they sit are in conflict, they must convene en banc to resolve the conflict." Id., paragraph two of the syllabus. The new provision establishes a standard for parties to seek en banc consideration under the same procedures that govern applications for reconsideration under App.R. 26(A)(1), except that a party may also seek consideration en banc within ten days of a judgment or order ruling on an application for reconsideration if that ruling itself creates an intra-district conflict that did not appear from the panel's original decision. The new provision also allows courts of appeals to establish their own procedures to the extent consistent with the statewide rule.

Former App.R 26(C), which required courts of appeals to decide applications for reconsideration within 45 days, has been eliminated in anticipation of an amendment to the Supreme Court Rules of Practice that will toll the time to appeal to the Supreme Court if a party has filed a timely application for reconsideration or en banc consideration in the court of appeals.

Staff Note (July 1, 2011 Amendment)

There are two amendments to App.R. 26(A)(1)(a). The first changes the event that starts the running of the ten-day period for filing an application for reconsideration. Under the former rule, the motion was due before the judgment or order of the court was approved by the court and filed by the court with the clerk for journalization or within ten days of the announcement of the court's decision, whichever was later. Under the amended rule, the motion is due within ten days after the clerk complies with the mailing and docketing requirements of App.R. 30(A). And because the timing requirements for applications for reconsideration under App.R. 26(A)(1)(a) also govern the timing for filing an application for en banc consideration under App.R. 26(A)(2), the clerk's compliance with the mailing and docketing requirements of App.R. 30(A) also now trigger the time to file an application for en banc consideration. The second amendment to App.R. 26(A)(1)(a) deletes language warning that an application for reconsideration did not extend the time to appeal to the Ohio Supreme Court; effective July 1, 2010, a timely filed application for reconsideration under App.R. 26(A)(1) or for en banc consideration under App.R. 26(A)(2) *does* extend the time to appeal to the Ohio Supreme Court under S.Ct. Prac. R. 2.2(A)(5) and (6).

There are also several amendments to App.R. 26(A)(2). Two of them are clarifications. The first clarification appears in App.R. 26(A)(2)(a) and is designed to clarify that a majority of the "en banc court", a defined term that does not include judges who have recused themselves or been disqualified, must agree to consider a case en banc. By contrast, under App.R. 26(A)(2)(d), in order to render an en banc decision, "a majority of the full-time judges of the appellate district" including those who do not actually participate in the en banc consideration, must agree. The second clarification appears in App.R. 26(A)(2)(b), which expressly permits the en banc court to decide sua sponte to consider a case en banc. No substantive changes are intended by either of these amendments.

Two substantive amendments to App.R. 26(A)(2)(c) govern the process for sua sponte en banc consideration. First, the rule now specifies that any sua sponte decision to consider a case en banc must be made within ten days of the date the clerk complies with the mailing and docketing requirements of App.R. 30(A). The former rule included no time limit for a sua sponte decision to consider a case en banc, and this addition was intended to ensure finality to the appellate process. Second, if the court decides sua sponte to consider a case en banc, it must vacate the judgments or orders in the case that will be considered en banc so that the time for a party to appeal to the Ohio Supreme Court does not run concurrently with the court's sua sponte en banc consideration. A recent amendment to the Supreme Court Practice Rules extends the time to appeal to the Ohio Supreme Court in the event that a *party* files a timely application for en banc consideration, but there is no such provision in the event the court of appeals decides sua sponte to consider a case en banc. See S.Ct. Prac. R. 2.2(a)(6).

Staff Note (July 1, 2012 Amendment)

The amendment to App.R. 26(A)(2)(c) removes language added in 2011 that required a court of appeals to vacate a panel decision in the event of a *sua sponte* decision to consider a case en banc. That language was added to ensure that a party's time to appeal to the Supreme Court would not begin to run while en banc consideration was pending. But the language is no longer necessary in light of a 2011 amendment to S.Ct.Prac.R. 2.2.

GUIDELINE 10.8—THE DUTY TO ASSERT LEGAL CLAIMS

A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should:

1. consider all legal claims potentially available; and

2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and

3. evaluate each potential claim in light of:

a. the unique characteristics of death penalty law and practice; and

b. the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence; and

c. the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and

d. any other professionally appropriate costs and benefits to the assertion of the claim.

B. Counsel who decide to assert a particular legal claim should:

1. present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and

2. ensure that a full record is made of all legal proceedings in connection with the claim.

C. Counsel at all stages of the case should keep under consideration the possible advantages to the client of:

1. asserting legal claims whose basis has only recently become known or available to counsel; and

2. supplementing claims previously made with additional factual or legal information.

History of Guideline

This Guideline is based on Guideline 11.5.1 ("The Decision to File Pretrial Motions") and Guideline 11.7.3 ("Objection to Error and Preservation of Issues for Post Judgment Review") of the original edition. New language makes clear that the obligations imposed by this Guideline exist at every stage of the proceeding and extend to procedural vehicles other than the submission of motions to the trial court.

In Subsection A(3)(b), the phrase "near certainty" is new and replaces the word "likelihood" from the original edition. The change reflects recent scholarship indicating that appellate and post-conviction remedies are pursued by almost 100% of capital defendants who are convicted and sentenced to death.

Subsections B and C are new to this edition.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-3.6 ("Prompt Action to Protect the Accused"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.5 ("Compliance with Discovery Procedure"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 5.1 (1995) ("The Decision to File Pretrial Motions").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 5.3 (1995) ("Subsequent Filing of Pretrial Motions").

Commentary

"One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial."[227] For this reason, trial counsel in a death penalty case must be especially aware not only of strategies for winning at trial,[228] but also of the heightened need to fully preserve all potential issues for later review.

As the text of the first sentence of Subsection A makes clear, this obligation is not limited to trial counsel or to motions made to the trial court. For example, if a state post-conviction court rules on the merits of a claim for relief, the claim will be available for federal review even if the state's rules required the issue to be raised at trial.[229] So, too, it may be appropriate for counsel to proceed on some claims (e.g., double jeopardy) by seeking an interlocutory supervisory writ from an appellate

227. Stephen B. Bright, *Preserving Error at Capital Trials*, THE CHAMPION, Apr. 1997, at 42-43. For example, John Eldon Smith was executed by the State of Georgia even though he was sentenced to death by a jury selected from a jury pool from which women were unconstitutionally excluded. The federal courts refused to consider the issue because Mr. Smith's lawyers failed to preserve it. Mr. Smith's co-defendant was also sentenced to death from a jury selected from the same pool. The issue was preserved in the co-defendant's case, and the co-defendant's conviction and death sentence were vacated. At retrial, the co-defendant was sentenced to life imprisonment. *See* Smith v. Kemp, 715 F.2d 1459, 1476 (11th Cir. 1983) (Hatchett, J., concurring in part and dissenting in part).

228. *See* NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION Guideline 5.1 (1995) (listing potential motions).

229. *See* Ake v. Oklahoma, 470 U.S. 68, 75 (1985); *see also* Stewart v. Smith, 536 U.S. 856, 859-60 (2002) (*per curiam*).

court[230] or by otherwise seeking relief outside the confines of the capital litigation itself.[231]

As discussed *supra* in the text accompanying note 28, most jurisdictions have strict waiver rules that will forestall post-judgment relief if an issue was not litigated at the first opportunity. An issue may be waived not only by the failure to timely file a pretrial motion, but also because of the lack of a contemporaneous objection at trial, or the failure to request a jury instruction, or counsel's failure to comply with some other procedural requirement established by statute, court rule, or case law. Counsel must therefore know and follow the procedural requirements for issue preservation and act with the understanding that the failure to raise an issue by motion, objection, or other appropriate procedure may well forfeit the ability of the client to obtain relief on that issue in subsequent proceedings.

Whether raising an issue specific to a capital case (such as requesting individual, sequestered voir dire on death-qualification of the jury) or a more common motion shaped by the capital aspect of the case (such as requesting a change of venue because of publicity), counsel should be sure to litigate all of the possible legal[232] and factual[233] bases

230. *See, e.g.*, Schumer v. Holtzman, 454 N.E.2d 522, 526 (N.Y. 1983) (granting writ of prohibition sought by non-capital suspect to preclude investigation by improperly designated prosecutor); *cf.* Hynes v. Tomei, 706 N.E.2d 1201, 1207 (N.Y. 1998) (invalidating portion of New York death penalty statute in proceeding for writ of prohibition brought by prosecutor).

231. *See* Bradley v. Pryor, 305 F.3d 1287, 1289-90 (11th Cir. 2002) (holding that action seeking DNA samples for testing to establish the innocence of a capital prisoner is properly brought under Section 1983 rather than as habeas corpus petition), *cert. denied*, 123 S. Ct. 1909 (2003); *supra* text accompanying notes 5-9. As this example suggests, developments in DNA technology and increasing knowledge of the extent and causes of wrongful convictions in capital cases, *see supra* text and accompanying notes 48-51, 198-204, should lead defense attorneys to be aggressive in pursuing the implication of the Court's assumption in *Herrerra v. Collins*, 506 U.S. 390, 417 (1993), "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there was no state avenue open to process such a claim." *See* House v. Bell, 311 F.3d 767 (6th Cir. 2002) (en banc), *cert. denied*, 123 S. Ct. 2575 (2003) (relying upon this passage and opinion of Justice O'Connor in *Schlup v. Delo*, 513 U.S. 298 (1995), in certifying to state courts issue of whether procedural vehicle existed to present to them evidence of innocence first uncovered during federal habeas proceedings).

232. Counsel should always cite to any arguably applicable provision of the United States Constitution, the state constitution, and state law as bases for granting a claim. A reviewing court may refuse to consider a legal theory different from that put forward originally. *See* Anderson v. Harless, 459 U.S. 4, 6 (1982) (refusing to consider violation of Due Process Clause of federal Constitution because defense counsel in state courts relied solely upon due process clause of state constitution). For example, courts have refused to consider an assertion that a statement was taken in violation of the Sixth Amendment right to counsel because it was argued in earlier proceedings only that the statement was obtained in violation of the Fifth Amendment protection against self-

for the request. This will increase the likelihood that the request will be granted and will also fully preserve the issue for post-conviction review in the event the claim is denied.

Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case.[234] As described in the commentary to Guideline 1.1, counsel also has a duty, pursuant to Subsection (A)(3)(a)-(c) of this Guideline, to preserve issues calling for a change in existing precedent; the client's life may well depend on how zealously counsel discharges this duty.[235] Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted practices.[236]

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incrimination. *See* McCleskey v. Zant, 499 U.S. 467, 502 (1991). Counsel should also present all of the relevant facts as early as feasible. *See generally* Bright, *supra* note 227, at 43, 44.

233. In this regard, as Subsection C indicates, counsel should bear in mind that in capital litigation the courts tend to be much more responsive to supplemental presentations than they might be in other contexts. *See, e.g.*, Brooks v. Estelle, 702 F.2d 84, 84-85 (5th Cir. 1983) (noting petitioner's multiple applications to the court and addressing them on the merits); Spaziano v. State, 660 So. 2d 1363, 1364, 65-66 (Fla. 1995) (granting motions filed by defendant facing fifth death warrant that "[sought] to open by rehearing an appeal that was finalized more than thirteen years ago and a post-conviction proceeding that was terminated with a denial of rehearing more than nine years ago" and ordering a remand that eventually resulted in an in-court recantation by a key witness and a life sentence); *see also DNA Tests to be Done in '74 Case*, ORLANDO SENTINEL, Dec. 13, 2002, at B3.

234. *See* Bright, *supra* note 227, at 43 ("Failure to make an objection for fear of alienating the judge or jury may be a valid consideration in a case in which there is a good chance of acquittal or the length of sentence will be so short that appellate review will be irrelevant to the client. But in a capital case, it may deprive the client of a life-saving reversal on direct appeal or in habeas corpus proceedings.").

235. *See supra* text accompanying note 28. If a claim, whether meritorious or not, is being litigated anywhere in the country, counsel is likely to be charged with knowledge that the "tools to construct their constitutional claim" exist and be expected to raise it. Engle v. Isaac, 456 U.S. 107, 133 (1982). In *Smith v. Murray*, 477 U.S. 527 (1986), counsel failed to raise a particular issue on behalf of Mr. Smith in one state court because the state supreme court had recently rejected it. *See id.* at 531. Mr. Smith raised the issue in subsequent state and federal collateral proceedings, *see id.*, and, well after these were concluded, the United States Supreme Court ruled favorably on the question. *See id*. at 536. However, because of counsel's previous decision to forego the presentation of a claim that was then meritless, the Court "conclude[d] that . . . [Mr. Smith] must therefore be executed," *Id.* at 540 (Stevens, J., dissenting), and he was. *See Legislative Modification*, *supra* note 12, at 852; *see also infra* note 343.

236. For example, execution by electrocution has become *de facto* unconstitutional because state governments have concluded that challenges to the practice have merit, even though the contrary precedent remains in place. *See In re* Kemmler, 136 U.S. 436, 449 (1890); *cf. Alabama: Optional Execution by Injection*, N.Y. TIMES, Apr. 26, 2002, at A20 (discussing how Alabama enacted a law making lethal injection the state's primary method of execution when it looked as if the Supreme Court might rule that the electric chair was cruel and unusual punishment); Sara Rimer, *Florida Lawmakers Reject Electric Chair*, N.Y. TIMES, Jan. 7, 2000, at A13 (same in Florida).

Because "[p]reserving all [possible] grounds can be very difficult in the heat of battle during trial,"[237] counsel should file written motions in limine prior to trial raising any issues that counsel anticipate will arise at trial. All of the grounds should be set out in the motion.[238] Similarly, requests for rulings during the course of post-conviction proceedings (e.g., for investigative resources pursuant to Guideline 10.4(D)) should be made fully and formally.

In accordance with Subsection B(2), counsel at every stage must ensure that there is a complete record respecting all claims that are made, including objections, motions, statements of grounds, questioning of witnesses or venire members, oral and written arguments of both sides, discussions among counsel and the court, evidence proffered and received, rulings of the court, reasons given by the court for its rulings, and any agreements reached between the parties. If a court refuses to allow a proceeding to be recorded, counsel should state the objection to the court's refusal, to the substance of the court's ruling, and then at the first available opportunity make a record of what transpired in the unrecorded proceeding.[239] Counsel should also ensure that the record is clear with regard to the critical facts to support the claim. For example, if counsel objects to the peremptory strike of a juror as race-based, counsel should ensure that it is clear from the record not only that the prosecutor struck a particular juror, but the race of the juror, of every other member of the venire, and the extent to which the unchallenged venire members shared the characteristics claimed to be justifying the challenge.[240]

Further, as reflected in Guideline 10.7(B)(2), counsel at all stages of the case must determine independently whether the existing official record may incompletely reflect the proceedings, e.g., because the court reporter took notes but did not transcribe them or an interpreter's translation was inaccurate, or because the court clerk did not include legal memoranda in the record transmitted to subsequent courts, or there was official negligence or misconduct.

As the nonexclusive list of considerations in Subsection A(3) suggests, there are many instances in which counsel should assert legal claims even though their prospects of immediate success on the merits

237. Bright, *supra* note 227, at 45.

238. *See* ALABAMA CAPITAL DEFENSE TRIAL MANUAL, *supra* note 211, at 53.

239. *See* Dobbs v. Zant, 506 U.S. 357, 358 (1993); Robinson v. Robinson, 487 S.W.2d 713, 714-15 (Tex. 1972); 4M Linen & Unif. Supply Co. v. W.P. Ballard & Co., 793 S.W.2d 320, 323 (Tex. Ct. App. 1990).

240. *See* Bright, *supra* note 227, at 46.

are at best modest. Examples of such circumstances (in addition to those in which counsel need to forestall later procedural defenses (Subsection A(3)(c)), include instances where:

- the claim should be preserved in light of foreseeable future events (e.g., the completion of an investigation, a ruling in a relevant case); or

- asserting the claim may increase the government's incentive to reach an agreed-upon disposition; or

- the presentation made in support of the claim may favorably influence other relevant actors (e.g., the Governor).[241]

241. *See* 3 CAL. ATT'YS FOR CRIM. JUSTICE, 3 CALIFORNIA DEATH PENALTY DEFENSE MANUAL 4 (1993).

(126th General Assembly)
(Substitute Senate Bill Number 20)

AN ACT

To amend sections 2901.11 and 2901.12 of the Revised Code to clarify the application of the state's criminal jurisdiction statute to offenses committed in a jurisdiction other than Ohio that result from a conspiracy, an attempt, or complicity to commit the offense that occurs in Ohio; to clarify the application of that statute in homicide cases; to clarify that Ohio criminal specifications are applicable to persons who commit an offense in a jurisdiction other than Ohio but are subject to Ohio criminal jurisdiction; and to make other related changes to the state's criminal jurisdiction and venue statutes.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 2901.11 and 2901.12 of the Revised Code be amended to read as follows:

Sec. 2901.11. (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.

(2) While in this state, the person ~~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 the other jurisdiction, or, while in this state, the person conspires to commit an offense in another jurisdiction, which offense is an offense under both the laws of this state and the other jurisdiction, and a substantial overt act in furtherance of the conspiracy is undertaken in this state by the person or another person involved in the conspiracy, subsequent to the person's entrance into the conspiracy. In any case in which a person attempts to commit, is guilty of complicity in the commission of, or conspires to commit an offense in another jurisdiction as described in this division, the person is subject to criminal prosecution and punishment in this state for the

attempt, complicity, or conspiracy, and for any resulting offense that is committed or completed in the other jurisdiction.

(3) While out of this state, the person 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, the person 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, the person unlawfully takes or retains property and subsequently brings any of the unlawfully taken or retained property into this state.

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

(7) The person, by means of a computer, computer system, computer network, telecommunication, telecommunications device, telecommunications service, or information service, causes or knowingly permits any writing, data, image, or other telecommunication to be disseminated or transmitted into this state in violation of the law of this state.

(B) In homicide, the element referred to in division (A)(1) of this section ~~is either~~ includes the act that causes death, ~~or~~ the physical contact that causes death, ~~or~~ the death itself, or any other element that is set forth in the offense in question. 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)(1) This state includes the land and water within its boundaries and the air space above that 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.

(2) The courts of common pleas of Adams, Athens, Belmont, Brown, Clermont, Columbiana, Gallia, Hamilton, Jefferson, Lawrence, Meigs, Monroe, Scioto, and Washington counties have jurisdiction beyond the north or northwest shore of the Ohio river extending to the opposite shore line, between the extended boundary lines of any adjacent counties or adjacent state. Each of those courts of common pleas has concurrent jurisdiction on the Ohio river with any adjacent court of common pleas that borders on that river and with any court of Kentucky or of West Virginia that borders on the Ohio river and that has jurisdiction on the Ohio river under the law of Kentucky or the law of West Virginia, whichever is

applicable, or under federal law.

(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.

(E) When a person is subject to criminal prosecution and punishment in this state for an offense committed or completed outside of this state, the person is subject to all specifications for that offense that would be applicable if the offense had been committed within this state.

(F) Any act, conduct, or element that is a basis of a person being subject under this section to criminal prosecution and punishment in this state need not be committed personally by the person as long as it is committed by another person who is in complicity or conspiracy with the person.

(G) This section shall be liberally construed, consistent with constitutional limitations, to allow this state the broadest possible jurisdiction over offenses and persons committing offenses in, or affecting, this state.

(H) For purposes of division (A)(2) of this section, an overt act is substantial when it is of a character that manifests a purpose on the part of the actor that the object of the conspiracy should be completed.

(I) As used in this section, "computer," "computer system," "computer network," "information service," "telecommunication," "telecommunications device," "telecommunications service," "data," and "writing" have the same meanings as in section 2913.01 of the Revised Code.

Sec. 2901.12. (A) The trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter, and in the territory of which the offense or any element of the offense was committed.

(B) When the offense or any element of the offense was committed in an aircraft, motor vehicle, train, watercraft, or other vehicle, in transit, and it cannot reasonably be determined in which jurisdiction the offense was committed, the offender may be tried in any jurisdiction through which the aircraft, motor vehicle, train, watercraft, or other vehicle passed.

(C) When the offense involved the unlawful taking or receiving of property or the unlawful taking or enticing of another, the offender may be tried in any jurisdiction from which or into which the property or victim was taken, received, or enticed.

(D) When the offense is conspiracy, attempt, or complicity cognizable under division (A)(2) of section 2901.11 of the Revised Code, the offender

may be tried in any jurisdiction in which the conspiracy, attempt, complicity, or any of its elements occurred. If an offense resulted outside this state from the conspiracy, attempt, or complicity, that resulting offense also may be tried in any jurisdiction in which the conspiracy, attempt, complicity, or any of the elements of the conspiracy, attempt, or complicity occurred.

(E) When the offense is conspiracy or attempt cognizable under division (A)(3) of section 2901.11 of the Revised Code, the offender may be tried in any jurisdiction in which the offense that was the object of the conspiracy or attempt, or any element of that offense, was intended to or could have taken place. When the offense is complicity cognizable under division (A)(3) of section 2901.11 of the Revised Code, the offender may be tried in any jurisdiction in which the principal offender may be tried.

(F) When an offense is considered to have been committed in this state while the offender was out of this state, and the jurisdiction in this state in which the offense or any material element of the offense was committed is not reasonably ascertainable, the offender may be tried in any jurisdiction in which the offense or element reasonably could have been committed.

(G) When it appears beyond a reasonable doubt that an offense or any element of an offense was committed in any of two or more jurisdictions, but it cannot reasonably be determined in which jurisdiction the offense or element was committed, the offender may be tried in any of those jurisdictions.

(H) When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, the offender may be tried for all of those offenses in any jurisdiction in which one of those offenses or any element of one of those offenses occurred. Without limitation on the evidence that may be used to establish the course of criminal conduct, any of the following is prima-facie evidence of a course of criminal conduct:

(1) The offenses involved the same victim, or victims of the same type or from the same group.

(2) The offenses were committed by the offender in the offender's same employment, or capacity, or relationship to another.

(3) The offenses were committed as part of the same transaction or chain of events, or in furtherance of the same purpose or objective.

(4) The offenses were committed in furtherance of the same conspiracy.

(5) The offenses involved the same or a similar modus operandi.

(6) The offenses were committed along the offender's line of travel in this state, regardless of the offender's point of origin or destination.

(I)(1) When the offense involves a computer, computer system,

computer network, telecommunication, telecommunications device, telecommunications service, or information service, the offender may be tried in any jurisdiction containing any location of the computer, computer system, or computer network of the victim of the offense, in any jurisdiction from which or into which, as part of the offense, any writing, data, or image is disseminated or transmitted by means of a computer, computer system, computer network, telecommunication, telecommunications device, telecommunications service, or information service, or in any jurisdiction in which the alleged offender commits any activity that is an essential part of the offense.

(2) As used in this section, "computer," "computer system," "computer network," "information service," "telecommunication," "telecommunications device," "telecommunications service," "data," and "writing" have the same meanings as in section 2913.01 of the Revised Code.

(J) When the offense involves the death of a person, and it cannot reasonably be determined in which jurisdiction the offense was committed, the offender may be tried in the jurisdiction in which the dead person's body or any part of the dead person's body was found.

(K) Notwithstanding any other requirement for the place of trial, venue may be changed, upon motion of the prosecution, the defense, or the court, to any court having jurisdiction of the subject matter outside the county in which trial otherwise would be held, when it appears that a fair and impartial trial cannot be held in the jurisdiction in which trial otherwise would be held, or when it appears that trial should be held in another jurisdiction for the convenience of the parties and in the interests of justice.

SECTION 2. That existing sections 2901.11 and 2901.12 of the Revised Code are hereby repealed.

SECTION 3. 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* (2004), 104 Ohio St. 3d 1.

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Speaker _____ of the House of Representatives.

_____

President _____ of the Senate.

Passed _____, 20____

Approved _____, 20____

_____

Governor.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

_____

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the ____ day of _____, A. D. 20____.

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Secretary of State.

File No. _____ Effective Date _____