No. 21-7362

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

KYLE Z. KURTZ – PETITIONER

vs.

DAVID GRAY – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR THE WRIT OF CERTIORARI

Kyle Kurtz-Pro Se

Belmont Corr. Inst.

P.O. Box 540

St. Clairsville, Ohio 43950

Father's Cell Phone No. (614) 595-1293

QUESTIONS PRESENTED FOR REVIEW

Are the rules promulgated by the United States Supreme Court not being enforced by the judges representing the Kingdom of Judah or are the law enforcement officers, the prosecution, blatantly violating the rules promulgated by the United States Supreme Court and promoting slavery with no way for the indigenous oppressed poor man to protect himself against such blatant corrupt practices of law enforcement?

Does a District Court Judge or a Sixth Circuit Court Judge possess the legislative power to implement their own rules when executing sworn judicial duties and would such legislative power exercised by a Judge be contrary to the rules promulgated by the Supreme Court of the United States for practice and procedure of all inferior Courts?

Does Ohio Supreme Court Practice Rule 7.01(A)(4) governing delayed appeals implement any time limitation in executing a delayed appeal to the Ohio Supreme Court?

Does the Columbus Police Department possess the power and authority to enter me into a treaty, alliance and/or confederation that is foreign to the United States Constitution (Contract) and/or Ohio Constitution (Subcontract)?

Does the Franklin County, Ohio prosecutor's office have the authority to alter rules of criminal procedure in order to convict me?

Does the Franklin County, Ohio prosecutor's office possess the authority to alter the rules of evidence in order to convict me?

Does the Franklin County, Ohio prosecutor's office possess the authority to vouch for witness' testimony as if the testimony were credible or is that prosecutorial misconduct?

Does the Franklin County, Ohio prosecutor's office possess the authority to practice prohibited *Ex Post Facto* law?

Does the Franklin County, Ohio prosecutor's office possess the power to coerce me into involuntary speech without acknowledgment of my Constitutional rights as an accused citizen?

Does U.S.C.S. 2254 Rule 5(b) state in addition to addressing each allegation in a petition the respondent must state any procedural bar?

Did the state of Ohio witness' commit perjury on the stand under sworn oath?

Did the Franklin County, Ohio prosecutor's office cover up perjured testimony and prospectively vouched for their witness' perjury as more credible than all admitted Self-Defense evidence in order to convict me and win the trial?

Did the Franklin County, Ohio prosecutor's office commit prosecutorial misconduct?

Would the state of Ohio witness' perjured testimony and prosecutorial misconduct be obstructed justice because a sufficiency review has not been conducted in any Courthouse?

Did the Federal District Court and the Sixth Circuit Court of Appeals allow a blatant violation of U.S.C.S. 2254 Rule 5 by respondent's representation, Assistant Attorney General Lamb, by not enforcing addressment of the allegations in the Habeas Corpus petition before stating any bars?

Does any law being enforced by the Executive branch of Ohio government, Assistant Attorney General William Lamb, remain in effect through lapse of following procedure of U.S.C.S. 2254 Rule 5 and its relation to U.S.C.S. Title 28 section 2072?

Did my Court-appointed attorney, George Leech, who is currently a Judge on the juvenile Court in Franklin County, Ohio assist me in claiming the affirmative defense of Self-Defense to seven indicted counts by a Grand Jury of Franklin County, Ohio as a contractual obligation?

Was a contractual obligation, ordered by the Franklin County Common Pleas Court's appointment of George Leech, to provide a complete defense against seven indicted counts by the Franklin County, Ohio prosecutor's office?

Was a contractual obligation a complete defense of an affirmative defense of Self-Defense between Court-appointed counsel George Leach and I during a criminal trial held February 6 through 10, 2017?

Was a contractual obligation of a complete defense of an affirmative defense of Self-Defense impaired by prohibited practice of *Ex Post Facto* law by the Franklin County, Ohio prosecutor's office?

Was Self-Defense an essential element of any crime indicted by a Franklin County, Ohio Grand Jury or was Self-Defense enhanced, defined and instructed as an essential element of Count Three, Count Two and Count One through prohibited practice of *Ex Post Facto* law by the Franklin County, Ohio prosecutor's office after the facts of evidence and testimony of an affirmative defense of Self-Defense I presented at trial?

Is reasonable doubt defined through Ohio R.C. 2901.05(E)?

Does reasonable doubt as defined through Ohio R.C. 2901.05(E) suffice to the burden as enunciated by the United States Supreme Court decision *in re Winship*?

Does the Franklin County, Ohio prosecutor's office possess the power to define "Reasonable Doubt" itself via Self-Defense as an essential element of aggravated murder while committing aggravated robbery and kidnapping?

Does the Franklin County, Ohio prosecutor's office negate the burden of proof beyond a reasonable doubt when Self-Defense was enhanced and defined to an essential element of instructed laws?

Was reasonable doubt itself, as defined through Ohio R.C. 2901.05 as is Self-Defense, enhanced to an essential element of aggravated murder, aggravated robbery and kidnapping through prohibited practice of *Ex Post Facto* law?

Does the Franklin County, Ohio prosecutor's possess the power to convict me in absence of proof beyond a reasonable doubt?

Are three counts of Count Three in executing sentence to confinement in prison executed through prohibited *Ex Post Facto* laws?

If Self-Defense was enhanced, defined and instructed to an essential element of aggravated murder, kidnapping and aggravated robbery through prohibited practice of *Ex Post Facto* law in Count Three did the trial jury reject my claim of Self-Defense?

If a jury rejected my claim of Self-Defense, as claimed by Sixth Circuit Judge White, would a resultant conviction be proven beyond a reasonable doubt as every essential element must be proven beyond a reasonable doubt through Due Process of Law if Self-Defense was enhanced, defined and instructed as an essential element of Count Three, Count Two and Count One through prohibited practice of *Ex Post Facto* laws of the resultant conviction obtained by the Franklin County, Ohio prosecutor's office?

Can Sixth Circuit Judge White be cited for bad behavior by not prohibiting a Constitutionally prohibited practice of *Ex Post Facto* law?

If a conviction was obtained through fraudulent means is the doctrine of *res judicata* applicable to a fraudulently obtained conviction?

If a conviction was obtained through the Constitutionally prohibited practice of *Ex Post Facto* law was the conviction obtained through fraudulent means?

Is the resultant conviction by the Franklin County, Ohio prosecutor's office Constitutional and not fraudulent?

Are prison officials at Belmont Correctional Institution allowed to make my appeals late to the Courts of Ohio and not allocate decisions rendered from the Courts of Ohio to me as sent through the United States Postal Service?

Does Article One of the United States Declaration of Independence Subsection Ten Clause One apply to me "no state [of Ohio] shall enter into any treaty, alliance or confederation, grant letters of Marque and Reprisal or emit bills of credit, pass any bill of attainder or law impairing the obligation of contracts, and [Ohio] shall not pass any *Ex Post Facto* law"?

Does Article Six Clause Two of the United States Declaration of Independence apply to me "this Constitution and the laws of the United States made in pursuance thereof under the authority of the United States shall be the Supreme law of the land, the Judges in every state [of Ohio] shall be bound thereby, and any thing in the Constitution or laws of any state to the contrary notwithstanding" the binding of the Judges in every state of Ohio to the Supremacy of the Constitution and the laws of the United States made in pursuance thereof?

Does the Fifth Amendment to the United States Constitution apply to me I "shall not be held to answer for any infamous crime unless on indictment of a Grand Jury, [I] shall not be compelled in any criminal case to be a witness against [myself],[ ]I shall not be deprived of life, liberty or property without due process of law [and my] private property shall not be taken for private use without just compensation"?

Does the Sixth Amendment to the United States Constitution apply to me in a criminal prosecution I "shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein a crime shall have been committed, to be informed of the nature and cause of any accusation, shall be confronted with the witnesses against, to have compulsory process for obtaining witnesses in favor and to have the Assistance of Counsel for [a complete] defense"?

Does the Eighth Amendment to the United States Constitution apply to me "excessive bail shall not be required, excessive fines shall not be imposed and cruel and unusual punishment shall not be inflicted"?

Does the Fourteenth Amendment to the United States Constitution apply to me in Section One I was "born in the United States and subject to the jurisdiction thereof, 'I am' a citizen of the United States and of the state of Ohio wherein 'I' reside, no state 'of Ohio' shall make or enforce any law which shall abridge the privileges and immunities of a citizen of the United States, no state 'of Ohio' shall deprive 'me' of life, liberty or property without due process of law, no state 'of Ohio' shall deny 'me', a citizen of the United States, within its jurisdiction equal protection of the laws...the validity of the public debt of the United States authorized by law including debts incurred for payment for services in suppressing insurrection or rebellion shall not be questioned, all such debts, obligations and claims incurred in aid of insurrection and rebellion against the United States shall be held illegal and void and Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article"?

PARTIES TO THE PROCEEDING

KYLE KURTZ - Petitioner,

v.

DAVID GRAY, Warden - Respondent.

PROCEEDINGS IN STATE AND FEDERAL COURT

1. Franklin County Court of Common Pleas; Case No. 15CR-3276: Judgement Entered February 10, 2017; Sentence Entered April 20, 2017.

2. Franklin County Court of Appels Tenth Appellate District; Case No. 17AP-382: Opinion Rendered September 27, 2018.

3. U.S. District Court, Southern District of Ohio, Eastern Division; No. 2:19-cv-5186: Opinion Entered December 27, 2019.

4. U.S. District Court, Southern District of Ohio, Eastern Division; No. 2:19-cv-5186: Opinion Entered August 19, 2020.

5. U.S. District Court, Southern District of Ohio, Eastern Division; No. 2:19-cv-5186: Opinion Entered September 14, 2020.

6. U.S. Court of Appeals for the Sixth Circuit; No. 21-3138: Opinion Entered July 14, 2021.

7. U.S. Court of Appeals for the Sixth Circuit; No. 21-3138: Opinion Entered October 28, 2021

CITATIONS OF OPINIONS ENTERED BY THE COURTS

State v. Kurtz, 2018-Ohio-3942

Judges: SADLER, J. BROWN, P.J., and DORRIAN, J., concur.

Opinion by: SADLER

Opinion

Having overruled appellant's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas. BROWN, P.J., and DORRIAN, J., concur.

Kurtz v. Warden, 2019 U.S. Dist. LEXIS 221477

Opinion by: KIMBERLY A. JOLSON

Opinion

Accordingly, the Magistrate Judge **RECOMMENDS** that the petition be **DENIED without prejudice** and that this action be **DISMISSED**.

Kurtz v. Warden, Belmont Corr. Inst., 2020 U.S. Dist. LEXIS 149574

Opinion by: KIMBERLY A. JOLSON

Opinion

Therefore, it is **RECOMMENDED** that this action be **DISMISSED** [*13].

Opinion by: EDMUND A. SARGUS, JR.

Opinion

The Report and Recommendation (ECF No. 19) is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

Kurtz v. Gray, 2021 U.S. App. LEXIS 20915

Judges: Before: WHITE, Circuit Judge.

Opinion

Accordingly, the court **DENIES** Kurtz's COA application and **DENIES** his IFP motion as moot.

Kurtz v. Gray, 2021 U.S. App. LEXIS 32378

Judges: Before: SUHRHEINRICH, CLAY, and NALBANDIAN, Circuit Judges.

Opinion

Accordingly, we **DENY** Kurtz's petition for rehearing.

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JURISDICTI7ON

The date on which the United States Court of Appeals decided my case was 7-142021.

A timely petition for rehearing was denied by the United States Court of Appeals 10-28-2021, and a copy of the order denying my rehearing request appears at Appendix A.

The date on which the highest state court decided my case was 12-31-2019. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C.S. 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE:

Article 1 Section 8 Clause 9 Inferior Tribunals

Article 1 Section 8 Clause 10 Offenses

Article 1 Section 8 Clause 18 All Necessary and Proper Laws

Article 1 Section 9 Clause 2 Habeas Corpus

Article 1 Section 9 Clause 3 Bill of Attainder-Ex Post Facto Laws

Article 1 Section 10 Clause 1 Powers Denied States-Ex Post Facto Laws-Obligation of Contracts

Article 2 Section 3 Execute Laws-Commission Officers

Article 3 Section 1 Supreme Court and Inferior Courts-Judges and Compensation.

Article 3 Section 2 Clause 1 Subjects of Jurisdiction

Article 3 Section 2 Clause 2 Jurisdiction of Supreme Court

Article 3 Section 2 Clause 3 Trial by Jury

Article 4 Section 2 Clause 1 Privileges and Immunities of Citizens

Article 4 Section 4 Form of State Governments-Protection

Article 6 Clause 2 Supreme Law

Amendment 1 Religious and Political Freedom

Amendment 2 Right to Bear Arms

Amendment 4 Unreasonable Search and Seizures

Amendment 5 Due Process of Law and Just Compensation Clauses

Amendment 6 Rights of the Accused

Amendment 8 Bail-Punishment

Amendment 13 Slavery Prohibited

Amendment 14 Citizens of the United States

Amendment 16 Income Tax

Title 18 Chapter 1 Section 4 Misprision of Felony

Title 18 Chapter 1 Section 16 Crime of Violence Defined

Title 18 Chapter 51 Section 1111 Murder

Title 18 Chapter 51 Section 1112 Manslaughter

Title 18 Chapter 51 Section 1113 Attempt to Commit Murder or Manslaughter

Title 18 Chapter 51 Section 1117 Conspiracy to Murder

Title 18 Chapter 51 Section 1121 Killing Persons Aiding Federal Investigations or State Correctional Officers

Title 18 Chapter 73 Section 1506 Theft or Alteration of Record or Process; False Bail

Title 18 Chapter 77 Section 1581 Peonage; Obstructing Enforcement

Title 18 Chapter 77 Section 1590 Trafficking Respect to Peonage, Slavery, Involuntary Servitude, or Forced Labor

Title 18 Chapter 77 Section 1593A Benefitting Financially from Peonage, Slavery, and Trafficking in Persons

Title 18 Chapter 79 Section 1621 Perjury Generally

Title 18 Chapter 79 Section 1622 Subornation of Perjury

Title 18 Chapter 79 Section 1623 False Declarations Before Grand Jury or Court

Title 18 Chapter 95 Section 1951 Interference with Commerce by Threats or Violence

Title 18 Chapter 113B Terrorism Section 2331 Definitions

Title 18 Chapter 223 Section 3501 Admissibility of Confessions

Title 18 Chapter 232 Section 3665 Firearms Possessed by Convicted Felons

Title 28 Chapter 5 Section 115 Ohio

Title 28 Chapter 5 Section 144 Bias or Prejudice of Judge

Title 28 Chapter 33 Section 531 Federal Bureau of Investigation

Title 28 Chapter 81 Section 1257 State Courts; Certiorari

Title 28 Chapter 85 Section 1331 Federal Question

Title 28 Chapter 111 Section 1651 Writs

Title 28 Chapter 111 Section 1652 State Laws as Rules of Decision

Title 28 Chapter 121 Section 1872 Issues of Fact in Supreme Court

Title 28 Chapter 131 Section 2071 Rule-Making Power Generally

Title 28 Chapter 131 Section 2072 Rules of Procedure and Evidence; Power to Prescribe

Title 28 Chapter 131 Section 2074 Rules of Procedure and Evidence; Submission to Congress; Effective Date

Title 28 Chapter 133 Section 2102 Priority of Criminal Case on Appeal from State Court

Title 28 Chapter 133 Section 2104 Reviews of State Court Decisions

Title 28 Chapter 133 Section 2106 Determination

Title 28 Chapter 153 Section 2243 Issuance of Writ; Return; Hearing; Decision

Title 28 Chapter 153 Section 2248 Return or Answer; Conclusiveness

Title 28 Chapter 153 Section 2249 Certified Copies of Indictment, Plea and Judgment; Duty of Respondent

Title 28 Chapter 153 Section 2254. State custody; remedies in Federal courts

STATEMENT OF THE CASE:

I am convicted contrary to Due Process of Law and Equal Protection of Law guaranteed through United States Constitutional Amendment 14. Involuntary servitude absent Due Process of Law is slavery. Slavery is expressly prohibited through United States Constitutional Amendment 13. I was kidnapped at gunpoint on June 26, 2015 by a Brandon Brown. At the time I knew the human being as "B". When a street criminal uses an acronym such as "B" for a name they do so to cover up their corrupt and criminal activities from the law abiding citizens of America. I was going to 52 North James Road to buy marijuana from Jeanette Hampton. "B" was her boyfriend. I called Ms. Hampton beforehand and asked her if she had marijuana to buy. I told on "B" to Ms. Hampton that he shorted my previous marijuana purchase. "B" became enraged and grabbed the phone from Ms. Hampton. "B" denied shorting the marijuana before and told me I could come and get $40 worth that I was asking to buy plus the one gram that was shorted from the purchase before.

When I arrived at 52 North James Road "B" was hiding behind the house. I did not know that. I was walking to the side door, where Ms. Hampton told me to always go, when "B" came from behind the house with his right hand hidden behind his back. "B" pulled his right hand from behind his back with a black 9mm in his hand and aimed it at my face. I could see the shine from the bullet in the chamber down the barrel. I drew my 9mm and yelled put the gun down two or three times. "B" relinquished the black 9mm to the hood of the silver Kia to my left. I then yelled get on the ground. I knew "B" was kidnapping me with a deadly weapon. That is a felony and under Ohio law I had the authority to arrest "B". When "B" did not comply with my secondary orders to get on the ground he went to grab his black 9mm. I feared for my life and did not let "B" have another chance to hurt me. I shot at "B" until I seen him fall.

I turned around and seen the black 9mm almost falling from the side of the hood of the silver Kia. I gained control of the black 9mm. I made it back to my blue Lincoln Town car and threw the two weapons in the passenger seat. I went to start my engine and realized I did not have my car keys. I remembered I had my car keys in my left hand when "B" kidnapped me at gunpoint. I threw them on the recycle bin to my right when I drew my 9mm. I had to run back to the recycle bin and retrieve my car keys. I made it back to my car safely, started my engine and managed to reverse from the driveway at 52 North James Road. I had to wait three to five minutes for traffic to pass before I could safely reverse my car onto the main road. The prosecution suggested during cross-examination I should have reversed into oncoming traffic and endangered myself and other innocent citizens driving down James Road.

I was not advised of any Constitutional rights by the arresting Whitehall officer. I was transported to Columbus Police Headquarters in downtown Columbus. I sat in an interview room for five to six hours before a detective arrived. I was not advised of any Constitutional rights during an interview with a detective Cutshall. At the close of the interview detective Cutshall presented me a waiver to sign. The waiver was entitled "Waiver of Constitutional Rights." I refused to sign the waiver and wanted an attorney. I was indicted of seven charges by a grand jury of Franklin County, Ohio. I was provided a public defender to represent me at preliminary hearing. She advised me while I was in a holding cell the witness' for the state admitted "B" pulled a gun on me first. She requested I sign a continuance as she needed discovery information to prepare a defense against the indictment. I signed the continuance.

Less than a week later I received a letter from the public defender's office advising me they could no longer represent me as the Franklin County prosecution raised a conflict of interest. The conflict of interest was the fact "B" used so many attorney's employed with the public defender's office during his criminal career they knew his criminal history and propensity for violence. I was appointed an attorney, George Leech, who met with me thereafter. I told Mr. Leech what happened on June 26, 2015 and he advised me this is self-defense. We would set up a

defense of self-defense to the indictment, I would get on the stand and testify just like I told him what happened and then I would go home. The state didn't see it that way. The state wanted to win its case and make an example out of a trial going accused citizen.

The Franklin County prosecution enhanced, instructed and defined Self-Defense as an essential element of aggravated murder while committing kidnapping and aggravated robbery through the prohibited practice of *Ex Post Facto* laws. I did not realize they did that until I was going through the decision from the Tenth District Appellate Court in preparing an appeal to the Ohio Supreme Court. The Ohio Supreme Court has decided a void conviction can be heard at any time. A conviction obtained through prohibited Ex Post Facto law is a void conviction. Res judicata cannot apply to a prohibited conviction. The state of Ohio cannot enforce a void conviction. But here I am, in a Habeas Corpus setting, presenting a prohibited conviction to the United States Supreme Court through a Petitioner for Certiorari.

On December 27, 2019, a R &R was filed by the District Court which stated a motion for delayed appeal to the Supreme Court of Ohio was pending and thus Petitioner's claims were not exhausted. It was recommended the petition be denied without prejudice and dismissed. On December 31, 2019, the Supreme Court of Ohio denied to exercise jurisdiction requested in a motion of delayed appeal in this case. Petitioner objected to the R & R and provided the claims exhaustion to the District Court. District Magistrate Kimberly Jolson accepted the exhaustion requirement and ordered Respondent to answer the Habeas Corpus petition. Respondent did not address the allegations in the Habeas Corpus petition as required by Title 28 2254 Rule 5. Respondent stated a procedural bar and a retroactivity bar to the Habeas Corpus petition. Respondent obstructed justice when he did not address any allegations in my Habeas Corpus petition. Had Respondent addressed the allegations as required by Title 28 2254 Rule 5 illegal Ex Post Facto law practice and Due Process of law violations would have been discovered. The District Court allowed a violation of 2254 Rule 5 by respondent's representation William Lamb. Title 28 2072 provides whatever laws the prosecutor's represented by Assistant Attorney General William Lamb keep attempting to enforce are to be of no further force and effect as they have come into conflict with 2254 Rule 5 as promulgated by the United States Supreme Court.

Aggravated murder (Count Three) while committing kidnapping (Count Two) and aggravated robbery (Count One) was enhanced, defined and instructed *Ex Post Facto* with Self-Defense as an essential element. **1st**. Self-Defense was an innocent action done before passage of *Ex Post Facto* law by the Franklin County prosecution. **2d**. The Franklin County prosecution made three crimes of R.C. 2911.01 aggravated robbery, R.C. 2905.01 kidnapping and R.C. 2903.01(B) aggravated murder greater than they were when committed by enhancing, defining and instructing Self-Defense as an essential element of Count Three which incorporated the previous two counts all in one count of Count Three. **3d**. The Franklin County prosecution changed the punishment and inflicted greater punishment than the law annexed to R.C. 2901.05 Self-Defense when committed. **4th**. Count Three, R.C. 2903.01(B), altered the legal rules of evidence and received less, or different, testimony, than the law, R.C. 2903.01(B), required at the time of the commission of the offense, in order to convict me. The law I was convicted and sentenced by meets all four requirements of *Ex Post Facto* law, is manifestly unjust and oppressive. Count Three, Count Two and Count One were enhanced, defined and instructed *Ex Post Facto* with Self-defense as an essential element. Self-Defense was not an essential element of Count Three, Count Two nor Count One when I was indicted. I was acquitted on Count Four which was not instructed *Ex Post Facto* with Self-Defense as an essential element. I was found guilty on Count Three which instructed Self-Defense enhanced and defined as an essential element of the three counts. Self-Defense was not an essential element in any count in the indictment presented before a Grand Jury of Franklin County, Ohio and an indictment approved of by a Grand Jury of Franklin County, Ohio to proceed against me.

Two jury questions presented to the Court during deliberations provide the reasonable doubt necessary for an acquittal of Count One, Two and Three.

"(Jr. Inst. Pg. 43 #6-25) The Court: Okay. We've received a question from the jury. It's actually two questions. It says: "Count 1. Does it matter that he took the weapon to remove the threat from the scene? And what law would indicate that taking the weapon was not robbery?"

The Franklin County prosecutor's office did not comply with Ohio Rules of Criminal Procedure Rule: 1 Scope of Rules; Applicability; Construction; Exceptions, 5 Initial Appearance; Preliminary Hearing, 6 The Grand Jury, 7 The Indictment and the Information, 16 Discovery and Inspection, 17 Subpoena, 29 Motion for Acquittal, 30 Instructions, 32 Sentence, 41 Search and Seizure, 44 Assignment of Counsel, 52 Harmless Error and Plain Error and 57 Rule of Court; Procedure not Otherwise Specified. The state witness' committed perjury on the stand. The Franklin County prosecutor's office covered up that perjury and prospectively vouched for their witness' perjury. The state witness' perjury has not been evidenced as a sufficiency review has not been conducted in any Courthouse.

My Court-appointed Attorney George Leech, who is currently Judge on the juvenile Court in Franklin County, assisted me in filing the affirmative defense of Self-Defense to seven indicted counts by a Grand Jury of Franklin County, Ohio. The contractual obligation ordered by the Court's appointment was to provide a defense against seven indicted charges. That contractual obligation was the affirmative defense of Self-Defense. That contractual obligation was impaired by the illegal practice of *Ex Post Facto* law by the Franklin County Prosecutor's Office. Count Three was enhanced, defined and instructed through the illegal practice of *Ex Post Facto* law. Count One and Count Two were incorporated into Count Three as one whole count.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE:

The Franklin County prosecutor's office presented an indictment to a grand jury of Franklin County, Ohio with accusations of the commission of offenses against the public laws enumerated through the Ohio Revised Code in pursuance of the rights enumerated through the Constitution of Ohio in pursuance of the rights enumerated through the Constitution of the Bill of Rights enumerated in pursuance of the Declaration of Independence of the United States of America declared in pursuance of the meeting of the Continental Congress of the year 1776.

REASONS FOR GRANTING THE PETITION:

U.S.S.C. RULE 10(b): A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

Petitioner is not convicted through Due Process of Law and is being held in prison under involuntary servitude. Involuntary servitude absent a conviction obtained through Due Process of Law is considered slavery. Slavery is expressly prohibited through Constitutional Amendment 13. My Civil Rights as a United States citizen, Due Process and Equal Protection of Law, are expressly enumerated and guaranteed through Constitutional Amendment 14.

The interpretations by **Justice Chase** of the illegal practice of *Ex Post Facto* law have never been opposed by any **United States Supreme Court**. The **United States Supreme Court** in *Calder v. Bull* 3 U.S., 386 at paragraph 11 decided: "I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. **1st.** Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. **2d.** Every law that aggravates a crime, or makes it greater than it was, when committed. **3d.** Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. **4th.** Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive."

Well settled law interpretation derived from *Stromberg v. California*, 283 U.S. 359, the United States Supreme Court interpreted if conviction rests upon multiple theories presented at trial, if there is a reasonable probability the jury relied on an unconstitutional understanding of the law in any one of the theories in reaching a guilty verdict, the entire conviction must be set aside as unconstitutional.

In *Stromberg v. California*, 283 U.S. 359 at HN2: "It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld."

In *Stromberg v. California*, 283 U.S. 359 at HN4: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. The first clause of the statute being invalid upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside."

In *re Winship*, 397 U.S. 358 at Syllabus: "*Held*: Proof beyond a reasonable doubt, which is required by the Due Process Clause in criminal trials, is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act that would constitute a crime..."

In *re Winship*, 397 U.S. 358 at 360: 'The judge acknowledged that the proof might not establish guilt beyond a reasonable doubt, but rejected appellant's contention that such proof was required by the Fourteenth Amendment. The judge relied instead on § 744 (b) of the New York Family Court Act which provides that HN2 'any determination at the conclusion of [an adjudicatory] hearing that a [juvenile] did an act or acts

must be based on a preponderance of the evidence.'" *In re Winship*, 397 U.S. 358 at pg. 361: "We noted probable jurisdiction, 396 U.S. 885 (1969). We reverse."

In *re Winship*, 397 U.S. 358 at HN3: "Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required."

In *re Winship*, 397 U.S. 358 at 363: "In *Davis* a murder conviction was reversed because the trial judge instructed the jury that it was their duty to convict when the evidence was equally balanced regarding the sanity of the accused. This Court said: 'On the contrary, he is entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime. . .. No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.'"

In *re Winship*, 397 U.S. 358 at 364: "'Where one party has at stake an interest of transcending value -- as a criminal defendant his liberty -- this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' Dorsen & Rezneck, In Re Gault and the Future of Juvenile Law, 1 Family Law Quarterly, No. 4, pp. 1, 26 (1967). Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty. Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

In *re Winship*, 397 U.S. 358 at 367-368: "Finally, we reject the Court of Appeals' suggestion that there is, in any event, only a "tenuous difference" between the reasonable-doubt and preponderance standards. The suggestion is singularly unpersuasive. In this very case, the trial judge's ability to distinguish between the two standards enabled him to make a finding of guilt that he conceded he might not have made under the standard of proof beyond a reasonable doubt. Indeed, the trial judge's action evidences the accuracy of the observation of commentators that HN5 'the preponderance test is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted.'" Dorsen & Rezneck, supra, at 26-27.

In *re Winship*, 397 U.S. 358 at HN6: "In sum, the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in Gault -- notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination."

In *Sandstrom v. Montana*, 442 U.S. 510 at Syllabus: "*Held*: Because the jury may have interpreted the challenged presumption as conclusive, like the presumptions in *Morissette v. United States*, 342 U.S. 246, and *United States v. United States Gypsum Co.*, 438 U.S. 422, or as shifting the burden of persuasion, like that in *Mullaney v. Wilbur*, 421 U.S. 684, and because either interpretation would have violated the

Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt, the instruction is unconstitutional. Pp. 514-527."

In *Sandstrom v. Montana*, 442 U.S. 510 at Syllabus: "(b) Conclusive presumptions 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,' *Morissette*, supra, at 275, and they '[invade the] factfinding function,' *United States Gypsum Co.*, supra, at 446, which in a criminal case the law assigns to the jury. The presumption announced to petitioner's jury may well have had exactly these consequences, since upon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and 'ordinary consequences' of petitioner's action), the jury could have reasonably concluded that it was directed to find against petitioner on the element of intent. The State was thus not forced to prove 'beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged,' *In re Winship*, 397 U.S. 358, 364, and petitioner was deprived of his constitutional rights. Pp. 521-523."

In *Sandstrom v. Montana*, 442 U.S. 510 at Syllabus: "(c) A presumption which, although not conclusive, had the effect of shifting the burden of persuasion to petitioner, would have suffered from similar infirmities. If the jury interpreted the presumption in this manner, it could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was then shifted to petitioner to prove that he lacked the requisite mental state. Such a presumption was found constitutionally deficient in *Mullaney*, supra, P. 524."

In *Sandstrom v. Montana*, 442 U.S. 510 at 513: "The prosecution requested the trial judge to instruct the jury that 'law presumes that a person intends the ordinary consequences of his voluntary acts.' Petitioner's counsel objected, arguing that 'the instruction has the effect of shifting the burden of proof on the issue of purpose or knowledge to the defense, and that 'that is impermissible under the Federal Constitution, due process of law.' Id., at 34. He offered to provide a number of federal decisions in support of the objection, including this Court's holding in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), but was told by the judge: 'You can give those to the Supreme Court. The objection is overruled.' App. 34. The instruction was delivered, the jury found petitioner guilty of deliberate homicide, id., at 38, and petitioner was sentenced to 100 years in prison."

In *Sandstrom v. Montana*, 442 U.S. 510 at 514: "Both federal and state courts have held, under a variety of rationales, that the giving of an instruction similar to that challenged here is fatal to the validity of a criminal conviction. We granted certiorari, 439 U.S. 1067 (1979), to decide the important question of the instruction's constitutionality. We reverse."

In *Sandstrom v. Montana*, 442 U.S. 510 at 517: "The Supreme Court of Montana is, of course, the final authority on the legal weight to be given a presumption under Montana law, but it is not the final authority on the interpretation which a jury could have given the instruction. If Montana intended its presumption to have only the effect described by its Supreme Court, then we are convinced that a reasonable juror could well have been misled by the instruction given, and could have believed that the presumption was not limited to requiring the defendant to satisfy only a burden of production."

In *Sandstrom v. Montana*, 442 U.S. 510 at 518: "And although the Montana Supreme Court held to the contrary in this case, HN6 Montana's own Rules of Evidence expressly state that the presumption at issue here may be overcome only 'by a preponderance of evidence contrary to the presumption.' Montana Rule of Evidence 301 (b)(2). Such a requirement shifts not only the burden of production, but also the ultimate burden of persuasion on the issue of intent."

In *Sandstrom v. Montana*, 442 U.S. 510 at 519: "However, the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that *Sandstrom's* jurors actually did proceed upon one or the other of these latter interpretations. And that means that unless these kinds of presumptions are constitutional, the instruction cannot be adjudged valid... It is the line of cases urged by petitioner, and exemplified by *In re Winship*, 397 U.S. 358 (1970), that provides the appropriate mode of constitutional analysis for these kinds of presumptions."

In *Sandstrom v. Montana*, 442 U.S. 510 at 521: "It is clear that under Montana law, whether the crime was committed purposely or knowingly is a fact necessary to constitute the crime of deliberate homicide. Indeed, it was the lone element of the offense at issue in *Sandstrom's* trial, as he confessed to causing the death of the victim, told the jury that knowledge and purpose were the only questions he was controverting, and introduced evidence solely on those points. App. 6-8. Moreover, it is conceded that proof of defendant's 'intent' would be sufficient to establish this element. Thus, the question before this Court is whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of petitioner's state of mind. We conclude that under either of the two possible interpretations of the instruction set out above, precisely that effect would result, and that the instruction therefore represents constitutional error."

In *Sandstrom v. Montana*, 442 U.S. 510 at 523: "As in *Morissette* and *United States Gympsum Co.*, a conclusive presumption in this case would 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,' and would 'invade [the] factfinding function' which in a criminal case the law assigns solely to the jury. The instruction announced to David Sandstrom's jury may well have had exactly these consequences. Upon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and 'ordinary consequences' of defendant's action), Sandstrom's jurors could reasonably have concluded that they were directed to find against defendant on the element of intent. The State was thus not forced to prove 'beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged,' 397 U.S., at 364, and defendant was deprived of his constitutional rights as explicated in *Winship*."

In *Sandstrom v. Montana*, 442 U.S. 510 at 524: "Such a presumption was found constitutionally deficient in *Mullaney v. Wilbur*, 421 U.S. 684 (1975). In *Mullaney*, the charge was murder, which under Maine law required proof not only of intent but of malice. The trial court charged the jury that 'malice aforethought is an essential and indispensable element of the crime of murder.' Id., at 686. However, it also instructed that if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. Ibid. As we recounted just two Terms ago in *Patterson v. New York*, '[this] Court . . . unanimously agreed with the Court of Appeals that Wilbur's due process rights had been invaded by the presumption casting upon him the burden of proving by a preponderance of the evidence that he had acted in the heat of passion upon sudden provocation.' 432 U.S., at 214. And Patterson reaffirmed that HN12 'a State must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the defendant' by means of such a presumption. Id., at 215. Because David Sandstrom's jury may have interpreted the judge's instruction as constituting either a burden-shifting presumption like that in *Mullaney*, or a conclusive presumption like those in *Morissette* and *United States Gypsum Co.*, and because either interpretation would have deprived defendant of his right to the due process of law, we hold the instruction given in this case unconstitutional."

In *Sandstrom v. Montana*, 442 U.S. 510 at 525-526: "We cannot accept respondent's argument. As an initial matter, we are not at all certain that a jury would interpret the word 'intends' as bearing solely upon purpose. As we said in *United States v. United States Gypsum Co.*, 438 U.S., at 445, HN13 "[the] element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness... But, more significantly, even if a jury could have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do. As the jury's verdict was a general one, App. 38, we have no way of knowing that Sandstrom was not convicted on the basis of the unconstitutional instruction. And '[it] has long been settled that HN14 when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. See, e. g., *Stromberg v. California*, 283 U.S. 359 (1931).'"

In *Sandstrom v. Montana*, 442 U.S. 510 at Concur: "The Fourteenth Amendment to the United States Constitution prohibits any State from depriving a person of liberty without due process of law, and in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), this Court held that the Fourteenth Amendment's guarantees prohibit a State from shifting to the defendant the burden of disproving an element of the crime charged."

In *Francis v. Franklin*, 471 U.S. 307 at Syllabus: "Held: The instruction on intent, when read in the context of the jury charge as a whole, violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. *Sandstrom v. Montana*, supra."

In *Francis v. Franklin*, 471 U.S. 307 at Syllabus: "(a) A jury instruction that creates a mandatory presumption whereby the jury must infer the presumed fact if the State proves certain predicate facts violates the Due Process Clause if it relieves the State of the burden of persuasion on an element of an offense. If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating such a presumption, the potentially offending words must be considered in the context of the charge as a whole."

In *Francis v. Franklin*, 471 U.S. 307 at Syllabus: "(b) Here, a reasonable juror could have understood that the first two sentences of the instruction on intent created a mandatory presumption that shifted to respondent the burden of persuasion on the element of intent once the State had proved the predicate acts. The fact that the jury was informed that the presumption 'may be rebutted' does not cure the infirmity in the charge, since, when combined with the immediately preceding language, the instruction could be read as telling the jury that it was required to infer intent to kill as a natural and probable consequence of the act of firing the pistol unless respondent persuaded the jury that such an inference was unwarranted."

In *Francis v. Franklin*, 471 U.S. 307 at Syllabus: "(c) The general instructions as to the prosecution's burden and respondent's presumption of innocence did not dissipate the error in the challenged portion of the instruction on intent because such instructions are not necessarily inconsistent with language creating a mandatory presumption of intent. Nor did the more specific 'criminal intention' instruction following the challenged sentences provide a sufficient corrective, since it may well be that it was not directed to the element of intent at all but to another element of malice murder in Georgia -- the absence of provocation or justification. That is, a reasonable juror may well have thought that the instructions related to different elements of the crime and were therefore not contradictory -- that he could presume intent to kill but not the absence of provocation or justification. But even if a juror could have understood the 'criminal intention' instruction as applying to the element of intent, that instruction did no more than contradict the immediately preceding instructions. Language that merely contradicts and does not explain a constitutionally infirm instruction does not suffice to absolve the infirmity."

In *Francis v. Franklin*, 471 U.S. 307 at Syllabus: "(d) Whether or not *Sandstrom* error can ever be harmless, the constitutional infirmity in this jury charge was not harmless error because intent was plainly at issue and was not overwhelmingly proved by the evidence."

In *Francis v. Franklin*, 471 U.S. 307 at 313: "HN2 The Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' *In re Winship*, 397 U.S., at 364.This 'bedrock, axiomatic and elementary' [constitutional] principle, id., at 363, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. *Sandstrom v. Montana*, supra, at 520-524; *Patterson v. New York*, 432 U.S. 197, 210, 215 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 698-701 (1975); see also *Morissette v. United States*, 342 U.S. 246, 274-275 (1952). The prohibition protects the 'fundamental value determination of our society,' given voice in Justice Harlan's concurrence in *Winship*, that 'it is far worse to convict an innocent man than to let a guilty man go free.' 397 U.S., at 372. See *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958). The question before the Court in this case is almost identical to that before the Court in *Sandstrom*: 'whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of . . . state of mind,' 442 U.S., at 521, by creating a mandatory presumption of intent upon proof by the State of other elements of the offense."

In *Francis v. Franklin*, 471 U.S. 307 at 314: "HN5 Mandatory presumptions must be measured against the standards of *Winship* as elucidated in *Sandstrom*. Such presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense. *Patterson v. New York*, supra, at 215 ('[A] State must prove every ingredient of an offense beyond a reasonable doubt and . . . may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense'). See also *Sandstrom*, supra, at 520-524; *Mullaney v. Wilbur*, supra, at 698-701."

In *Francis v. Franklin*, 471 U.S. 307 at 315-316: "The question, however, is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning. *Sandstrom*, 442 U.S., at 516-517 (state court "is not the final authority on the interpretation which a jury could have given the instruction"). The federal constitutional question is whether a reasonable juror could have understood the two sentences as a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts... The challenged sentences are cast in the language of command... The jurors 'were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory.' Ibid. (emphasis added). The portion of the jury charge challenged in this case directs the jury to presume an essential element of the offense -- intent to kill -- upon proof of other elements of the offense -- the act of slaying another. In this way the instructions 'undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.'"

In *Francis v. Franklin*, 471 U.S. 307 at 317: "HN8 An irrebuttable or conclusive presumption relieves the State of its burden of persuasion by removing the presumed element from the case entirely if the State proves the predicate facts. A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. A mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective, but it is no less unconstitutional. Our cases make clear that '[such] shifting of the burden of persuasion with respect to a fact which the State deems

so important that it must be either proved or presumed is impermissible under the Due Process Clause.' *Patterson v. New York*, 432 U.S., at 215. In *Mullaney v. Wilbur* we explicitly held unconstitutional a mandatory rebuttable presumption that shifted to the defendant a burden of persuasion on the question of intent. 421 U.S., at 698-701. And in *Sandstrom* we similarly held that instructions that might reasonably have been understood by the jury as creating a mandatory rebuttable presumption were unconstitutional. 442 U.S., at 524."

In *Francis v. Franklin*, 471 U.S. 307 at 318: "When combined with the immediately preceding mandatory language, the instruction that the presumptions 'may be rebutted' could reasonably be read as telling the jury that it was required to infer intent to kill as the natural and probable consequence of the act of firing the gun unless the defendant persuaded the jury that such an inference was unwarranted. The very statement that the presumption 'may be rebutted' could have indicated to a reasonable juror that the defendant bore an affirmative burden of persuasion once the State proved the underlying act giving rise to the presumption. Standing alone, the challenged language undeniably created an unconstitutional burden-shifting presumption with respect to the element of intent."

In *Francis v. Franklin*, 471 U.S. 307 at 319-320: "As we explained in *Sandstrom*, general instructions on the State's burden of persuasion and the defendant's presumption of innocence are not 'rhetorically inconsistent with a conclusive or burden-shifting presumption,' because '[the] jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied.' 442 U.S., at 518-519, n. 7. In light of the instructions on intent given in this case, a reasonable juror could thus have thought that, although intent must be proved beyond a reasonable doubt, proof of the firing of the gun and its ordinary consequences constituted proof of intent beyond a reasonable doubt unless the defendant persuaded the jury otherwise. Cf. *Mullaney v. Wilbur*, 421 U.S., at 703, n. 31. These general instructions as to the prosecution's burden and the defendant's presumption of innocence do not dissipate the error in the challenged portion of the instructions."

In *Francis v. Franklin*, 471 U.S. 307 at 325: "Because a reasonable juror could have understood the challenged portions of the jury instruction in this case as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of intent, and because the charge read as a whole does not explain or cure the error, we hold that the jury charge does not comport with the requirements of the Due Process Clause."

In *Francis v. Franklin*, 471 U.S. 307 at 325-326: "The Court of Appeals conducted a careful harmless error inquiry and concluded that the *Sandstrom* error at trial could not be deemed harmless. 720 F.2d, at 1212. The court noted:'[Franklin's] only defense was that he did not have the requisite intent to kill. The facts did not overwhelmingly preclude that defense. The coincidence of the first shot with the slamming of the door, the second shot's failure to hit anyone, or take a path on which it would have hit anyone, and the lack of injury to anyone else all supported the lack of intent defense. A presumption that Franklin intended to kill completely eliminated his defense of 'no intent.' Because intent was plainly at issue in this case, and was not overwhelmingly proved by the evidence . . . we cannot find the error to be harmless'... The jury's request for reinstruction on the elements of malice and accident, App. 13a-14a, lends further substance to the court's conclusion that the evidence of intent was far from overwhelming in this case. We therefore affirm the Court of Appeals on the harmless-error question as well."

In *Francis v. Franklin*, 471 U.S. 307 at 326-327: "*Sandstrom v. Montana* made clear that HN14 the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of intent in a criminal prosecution, 442 U.S., at 521. Today we reaffirm the rule of *Sandstrom* and

the wellspring due process principle from which it was drawn. The Court of Appeals faithfully and correctly applied this rule, and the court's judgment is therefore Affirmed."

In *Francis v. Franklin*, 471 U.S. 307 at FN8: "Most importantly, the dissent's proposed standard is irreconcilable with bedrock due process principles. The Court today holds that HN11 contradictory instructions as to intent -- one of which imparts to the jury an unconstitutional understanding of the allocation of burdens of persuasion -- create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner, unless other language in the charge explains the infirm language sufficiently to eliminate this possibility. If such a reasonable possibility of an unconstitutional understanding exists, 'we have no way of knowing that [the defendant] was not convicted on the basis of the unconstitutional instruction.' *Sandstrom*, 442 U.S., at 526. For this reason it has been settled law since *Stromberg v. California*, 283 U.S. 359 (1931), that when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside... The dissent's proposed alternative cannot be squared with this principle; notwithstanding a substantial doubt as to whether the jury decided that the State proved intent beyond a reasonable doubt, the dissent would uphold this conviction based on an impressionistic and intuitive judgment that it was more likely that the jury understood the charge in a constitutional manner than in an unconstitutional manner."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 29: "Dr. David Dolinak conducted Nichole's autopsy on November 28, 2005. The prosecution called Dr. Joseph Felo to testify about the autopsy instead of Dr. Dolinak, who at the time of trial had become the medical examiner for Austin, Texas. Maxwell objected to Dr. Felo's testimony, citing *Crawford* and the best-evidence rule. The trial court cited *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, and allowed Dr. Felo to substitute as a witness. Dr. Dolinak's autopsy report was also admitted into evidence over defense objection."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 34-35: "HN1 The Sixth Amendment's Confrontation Clause provides, 'In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.' The United States Supreme Court has interpreted this to mean that admission of an out-of-court statement of a witness who does not appear at trial is prohibited by the Confrontation Clause if the statement is testimonial unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). HN2 *Crawford* did not define the word 'testimonial' but stated generally that the core class of statements implicated by the Confrontation Clause includes statements 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' Id. at 52, quoting the amicus brief of the National Association of Criminal Defense Lawyers. The *Crawford* opinion announced a 'fundamentally new interpretation of the confrontation right.' *Williams v. Illinois*, 567 U.S. 50, 132 S.Ct. 2221, 2232, 183 L.Ed.2d 89 (2012)."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 39: "Next, the Supreme Court decided *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011). In *Bullcoming*, instead of calling the analyst who signed and certified the forensic report for blood-alcohol concentration in a DWI case, the prosecution introduced the lab report through the testimony of another analyst who had not performed or observed the analysis but was familiar with the testing procedures of the laboratory. Although the witness was a 'knowledgeable representative of the laboratory' who could 'explain the lab's processes and the details of the report,' id. at 2723 (Kennedy, J, dissenting), the majority held that the surrogate witness was not a proper substitute for the analyst who had conducted the test. The court concluded, 'The accused's right is to be confronted with the analyst who made the certification.' Id. at 2710."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 40: "Thus, while the Crawford court declined to define 'testimonial,' later decisions seem to explain the meaning of the word by stating that HN3 testimonial statements are those made for 'a primary purpose of creating an out-of-court substitute for trial testimony.' *Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct. 1143, 1155, 179 L.Ed.2d 93 (2011) see also *Bullcoming* at 2714, fn. 6, quoting *Davis*, 547 U.S. at 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 ('To rank as 'testimonial,' a statement must have a 'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution'). If a statement's primary purpose is anything else, the statement is nontestimonial. Its admissibility is 'the concern of state and federal rules of evidence, not the Confrontation Clause.' Id."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 56:"Meanwhile, the state urges us to continue to adhere to *Craig's* holding that an autopsy report is admissible as a nontestimonial business record. But HN5 an otherwise inadmissible testimonial statement may not be admitted into evidence based upon the business-and-official-records hearsay exception. *Melendez-Diaz*, 557 U.S. at 324, 129 S.Ct. 2527, 174 L.Ed.2d 314. HN6 Although documents kept in the regular course of business are ordinarily admitted into evidence under the hearsay exception, they are inadmissible 'if the regularly conducted business activity is the production of evidence for use at trial.' Id. at 321. When a statement is 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' it is considered testimonial. Id. at 311, quoting *Crawford*, 541 U.S. at 52, 124 S.Ct. 1354, 158 L.Ed.2d 177. Thus, labeling autopsy reports as 'business records' does not end the inquiry."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 63: "*Melendez-Diaz* and *Bullcoming*, on which Maxwell relies, are readily distinguishable here. In both cases, the forensic reports were made at the request of police, for specific 'evidentiary purposes' in order to aid in a police investigation. The record does not show that to be the case here. We hold that HN12 an autopsy report that is neither prepared for the primary purpose of accusing a targeted individual nor prepared for the primary purpose of providing evidence in a criminal trial is nontestimonial, and its admission into evidence at trial under Evid.R. 803(6) as a business record does not violate a defendant's Sixth Amendment confrontation rights."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 64: "Finally, the state argues that any error in admitting Dr. Felo's testimony and the autopsy report constitutes harmless error beyond a reasonable doubt, an issue we must determine. See *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Even if there was error in admitting the coroner's testimony and the autopsy report, as discussed later in proposition XIII, overwhelming evidence was introduced that established Maxwell's guilt, and expert testimony was not crucial in proving the cause and manner of Nichole's death. Eyewitness testimony established that Maxwell shot Nichole in the head, and two .25-caliber shell casings were found inside the house after Maxwell fled the scene. Maxwell also admitted to Gregg that he shot Nichole twice. Finally, Michelle Kenney testified that Nichole died a short time after arriving at the hospital."

My trial Judge was Jenifer French. Her relative, Judith French, served on the Ohio Supreme Court and concurred, In *State v. Maxwell*, 139 Ohio St. 3d 12 at Concur: "I agree with the concurring and dissenting opinion that the admission of the autopsy report and the admission of Dr. Felo's testimony regarding the information contained in the autopsy report violated Maxwell's confrontation rights, but that the admission of that evidence constituted harmless error. I also agree that Dr. Felo's independent conclusions would not offend the Confrontation Clause."

My trial Judge was Jenifer French. Her relative, Judith French, served on the Ohio Supreme Court and concurred, In *State v. Maxwell*, 139 Ohio St. 3d 12 at Concur: "Autopsy reports are not per se nontestimonial. Ohio's statutory scheme makes clear that an autopsy is intended to serve two distinct purposes: (1) investigation of homicides and other crimes and (2) investigation of public-health concerns. R.C. 313.131(C)(1) ('An autopsy is a compelling public necessity if it is necessary to the conduct of an investigation by law enforcement officials of a homicide or

suspected homicide, or any other criminal investigation, or is necessary to establish the cause of the deceased person's death for the purpose of protecting against an immediate and substantial threat to the public health'). To determine which purpose takes precedence in any given case, we must look to the facts of that particular case. Here, police responded to a shooting. The coroner received the body of a victim who had been shot twice in the head. Common sense tells us that the coroner was not investigating a mysterious public-health epidemic. He was investigating a homicide and would have clearly expected his report to be used in a subsequent murder trial. Thus, in this case, the report was testimonial."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 293: "The nation, like this court, remains split on the question. But since *Crawford*, the court in cases like *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), and *Williams v. Illinois*, 567 U.S. 50, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012), has provided enough guidance to establish that in most criminal cases, autopsy evidence is testimonial and implicates a defendant's Sixth Amendment confrontation right."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 295: "However, the reasoning that an autopsy report is admissible as a nontestimonial business record was undone by *Melendez-Diaz*. The court held that the business-and-official-records hearsay exception does not permit an otherwise inadmissible testimonial statement to be admitted into evidence. *Melendez-Diaz*, at 324. The court pointed out that although documents kept in the regular course of business are ordinarily admitted into evidence under the hearsay exception, they will not be admitted 'if the regularly conducted business activity is the production of evidence for use at trial.' Id. at 321. The records may have had other purposes unrelated to their later use at trial, but if they were 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' they are considered testimonial. Id. at 311, quoting *Crawford* at 52."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 296: "The question of whether an objective witness who prepared an autopsy report would believe that that statement would be available for later use at trial is a difficult hurdle for the state to overcome in a case like this one, where the medical examiner autopsied a victim who was shot twice in the head. Any objective medical examiner would reasonably believe that an autopsy report that reflected the examination of a shooting victim would be available for use at a later trial. In the autopsy report admitted into evidence in this case, the cause of death on the front page of the report is listed as 'Gunshot wounds of head. HOMICIDE.' Could a medical examiner who makes that conclusion believe anything other than that the report will be available for use at a later trial? He could not. But this court has distorted the applicable test."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 299: "The majority applies the primary-purpose test in a very different way from the court in James. The majority does not conclude that the autopsy here was not part of a criminal investigation; it could not reasonably do so. Instead, it states the categorical conclusion that autopsy reports in Ohio in general 'are created for the primary purpose of documenting cause of death for public records and public health.' Majority opinion at ¶ 57. That is, autopsy records are created so that we can have records. That makes no more sense than holding that the primary purpose behind the medical examiner's autopsy report was that his boss told him to do it, or so that he could get paid for the week."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 300: "The majority does not explore why the state requires coroners to document causes of death in cases involving suspected violence. A coroner in Ohio is statutorily interconnected with Ohio's criminal-justice apparatus. Pursuant to R.C. 313.12(A), [w]hen any person dies as a result of criminal or other violent means the physician called in attendance, or any member of an

ambulance service, emergency squad, or law enforcement agency who obtains knowledge thereof arising from the person's duties, shall immediately notify the office of the coroner of the known facts concerning the time, place, manner, and circumstances of the death."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 304: "The coroner relies on law enforcement to provide information about suspicious deaths, consults with law enforcement on the preservation of evidence, and informs prosecuting attorneys when further investigation is advisable. It is not enough for the coroner to stamp 'Homicide' on an autopsy report and file it neatly away. The coroner's verdict establishes the starting point for a homicide investigation and eventual prosecution by determining a primary fact: a person has died by unnatural causes, not by his own hand."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 309-310: "I would hold that although the primary-purpose doctrine may apply to a lay witness who is in extremis at the time the statement is made, it does not apply to professionals regularly involved in creating statements used at trial. Instead, I favor the definition of 'testimonial statement' as enunciated in Judge Eaton's concurrence in James: '[A] testimonial statement is one having an evidentiary purpose, declared in a solemn manner, and made under circumstances that would lead a reasonable declarant to understand that it would be available for use prosecutorially.' *James*, 712 F.3d at 108 (Eaton, J., concurring). Under that test, too, the autopsy report in this case would be considered testimonial."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 317: "The majority makes the unremarkable statement that 'the majority of jurisdictions that have examined this issue have concluded that a substitute examiner, on direct examination, may at least testify as to his or her own expert opinions regarding the autopsy and the victim's death.' Majority opinion, ¶ 50. However, the testifying examiner is greatly restricted from revealing to the jury information from the autopsy report of the nontestifying preparer of the report. The testifying medical examiner in this case improperly introduced testimonial statements contained in the autopsy report prepared by the nontestifying medical examiner; he became a surrogate for the presentation of testimonial statements."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 318: "In *Bullcoming*, 564 U.S. ___, 131 S.Ct. at 2713, 180 L.Ed.2d 610, the court held that a scientific report could not be used as substantive evidence against the defendant unless the analyst who prepared and certified the report was subject to confrontation. 'As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness.' Id. at 2713. The test in question was a blood-alcohol test involving a defendant charged with driving while intoxicated. The state attempted to enter the test results into evidence through the testimony of another analyst; the analyst who performed the test was unavailable because he was on unpaid leave for an undisclosed reason. The court rejected the surrogate testimony."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 319-320: "The holding applies not just to the original analyst's conclusions and opinions, but also to factual observations he or she may have generated: Most witnesses, after all, testify to their observations of factual conditions or events, e.g., 'the light was green,' 'the hour was noon.' Such witnesses may record, on the spot, what they observed. Suppose a police report recorded an objective fact—*Bullcoming's* counsel posited the address above the front door of a house or the read-out of a radar gun. Could an officer other than the one who saw the number on the house or gun present the information in court—so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically 'No.' *Bullcoming*, at 2715.Therefore, as the court held in *Commonwealth v. Phim*, *462 Mass.* 470, 479, 969 N.E.2d 663 (2012), a substitute medical examiner cannot testify as to statements of fact contained in an autopsy report: Consistent with the Sixth

Amendment and traditional protections against hearsay a substitute medical examiner may not testify on direct examination to the facts, data, and conclusions stated in an autopsy report. Accordingly, the prosecutor should not have elicited testimony on the description of the fatal wound contained in the nontestifying medical examiner's files, or of the victim's weight, height, and general physical condition."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 324: "I would conclude that the admission of the information contained in the autopsy report prepared by Dr. Dolinak through Dr. Felo's testimony violated Maxwell's confrontation rights. The Sixth Amendment does not countenance surrogate testimony, nor does it allow the admission of testimonial statements prepared by nontestifying experts to serve as the basis of a testifying expert witness's testimony."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 326-327: "On the federal level, the Eleventh and D.C. Circuits, in *United States v. Ignasiak*, 667 F.3d 1217, 1231 (11th Cir.2012) and *United States v. Moore*, 651 F.3d 30, 72-73, 397 U.S. App. D.C. 148 (D.C.Cir.2011), have held that forensic pathology reports are testimonial for Confrontation Clause purposes. Further, at least eight state courts of last resort also find that autopsy reports are testimonial. *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293 (2009); *Navarette; State v. Kennedy*, 229 W.Va. 756, 735 S.E.2d 905 (2012); *Commonwealth v. Reavis*, 465 Mass. 875, 992 N.E.2d 304 (2013); *People v. Childs*, 491 Mich. 906, 810 N.W.2d 563 (2012); *Cuesta-Rodriguez v. State*, 2010 OK CR 23, 241 P.3d 214 (2010), cert. denied 565 U.S. 885, 132 S. Ct. 259, 181 L. Ed. 2d 151 (2011); *Wood v. State*, 299 S.W.3d 200, 209-210, 214-215 (Tex.Crim.App. 2009); *State v. Lui*, 179 Wn.2d 457, 315 P.3d 493 (Wash.2014)."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 333: "In reality, in most cases, like this one, the autopsy report will not affect the trial in a meaningful way. But there are other cases in which autopsy testimony will be crucial. There are innumerable conclusions that a coroner could make in an autopsy report—cause of death, time of death, whether certain injuries are antemortem or postmortem, the presence of defensive wounds, evidence of rape, whether a baby was shaken—that can implicate or exonerate a defendant. Further, the determinations made in an autopsy are not mechanical. 'Autopsies are also much more complex than the identification of a narcotic, and are more prone to shades of gray, as their outcome is a diagnosis, not a chemical compound match.' Tsiatis, *Putting Melendez-Diaz on Ice: How Autopsy Reports [*84] Can Survive the Supreme Court's Confrontation Clause Jurisprudence*, 85 St. John's L.Rev. 355, 383 (2011)."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 334-337: "Medical examiners are not mere scriveners' and 'autopsy reports are the product of the skill, methodology, and judgment of the highly trained examiners who actually performed the autopsy.' *United States v. Ignasiak*, 667 F.3d 1217, 1232 (11th Cir.2012). It is the diagnostic, subjective nature of autopsy reports that makes them especially appropriate for cross-examination: The crux of the confrontation issue—the need to confront and cross-examine the attending forensic pathologist—is that forensic pathologists are physicians. Physicians exercise judgment and make mistakes, whether they treat living, breathing patients or perform forensic autopsies. Courts that have adopted the view that forensic autopsy reports simply memorialize objective data are misinformed. Neither forensic pathologists nor forensic autopsy reports are fungible. Forensic pathologists would not necessarily report the same findings if each were, hypothetically, able to perform the same autopsy. Ginsberg, The Confrontation Clause and Forensic Autopsy Reports—A "Testimonial," 74 La.L.Rev. 117, 168 (2013). The cross-examination of a surrogate is thus inadequate for a defendant: The only vehicle by which a criminal defendant may explore the subjectivity involved in the performance of the forensic autopsy—to question the judgment of the examining forensic pathologist—is cross-examination. The in-court testimony of the surrogate forensic pathologist who examines the autopsy report prepared by the examining pathologist is an inadequate substitute. The surrogate witness is not the physician who was required to be familiar with the facts and the autopsy protocol, examine the victim's body, perform the autopsy procedure, make and report findings, and report the cause and manner of

death. The cross-examination of the surrogate yields very little. The surrogate can rely on the autopsy findings with impunity. There is simply little to be gained by the defendant in the effort to cross-examine the surrogate. Cross-examination is the great truth-seeking test, but it is an empty exercise when the surrogate testifies at trial. Id. at 170. The point made by the court in *Melendez-Diaz* rings especially true with regard to autopsy reports: 'Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well.' *Melendez—Diaz*, 557 U.S. at 319, 129 S.Ct. 2527, 174 L.Ed.2d 314. If other forensic tests implicate a defendant's confrontation right, certainly an autopsy report should: Both *Bullcoming* and *Melendez-Diaz* hold that a laboratory analyst's report of sufficient solemnity triggers the protections of the Confrontation Clause. It would be incongruous indeed, if an autopsy report requiring numerous skilled judgments on the part of a medical examiner, did not require the same confrontation. *James*, 712 F.3d 79, 111 (Eaton, J., concurring). The central question in the most serious of crimes is whether the victim involved suffered an unnatural death at the hands of another. The idea that a person who makes that determination is not subject to cross-examination is at direct odds with the Confrontation Clause."

In *State v. Maxwell*, 139 Ohio St. 3d 12 at P. 338: "Ultimately, I agree with the majority that the admission of Dr. Dolinak's autopsy report into evidence and Dr. Felo's testimony regarding it constituted harmless error beyond a reasonable doubt. I therefore concur in the judgment of the majority as to Maxwell's guilt. I dissent from the imposition of the sentence of death."

In *Bullcoming v. New Mexico*, 564 U.S. 647 at Syllabus: "The Sixth Amendment's Confrontation Clause gives the accused '[i]n all criminal prosecutions, . . . the right . . . to be confronted with the witnesses against him.' In *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177, this Court held that the Clause permits admission of '[t]estimonial statements of witnesses absent from trial . . . only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.' Later, in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 2532, 174 L. Ed. 2d 314, 322, the Court declined to create a 'forensic evidence' exception to *Crawford*, holding that a forensic laboratory report, created specifically to serve as evidence in a criminal proceeding, ranked as 'testimonial' for Confrontation Clause purposes. Absent stipulation, the Court ruled, the prosecution may not introduce such a report without offering a live witness competent to testify to the truth of the report's statements. 557 U.S., at 324, 129 S. Ct. 2527, 174 L. Ed. 2d 314."

In *Bullcoming v. New Mexico*, 564 U.S. 647 at Syllabus: "The Confrontation Clause, the opinion concludes, does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist. Pp. 658-665, 180 L. Ed. 2d, at 619-624."

In *Bullcoming v. New Mexico*, 564 U.S. 647 at Syllabus: "Nor was Razatos an adequate substitute witness simply because he qualified as an expert with respect to the testing machine and SLD's laboratory procedures. Surrogate testimony of the kind Razatos was equipped to give could not convey what Caylor knew or observed about the events he certified, nor expose any lapses or lies on Caylor's part. Significantly, Razatos did not know why Caylor had been placed on unpaid leave. With Caylor on the stand, Bullcoming's counsel could have asked Caylor questions designed to reveal whether Caylor's incompetence, evasiveness, or dishonesty accounted for his removal from work. And the State did not assert that Razatos had any independent opinion concerning Bullcoming's blood alcohol content. More fundamentally, the Confrontation Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements

provides a fair enough opportunity for cross-examination. Although the purpose of Sixth Amendment rights is to ensure a fair trial, it does not follow that such rights can be disregarded because, on the whole, the trial is fair. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145, 126 S. Ct. 2557, 165 L. Ed. 2d 409. If a 'particular guarantee' is violated, no substitute procedure can cure the violation. Id., at 146, 126 S. Ct. 2557, 165 L. Ed. 2d 409. Pp. 661-663, 180 L. Ed. 2d, at 621-623."

In *Bullcoming v. New Mexico*, 564 U.S. 647 at 651: "In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), this Court held that HN1 a forensic laboratory report stating that a suspect substance was cocaine ranked as testimonial for purposes of the Sixth Amendment's Confrontation Clause. The report had been created specifically to serve as evidence in a criminal proceeding. Absent stipulation, the Court ruled, the prosecution may not introduce such a report without offering a live witness competent to testify to the truth of the statements made in the report."

In *Bullcoming v. New Mexico*, 564 U.S. 647 at 655: "Caylor's report that Bullcoming's BAC was 0.21 supported a prosecution for aggravated DWI, the threshold for which is a BAC of 0.16 grams per hundred milliliters, § 66-8-102(D)(1). The State accordingly charged Bullcoming with this more serious crime... On the day of trial, the State announced that it would not be calling SLD analyst Curtis Caylor as a witness because he had 'very recently [been] put on unpaid leave' for a reason not revealed. 2010-NMSC-007, P8, 147 N.M. 487, 492, 226 P.3d 1, 6 (internal quotation marks omitted); App. 58. A startled defense counsel objected. The prosecution, she complained, had never disclosed, until trial commenced, that the witness 'out there . . . [was] not the analyst [of Bullcoming's sample].' Id., at 46. Counsel stated that, 'had [she] known that the analyst [who tested Bullcoming's blood] was not available,' her opening, indeed, her entire defense 'may very well have been dramatically different.' Id., at 47. The State, however, proposed to introduce Caylor's finding as a 'business record' during the testimony of Gerasimos Razatos, an SLD scientist who had neither observed nor reviewed Caylor's analysis. Id., at 44."

In *Bullcoming v. New Mexico*, 564 U.S. 647 at 657-658: "We granted certiorari to address this question: Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. 561 U.S. 1058, 131 S. Ct. 62, 177 L. Ed. 2d 1152 (2010). Our answer is in line with controlling precedent: HN2 As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness. Because the New Mexico Supreme Court permitted the testimonial statement of one witness, i.e., Caylor, to enter into evidence through the in-court testimony of a second person, i.e., Razatos, we reverse that court's judgment."

In *Bullcoming v. New Mexico*, 564 U.S. 647 at 658-659: "*Melendez-Diaz*, relying on *Crawford's* rationale, refused to create a 'forensic evidence' exception to this rule. 557 U.S., at 317-321, 129 S. Ct. 2527, 174 L. Ed. 2d 314. HN5 An analyst's certification prepared in connection with a criminal investigation or prosecution, the Court held, is 'testimonial,' and therefore within the compass of the Confrontation Clause. Id., at 321-324, 129 S. Ct. 2527, 174 L. Ed. 2d 314... The New Mexico Supreme Court, however, although recognizing that the SLD report was testimonial for purposes of the Confrontation Clause, considered SLD analyst Razatos an adequate substitute for Caylor. We explain first why Razatos' appearance did not meet the Confrontation Clause requirement."

In *Bullcoming v. New Mexico*, 564 U.S. 647 at 660-661: "The potential ramifications of the New Mexico Supreme Court's reasoning, furthermore, raise red flags. Most witnesses, after all, testify to their observations of factual conditions or events, e.g., 'the light was green,' 'the

hour was noon.' Such witnesses may record, on the spot, what they observed. Suppose a police report recorded an objective fact--Bullcoming's counsel posited the address above the front door of a house or the readout of a radar gun. See Brief for Petitioner 35. Could an officer other than the one who saw the number on the house or gun present the information in court--so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically 'No.' See *Davis v. Washington*, 547 U.S. 813, 826, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (Confrontation Clause may not be 'evaded by having a note-taking police [officer] recite the . . . testimony of the declarant' (emphasis deleted)); *Melendez-Diaz*, 557 U.S., at 335, 129 S. Ct. 2527, 2546, 174 L. Ed. 2d 314, 336 (Kennedy, J., dissenting) ('The Court made clear in Davis that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second'...The New Mexico Supreme Court stated that the number registered by the gas chromatograph machine called for no interpretation or exercise of independent judgment on Caylor's part. 147 N.M., at 494-495, 226 P.3d, at 8-9. We have already explained that Caylor certified to more than a machine-generated number. See supra, at 653, 180 L. Ed. 2d, at 617. In any event, the comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar. This Court settled in *Crawford* that HN7 the 'obviou[s] reliab[ility]' of a testimonial statement does not dispense with the Confrontation Clause."

In *Bullcoming v. New Mexico*, 564 U.S. 647 at 651-652: "But surrogate testimony of the kind Razatos was equipped to give could not convey what Caylor knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part."

In *Bullcoming v. New Mexico*, 564 U.S. 647 at 662-663: "A recent decision involving another Sixth Amendment right--the right to counsel--is instructive. In *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006), the Government argued that illegitimately denying a defendant his counsel of choice did not violate the Sixth Amendment where 'substitute counsel's performance' did not demonstrably prejudice the defendant. Id., at 144-145, 126 S. Ct. 2557, 165 L. Ed. 2d 409. This Court rejected the Government's argument. '[T]rue enough,' the Court explained, 'the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair.' Id., at 145, 126 S. Ct. 2557, 165 L. Ed. 2d 409. If a 'particular guarantee' of the Sixth Amendment is violated, no substitute procedure can cure the violation, and '[n]o additional showing of prejudice is required to make the violation complete.' Id., at 146, 126 S. Ct. 2557, 165 L. Ed. 2d 409. If representation by substitute counsel does not satisfy the Sixth Amendment, neither does the opportunity to confront a substitute witness... In short, when the State elected to introduce Caylor's certification, Caylor became a witness Bullcoming had the right to confront. Our precedent cannot sensibly be read any other way. See *Melendez-Diaz*, 557 U.S., at 334, 129 S. Ct. 2527, 2545, 174 L. Ed. 2d 314, 336 (Kennedy, J., dissenting) (Court's holding means 'the . . . analyst who must testify is the person who signed the certificate')...We turn, finally, to the State's contention that SLD's blood-alcohol analysis reports are nontestimonial in character, therefore no Confrontation Clause question even arises in this case. *Melendez-Diaz* left no room for that argument, the New Mexico Supreme Court concluded, see 147 N.M., at 494, 226 P.3d, at 7-8; supra, at 656-657, 180 L. Ed. 2d, at 618, a conclusion we find inescapable."

In *Bullcoming v. New Mexico*, 564 U.S. 647 at 664: "The State maintains that the affirmations made by analyst Caylor were not 'adversarial' or 'inquisitorial,' Brief for Respondent 27-33; instead, they were simply observations of an 'independent scientis[t]' made 'according to a non-adversarial public duty,' id., at 32-33. That argument fares no better here than it did in *Melendez-Diaz*. HN10 A document created solely for an 'evidentiary purpose,' *Melendez-Diaz* clarified, made in aid of a police investigation, ranks as testimonial. 557 U.S., at 311, 129 S. Ct. 2527,

174 L. Ed. 2d 314 (forensic reports available for use at trial are 'testimonial statements' and certifying analyst is a ' witness for purposes of the Sixth Amendment).'"

In *Bullcoming v. New Mexico*, 564 U.S. 647 at 665: "The State and its amici urge that unbending application of the Confrontation Clause to forensic evidence would impose an undue burden on the prosecution. This argument, also advanced in the dissent, *post*, at 683, 180 L. Ed. 2d, at 635-636, largely repeats a refrain rehearsed and rejected in *Melendez-Diaz*. See 557 U.S., at 325-328, 129 S. Ct. 2527, 2540, 174 L. Ed. 2d 314, 330. The constitutional requirement, we reiterate, 'may not [be] disregard[ed] . . . at our convenience,' id., at 325, 129 S. Ct. 2527, 174 L. Ed. 2d 314, and the predictions of dire consequences, we again observe, are dubious, see *ibid.*"

In *Bullcoming v. New Mexico*, 564 U.S. 647 at 666: "Retesting 'is almost always an option . . . in [DWI] cases,' Brief for Public Defender Service for District of Columbia et al. as Amici Curiae 25 (hereinafter PDS Brief), and the State had that option here: New Mexico could have avoided any Confrontation Clause problem by asking Razatos to retest the sample, and then testify to the results of his retest rather than to the results of a test he did not conduct or observe... Notably, New Mexico advocates retesting as an effective means to preserve a defendant's confrontation right 'when the [out-of-court] statement is raw data or a mere transcription of raw data onto a public record.' Brief for Respondent 53-54. But the State would require the defendant to initiate retesting. Id., at 55; post, at 677, 180 L. Ed. 2d, at 632 (defense 'remains free to . . . call and examine the technician who performed a test'); *post*, at 681, 180 L. Ed. 2d, at 634 ("free retesting" is available to defendants). The prosecution, however, bears the burden of proof. *Melendez-Diaz*, 557 U.S., at 324, 129 S. Ct. 2527, 174 L. Ed. 2d 314 ('[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.'). Hence the obligation to propel retesting when the original analyst is unavailable is the State's, not the defendant's. See *Taylor v. Illinois*, 484 U.S. 400, 410, n. 14, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988) (Confrontation Clause's requirements apply 'in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own')."

In Bullcoming v. New Mexico, 564 U.S. 647 at 667: "Even before this Court's decision in *Crawford*, moreover, it was common prosecutorial practice to call the forensic analyst to testify. Prosecutors did so 'to bolster the persuasive power of [the State's] case[,] . . . [even] when the defense would have preferred that the analyst did not testify.' PDS Brief 8. We note also the 'small fraction of . . . cases' that 'actually proceed to trial.' *Melendez-Diaz*, 557 U.S., at 325, 129 S. Ct. 2527, 2540, 174 L. Ed. 2d 314, 330 (citing estimate that 'nearly 95% of convictions in state and federal courts are obtained via guilty plea')."

Decided by the Sixth Circuit Court of Appeals in *Washington v. Hofbauer*, 228 F.3d 689 at 694: "NATHANIEL R. JONES, Circuit Judge. The petitioner, Rufus Washington, a Michigan prisoner convicted of second-degree criminal sexual conduct, appeals the district court's dismissal of his § 2254 habeas petition. His petition alleged prosecutorial misconduct and ineffective assistance of counsel. We find that the prosecutor's misconduct was sufficiently egregious to violate Washington's due process rights, that Washington's trial counsel was ineffective in not objecting to that conduct, and that the state court did not reasonably apply the relevant law in finding otherwise. We are thus compelled to REVERSE and issue the writ."

In *Washington v. Hofbauer*, 228 F.3d 689 at 698: "Because Washington's petition was filed after April 24, 1996, the rules of the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA') apply. See *Tucker v. Prelesnik*, 181 F.3d 747, 752 (6th Cir. 1999)... HN2 The Supreme Court recently instructed that § 2254(d)(1) defines two categories of cases in which a state prisoner may gain habeas relief. See *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 1519-20, 146 L. Ed. 2d 389 (2000) (O'Connor, J., concurring). To gain habeas relief under the

first category, involving state decisions 'contrary to' federal law, a defendant must show that 'the state court arrived at a conclusion opposite to that reached by [the Supreme] Court on a question of law' or that 'the state court decided a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.' 120 S. Ct. at 1523. Under the second category, involving the 'unreasonable application of federal law by a state court, a federal habeas court must ask whether the state court's application of clearly established federal law was 'objectively reasonable.' Id. at 1521. If the federal court finds that, viewed objectively, the state court has correctly identified the governing legal principle from the Supreme Court's decisions 'but unreasonably applied that principle to the facts of the prisoner's case,' it may grant the writ. Id. at 1523. HN3 In *Williams*, the Supreme Court rejected the Fourth Circuit's definition of an 'unreasonable application' of the law by reference to a 'reasonable jurist.' Id. at 1521-22. By implication, the standard for AEDPA review this Court set forth in *Tucker* is also overruled. See 181 F.3d at 753 (stating that a writ will issue 'if the unreasonableness of the state court's application of clearly established precedent is not debatable among reasonable jurists')."

In *Washington v. Hofbauer*, 228 F.3d 689 at 699: "HN4 A fundamental rule of evidence is that a defendant's 'bad character' cannot be used to argue that the defendant committed the crime for which he is being tried, or had the propensity to commit that crime. See, e.g., Fed. R. Evid. 404(a) ('Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . .'); Mich. R. Evid. 404(a) (same); *Michelson v. United States*, 335 U.S. 469, 476, 93 L. Ed. 168, 69 S. Ct. 213 (1948) (stating that improper character evidence "weighs too much with the jury and . . . overpersuades them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge"); *United States v. Vance*, 871 F.2d 572, 575 (6th Cir. 1989) (providing that 'bad acts evidence is not admissible to prove character or criminal propensity' under Fed. R. Evid. 404(b)); *United States v. Ring*, 513 F.2d 1001, 1004 (6th Cir. 1975) (stating that in jury trials, evidence of a criminal defendant's bad acts or prior misconduct is inadmissible to show criminal propensity because it 'tends to confuse the issue of guilt or innocence of the specific offenses charged and to weigh too heavily with the jury'). HN5 When a prosecutor dwells on a defendant's bad character in this prohibited manner, we may find prosecutorial misconduct. See, e.g., *Cook v. Bordenkircher*, 602 F.2d 117, 120 (6th Cir. 1979) (noting that the 'prosecutor's misconduct in this case is severe' due to his 'persistent Ad hominem attack on the petitioner's character')."

In *Washington v. Hofbauer*, 228 F.3d 689 at 700: "HN6 Misrepresenting facts in evidence can amount to substantial error because doing so 'may profoundly impress a jury and may have a significant impact on the jury's deliberations.' *Donnelly v. DeChristoforo*, 416 U.S. 637, 646, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974). For similar reasons, asserting facts that were never admitted into evidence may mislead a jury in a prejudicial way. See *Berger v. United States*, 295 U.S. 78, 84, 79 L. Ed. 1314, 55 S. Ct. 629 (1935). This is particularly true when a prosecutor misrepresents evidence because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty. See id. at 88."

In *Washington v. Hofbauer*, 228 F.3d 689 at 701-702: "Given this testimony, we find that the State committed plain misconduct by stating that Tamara's story had not changed as she talked to these different individuals. Not only did the prosecutor improperly refer to statements not in evidence, but it is clear that the prosecutor's purpose was to enhance Tamara's credibility in the eyes of the jury. See, e.g., J.A. at 255 ('You think that a ten year old child is going to go through all of that, fool everybody, talking about two instances.'). Such bolstering is also improper. Cf. *United States v. Francis*, 170 F.3d 546, 551 (6th Cir. 1999) (stating that improper 'bolstering occurs when the prosecutor implies that the witness's testimony is corroborated by evidence known to the government but not known to the jury'); *United States v. Duval*, 902 F.2d 35, 1990 WL 52371, at *2 (6th Cir. 1990) (unpublished decision) (stating that HN7 improper witness vouching occurs when a prosecutor alludes to

evidence outside the record as supporting the witness's testimony)... 'HN8 It is always improper for a prosecutor to suggest that a defendant is guilty merely because he is being prosecuted or has been indicted.' *United States v. Bess*, 593 F.2d 749, 754 (6th Cir. 1979). It is equally improper to imply to a jury that an underlying factual predicate of a crime must be true due to the fact of indictment or prosecution. For these reasons, we find the State's boosting of Tamara's credibility based on facts not in evidence to constitute clear misconduct."

In *Washington v. Hofbauer*, 228 F.3d 689 at 702: "HN9 An essential ingredient of the Sixth Amendment right to counsel is that counsel provide constitutionally effective assistance. See *Powell v. Alabama*, 287 U.S. 45, 57, 77 L. Ed. 158, 53 S. Ct. 55 (1932). In *Strickland*, the Supreme Court established that the benchmark of effectiveness 'must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' 466 U.S. at 686... This Court has on several occasions found that a counsel's failure to object to prosecutorial misconduct constitutes defective performance when that failure is due to clear inexperience or lack of knowledge of controlling law, rather than reasonable trial strategy. See, e.g., *Gravley v. Mills*, 87 F.3d 779, 785-86 (6th Cir. 1996); *Rachel v. Bordenkircher*, 590 F.2d 200, 204 (6th Cir. 1978). HN12 Second, even if counsel's performance is deemed deficient, a defendant must show that those deficiencies were prejudicial to the defense. See *Strickland*, 466 U.S. at 692. To make this showing, the defendant must demonstrate that there 'is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' Id. at 694. The essential question is 'whether better lawyering would have produced a different result.' *McQueen*, 99 F.3d at 1311 (quoting *Ward v. United States*, 995 F.2d 1317, 1321 (6th Cir. 1993))."

In *Washington v. Hofbauer*, 228 F.3d 689 at 705: "Our rules addressing character evidence implicitly recognize the fine yet vital distinction between the risk of prejudice borne by evidence introduced for permissible reasons and the clear prejudice that results from an uncured and flagrantly improper use of that same evidence. Thus, even if some potential prejudice arises from the introduction of certain evidence, this Court generally presumes that if properly instructed by judges and guided by counsel, juries are capable of considering evidence for one purpose but not another. See generally *Richardson v. Marsh*, 481 U.S. 200, 211, 95 L. Ed. 2d 176, 107 S. Ct. 1702 (1987). In this case, an objection would have prompted the judge to inform the jurors that, counter to the prosecutor's suggestion, they could not convict Washington because he was the 'type' of person who would commit the alleged crime; we then would presume that the jury heeded that instruction in rendering its verdict. On the other hand, Keston's silence allowed the prosecutor's improper use of that evidence, as well as its improper suggestions to the jury of how to consider that evidence, to go uncorrected. For this reason, and because this was a close case riding on Washington's credibility, see infra, Washington was prejudiced by his counsel's failure to object to the closing argument."

In *Washington v. Hofbauer*, 228 F.3d 689 at 707: "Moreover, while the trial court cited *Darden v. Wainwright*, 477 U.S. 168, 182, 91 L. Ed. 2d 144, 106 S. Ct. 2464 (1986) in support of its argument that a 'decision not to object to the prosecutor's trial efforts may be considered sound trial strategy,' *Darden's* holding provides no support for its decision. The cited portion of *Darden* addresses prosecutorial misconduct that the Supreme Court found insufficient to constitute a due process violation; as part of the discussion, the court noted that 'defense counsel made the tactical decision not to present any witness other than petitioner.' Id. at 182 (emphasis added). The decision in no way condones a lawyer's failure to object to plain misconduct as legitimate trial strategy. In short, Keston's failure to object fell below an objective standard of reasonableness and constituted an omission outside the wide range of professionally competent assistance. Washington has shown that the failure to object was based on simple incompetence, and not on sound trial strategy. Because the trial court's conclusion merely echoed Keston's deeply flawed justification, its application of Strickland was objectively unreasonable."

In *Washington v. Hofbauer*, 228 F.3d 689 at 708-709: "Washington argues that the State's actions at trial constituted prosecutorial misconduct that denied him due process. While the Michigan Court of Appeals held that this claim was defaulted due to Keston's failure to object at trial, we excuse procedural default if a criminal defendant can demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional error. See *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). Here, our conclusion that Keston's failure to object comprised ineffective assistance of counsel provides the required 'cause.' See *Gravley*, 87 F.3d at 785 (citing *Coleman v. Thompson*, 501 U.S. 722, 753-54, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991)). We also find that for reasons stated supra--the severity of the misconduct, the lack of substantial evidence against Washington, and the length of time between the witness examinations and the closing arguments--Keston's error infected the entire trial with error of constitutional dimensions. See *Rust*, 17 F.3d at 161. Thus, the 'cause and prejudice' test is met with respect to Washington's claim of prosecutorial misconduct. We therefore may proceed to the merits of his argument... As the people's representative in our system of justice, a prosecutor must adhere to the rules and principles that ensure that a jury determines a defendant's guilt based on the evidence before it. In a close credibility contest such as this, with horrible acts alleged but scant hard evidence for the jury to weigh, a prosecutor must be doubly careful to stay within the bounds of proper conduct...One of defense counsel's most important roles is to ensure that the prosecutor does not transgress those bounds. In this case, both attorneys failed to perform their respective duties. We find that their failure deprived Washington of his constitutional rights, and that the state courts' conclusions to the contrary were objectively unreasonable. We therefore **REVERSE** the district court and grant a conditional writ of habeas corpus, giving the State of Michigan ninety days in which to provide Washington a new trial or release him."

In *Rinehart v. Brewer*, 561 F.2d 126 at 129: "In spite of the state's contrary contention, the Iowa Supreme Court's holding of waiver under state procedural law is not determinative in this habeas action. HN1 The waiver ruling under state procedural law bars federal habeas review of the underlying federal claims only if the defendant deliberately bypasses state procedures. Federal courts are required to apply federal constitutional standards to the waiver problem, that standard being whether the defendant made a 'considered choice' to waive the federal claim in state court. *Fay v. Noia*, 372 U.S. 391, 438-39, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963). A choice made by counsel not participated in by the defendant does not automatically bar habeas review."

In *Rinehart v. Brewer*, 561 F.2d 126 at 130-131: "Rinehart understood neither the nature of the charge nor the consequences of his guilty plea because of the inadequate explanations of the law given to him by defense counsel and the court. There is uncontradicted evidence in the record which suggests that Rinehart was not informed of the elements of the crime of second-degree murder. Since his own defense counsel were confused as to the distinctions among first- and second-degree murder, and manslaughter, it is inconceivable to conclude that Rinehart would have known of the intent element required to convict him of second-degree murder or that a guilty plea would be an admission of the existence of the intent to kill. In addition, the trial judge did not explain the charge to Rinehart. HN3 If the defendant was not informed that intent to cause the victim's death is an essential element of the crime charged, his guilty plea was not voluntarily entered. *Henderson v. Morgan*, 426 U.S. 637, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976)... But whether he was correctly informed or not, he did not understand life imprisonment to be a possibility. Defense counsel's continuing advice that a 25-to-35 year sentence could be expected, although only speculative opinion by counsel, was understood by the defendant to be 'the law'... Further, these infirmities were not cured by the trial court. Judge Brannon did not inquire whether the defendant understood the charge or the consequences of his guilty plea, and offered no advice in this respect."

In *Rinehart v. Brewer*, 561 F.2d 126 at 132: "Second, defense counsel failed to grasp the very real possibility that Rinehart was guilty of only manslaughter, not second-degree murder. The Cherokee Mental Health Institute report indicated that the victim might have been the

aggressor by sexually assaulting Rinehart. Rinehart was only five feet tall and weighed only 95 pounds at the time, while the victim was an older and larger person. Accordingly, competent counsel would have researched and investigated the possibility of manslaughter in two respects -- imperfect self-defense and provocation. Rinehart may have been unreasonable in using deadly force in self-defense to counter the assault, but his imperfect self-defense would justify a manslaughter conviction. Further, provocation may have existed here -- if the extenuating circumstances negate malice aforethought, Rinehart could be guilty of manslaughter but not of second-degree murder. However, defense counsel did not pursue the lesser-included charge of manslaughter and did not stress this possibility to Rinehart or his parents. Rinehart was obviously materially prejudiced because he was not informed of these possibilities before he entered his guilty plea. Finally, defense counsel did not pursue the possibility that much of the state's evidence could be excluded by a suppression motion at trial. Counsel knew of the circumstances surrounding the statement signed by Rinehart -- the five-hour police interrogation without the benefit of advice from counsel or his parents -- yet did not sufficiently investigate the matter. Defense counsel should at least have pursued the possibility that Rinehart's statement might be excludable. Further, counsel should have recognized that the defendant's knife and jacket might also have been excludable under the 'fruit of the poisonous tree' doctrine. Since all of the direct evidence which connected Rinehart to the crime charged was at least potentially excludable, the defendant was materially prejudiced by counsel's failure to adequately investigate the possibility of suppression."

In *Rinehart v. Brewer*, 561 F.2d 126 at 133: "Consequently, Judge Brannon concluded before the arraignment that he must sentence Rinehart to life imprisonment. The Judge knew he had to find Rinehart guilty of at least second-degree murder in order to impose a life sentence. Rinehart was therefore denied his right to an impartial tribunal at arraignment because Judge Brannon was unable to objectively perform his duty of ensuring that Rinehart's guilty plea was made voluntarily and understandingly. Further, Rinehart was fatally prejudiced by the fact that his defense counsel were not informed of the Judge's ex parte inquiry until after sentencing. Co-counsel has testified that he would not have advised Rinehart to plead guilty if he had known about Judge Brannon's trip to Iowa City. In addition, the sentencing procedure further violated Rinehart's due process rights. By his failure to disclose the Iowa City trip to defense counsel, Judge Brannon denied counsel the opportunity to challenge the information upon which the life sentence was partially based. While there is some question as to whether presentence reports must be disclosed, these ex parte conversations were not a presentence report and there is considerable authority that the court should not consider any other ex parte information in sentencing without making disclosure. See *Townsend v. Burke*, 334 U.S. 736, 92 L. Ed. 1690, 68 S. Ct. 1252 (1947); *United States v. Solomon*, 422 F.2d 1110 (7th Cir.), cert. denied, 399 U.S. 911, 90 S. Ct. 2201, 26 L. Ed. 2d 565 (1970). HN5 Information unfavorable to the accused on the issue of sentencing ought to be disclosed to defense counsel so that inaccuracies may be discovered. This need for disclosure is particularly acute in the Rinehart case because part of the information the physician related to Judge Brannon was based upon statements made by Rinehart while under the influence of a truth serum. Thus, the information which should have been disclosed was of doubtful reliability. Each of the above claims -- the involuntary guilty plea, ineffectiveness of counsel and the Judge's improper conduct -- is closely intertwined with, if not inseparable from, the others. We conclude that Rinehart is entitled to judgment as a matter of law, especially in view of the aggregate effect of these denials of due process. The decision and order of the district court are affirmed."

In *United States v. Anderson*, 201 F.3d 1145 at 1147: "On appeal, they raise a number of issues, including whether it was plain error not to instruct the jury on the lesser included offense of involuntary manslaughter. We conclude that the failure to give an involuntary manslaughter instruction was plain error, and we reverse."

In *United States v. Anderson*, 201 F.3d 1145 at 1148: "HN1 This court reviews de novo whether the offense for which an instruction was requested is actually a lesser included offense of the offense charged, and reviews for an abuse of discretion whether a jury could have found that

the defendant was guilty of the lesser included offense but not of the greater. See *United States v. Vaandering*, 50 F.3d 696, 703 (9th Cir. 1995). HN2 If the defendant did not request the lesser included offense instruction or does not object to its omission, we review only for plain error. See *United States v. Montgomery*, 150 F.3d 983, 996 (9th Cir. 1998). Anderson and Miranda were charged with conspiracy to murder under 18 U.S.C. § 1117 and with first degree murder under 18 U.S.C § 1111(a), which proscribes 'the unlawful killing of a human being with malice aforethought.' HN3 18 U.S.C. § 1112(a) proscribes manslaughter: Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: Voluntary-Upon a sudden quarrel or heat of passion. Involuntary-In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death. HN4 Voluntary and involuntary manslaughter are lesser included offenses of murder. See *United States v. Quintero*, 21 F.3d 885, 889 (9th Cir. 1994); *United States v. Skinner*, 667 F.2d 1306, 1309-10 & 1309 n.1 (9th Cir. 1982) (per curiam)."

In *United States v. Anderson*, 201 F.3d 1145 at 1149-1150: "HN6 We may correct plain error if first, there is an actual error, and second, the error is plain, or 'clea'" or 'obvious.' *United States v. Sayetsitty*, 107 F.3d 1405, 1411 (9th Cir. 1997) (citing *United States v. Olano*, 507 U.S. 725, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993)). 'Third, the error must have affected substantial rights, which typically means that the error must have been prejudicial.' Id. Fourth, we may 'exercise [our] discretion to notice a forfeited error . . . only if . . . the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.' *United States v. Barajas-Montiel*, 185 F.3d 947, 953 (9th Cir. 1999) (quoting *Johnson v. United States*, 520 U.S. 461, 467, 137 L. Ed. 2d 718, 117 S. Ct. 1544 (1997))...HN7 The failure to instruct on involuntary manslaughter was error if there was evidence in the record to support the theory that the killing was accidental. 'An accidental killing may be second degree murder, manslaughter, or no crime at all.' *United States v. Lesina*, 833 F.2d 156, 160 (9th Cir. 1987) (citing *Thomas v. United States*, 136 U.S. App. D.C. 222, 419 F.2d 1203, 1205 (D.C. Cir. 1969)). HN8 If the defendant killed with the mental state required for murder (intent to kill or recklessness with extreme disregard for human life), but the killing occurred in the 'heat of passion' caused by adequate provocation, then the defendant is guilty of voluntary manslaughter. The finding of heat of passion and adequate provocation negates the malice that would otherwise attach. By contrast, the absence of malice in involuntary manslaughter arises not because of provocation induced passion, but rather because the offender's mental state is not sufficiently culpable to meet the traditional malice requirements. Thus, involuntary manslaughter is an unintentional killing that evinces a wanton or reckless disregard for human life but not of the extreme nature that will support a findi Even when the evidence is conflicting, if any construction of the evidence and testimony would rationally support a jury's conclusion that the killing was unintentional or accidental, an involuntary manslaughter instruction must be given. HN9 When the defendant maintains that the killing was unintentional, the instruction is necessary even when there is also testimony by others that the defendant stated his intention to kill the deceased. See *Thomas*, 419 F.2d at 1205-06 & n.4 (where defendant maintained that victim was accidentally shot in scuffle over gun in victim's pocketbook, involuntary manslaughter instruction was required despite evidence of expressed intent to kill because 'a one-sided view of the evidence is obviously improper'); *United States v. Browner*, 889 F.2d 549, 553-55 (5th Cir. 1989) (where defendant stabbed husband and asserted she intended to threaten but 'the stabbing itself was an accident,' and jury could have concluded she was grossly negligent in swinging the knife, she was entitled to involuntary manslaughter instruction). As this circuit held in Paul, HN10 when evidence is presented in support of an accidental death theory, the instructions given must 'explain that involuntary manslaughter is an unintentional killing.' 37 F.3d at 500-01."

In *United States v. Anderson*, 201 F.3d 1145 at 1151-1152: "The government argues that the defense theory was that the killing was done in self-defense, and that because a killing in self-defense is intentional, such a killing cannot constitute involuntary manslaughter. But self-defense and involuntary manslaughter are not mutually exclusive. A defendant who intends to use non-deadly force to protect himself, but who

uses that force in a criminally negligent way resulting in death, could be found guilty of involuntary manslaughter. As we have explained: [HN11 Involuntary manslaughter] can occur in circumstances that would support a defense of self-defense. The example most easily conceived is where the defendant is assaulted but does not have a reasonable apprehension of suffering great bodily harm or death, and is therefore privileged to use force, but only non-deadly force, in self-defense. If the defendant attempts to use non-deadly force, but does so in a criminally negligent manner and death results, then both involuntary manslaughter and self-defense instructions would be warranted, particularly if there is any disputed fact issue concerning the quantum of danger reasonably perceived by the defendant. This situation must be distinguished from the typical case of 'imperfect self-defense,' in which the defendant intends to use deadly force in the unreasonable belief that he is in danger of death or great bodily harm. In this circumstance, the offense is classed as voluntary manslaughter. *United States v. Manuel*, 706 F.2d 908, 915 (9th Cir. 1983) (distinguishing *United States v. Skinner*, 667 F.2d 1306 (9th Cir. 1982)); see also *United States v. Benally*, 146 F.3d 1232, 1237 (10th Cir. 1998) (involuntary manslaughter instruction must be given when evidence supports the criminally negligent exercise of non-deadly force); *United States v. Begay*, 833 F.2d 900, 901-02 (10th Cir. 1987) (same). The evidence in this case could support a jury finding that Miranda and Anderson were privileged to use non-deadly force against Jackson's imminent assault, and attempted merely to wrest the knife from his control, but did so in a criminally negligent manner resulting in death. This would be entirely consistent with the defendants' testimony throughout the trial that they did not intend to kill Jackson. An instruction on involuntary manslaughter was thus required, and it was error not to give the instruction... As indicated in the preceding section, it is clear from the case law that where there is evidence that the victim's death was accidental, an instruction explaining the mental state necessary for involuntary manslaughter is necessary. See *Paul*, 37 F.3d at 500 (in 1993, 'it was clear and obvious under the case law that such an instruction was required'); *Manuel*, 706 F.2d at 915 (involuntary manslaughter instruction required when defendant attempts to use non-deadly force in self-defense in a criminally negligent manner). Thus the failure to instruct on involuntary manslaughter was obvious error... In *Paul*, this court found that the failure to instruct on the mental state requirements for voluntary and involuntary manslaughter was prejudicial because it 'created a substantial risk that [defendant] was convicted of voluntary manslaughter, even though the jury may have believed the killing was neither intentional nor extremely reckless.' 37 F.3d at 500; see *United States v. Shortman*, 91 F.3d 80, 82 (9th Cir. 1996) (plain error to fail to instruct on 'gross negligence' in close case charging involuntary manslaughter). Prejudice is even more likely in this case, as the jury received no instruction at all on the lesser included offense of involuntary manslaughter, increasing the risk that Miranda and Anderson were convicted of voluntary manslaughter because under the instructions as given, the only alternatives were to convict of murder or to acquit entirely. HN12 An error that results in a longer sentence undoubtedly affects substantial rights. See *United States v. Martinez-Rios*, 143 F.3d 662, 676 (2d Cir. 1998). Involuntary manslaughter carries a shorter maximum sentence (six years) than voluntary manslaughter (ten years). See 18 U.S.C. § 1112(b). Anderson and Miranda each received the maximum ten-year sentence for voluntary manslaughter."

In *United States v. Anderson*, 201 F.3d 1145 at 1152-1153: "A failure to give a jury instruction, even if in error, does not seriously affect the fairness and integrity of judicial proceedings if the defense at trial made no argument relevant to the omitted instruction. For example, where jury instructions did not include an instruction on the specific intent required for conviction of alien smuggling, we declined to find that the integrity of the proceedings was thrown into question because the defendant never argued that she did not intend to violate the immigration laws. See *Barajas-Montiel*, 185 F.3d at 953; see also Johnson, 520 U.S. at 470 (erroneous instruction on materiality had no serious effect on integrity of proceedings where "petitioner has presented no plausible argument" that her false statement was not material). In this case, by contrast, Miranda and Anderson both testified that they had not intended to kill Jackson, and that Jackson was stabbed when Miranda grabbed for Jackson's knife, with Anderson holding Jackson down to help Miranda gain control of the knife. The government characterizes this testimony

as evidence not of involuntary manslaughter, but of self-defense, for which an instruction was given. But 'circumstances HN14 that would support a defense of self-defense' may also support a conviction for involuntary manslaughter, when a defendant attempts to use non-deadly force but does so in a criminally negligent manner, resulting in death. *Manuel*, 706 F.2d at 908. The circumstances described by the defendants' testimony lend themselves to such an interpretation. Miranda testified that he grabbed the knife to get control of it, not in order to stab Jackson in self-defense, and that the fatal wound occurred in the course of the struggle for control. Anderson's testimony was similar, as he testified that 'I think [Jackson] fell on that knife.' It is thus consistent with the evidence that the killing was 'an unintentional killing that evinces a wanton or reckless disregard for human life but not of the extreme nature that will support a finding of malice.' *Paul*, 37 F.3d at 499 (quotations omitted)... The jury was instructed that voluntary manslaughter required no premeditation, but did require that the defendant act on a sudden quarrel or heat of passion. HN15 A defendant arguing voluntary manslaughter 'attempts to negate the malice element by claiming, in essence, that she was not acting maliciously because some extreme provocation, beyond what a reasonable person could be expected to withstand, severely impaired her capacity for self-control in committing the killing.' *United States v. Quintero*, 21 F.3d 885, 890 (9th Cir. 1994)... Neither Miranda nor Anderson testified that he was provoked beyond control when Jackson was stabbed. Nor did they testify that the physical altercation was sufficient provocation to make them lose control. See *United States v. Wagner*, 834 F.2d 1474, 1487 (9th Cir. 1987) ('sudden quarrel' mitigates culpability only if altercation causes heat of passion). Instead, they testified that the stabbing was an accident during the struggle, a claim that is not inconsistent with the evidence. Cf. id. at 1479-87 (not plain error to fail to give involuntary manslaughter instruction where the evidence is inconsistent with the crime, as defendant pulled own knife and chased other inmate, stabbing him to death). The evidence of voluntary manslaughter thus was not overwhelming. And the government's theory was that the killing was a planned and premeditated first-degree murder, as summarized in its opening statement that Miranda and Anderson 'did not kill James Jackson by accident or self-defense, but instead they planned this murder in advance.' The government also maintained that the defendants did not act in the heat of passion. HN16 When the evidence linking the defendant to the crime is not strong, we have found a serious effect on the integrity and public reputation of the proceeding. See *Guam v. Veloria*, 136 F.3d 648, 653 (9th Cir. 1998)."

In *United States v. Anderson*, 201 F.3d 1145 at 1154: "In this case, the failure to give an involuntary manslaughter instruction also created the risk that the jury chose the least of the lesser included offenses contained in the instructions as given, and wrongfully convicted Miranda and Anderson of voluntary manslaughter. The instructions deprived Miranda and Anderson of their right to have the jury consider whether their version of events - that the killing was accidental - entitled them to a conviction of the lesser offense of involuntary manslaughter...We do not lightly exercise our discretion to find plain error and to conclude that the omission of an involuntary manslaughter instruction 'seriously affected the fairness, integrity, or public reputation' of Miranda and Anderson's trial. Our review of the record and the circumstances of the trial convince us that the integrity of the judicial proceedings can best be ensured by reversal, subject to retrial with proper instructions and the physical evidence that was unavailable at the second trial."

In *United States v. Brown*, 287 F.3d 965 at 973: "HN9 A suspect who has been advised of his right against self-incrimination may waive that right 'provided the waiver is made voluntarily, knowingly, and intelligently.' *Miranda*, 384 U.S. at 444. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. *United States v. Hernandez*, 913 F.2d 1506, 1509 (10th Cir. 1990). HN10 A determination of voluntariness is based on the totality of the circumstances. We examine several factors including the characteristics of the suspect, such as his age, intelligence, and education,

and the details of the interrogation, such as whether the suspect was informed of his rights, the length of the detention and the interrogation, and the use or threat of physical force. *Nguyen*, 155 F.3d at 1222. Although Mr. Brown faults the district court for failing to address several of these factors, he does not explain how they rendered his statements involuntary. The district court recognized that Mr. Brown was intoxicated when he was arrested and first given his Miranda warnings but, as the court pointed out, Mr. Brown was not questioned at that point."

In *United States v. Brown*, 287 F.3d 965 at 974-976: "Mr. Brown maintains that the trial court erred in refusing to give his requested instruction on the lesser included offense of involuntary manslaughter. His defense theory was that he acted in self-defense in a criminally negligent manner in causing the death of John Roy. The district court denied the request, stating that the jury could not reasonably return a verdict of involuntary manslaughter on the evidence...HN12 A defendant seeking a lesser included offense instruction must satisfy four criteria. See *United States v. Humphrey*, 208 F.3d 1190, 1206 (10th Cir. 2000); *United States v. Yazzie*, 188 F.3d 1178, 1185 (10th Cir. 1999). First, the defendant must make a proper request; second, the lesser included offense must contain some but not all of the elements of the charged offense; third, the elements differentiating the two offenses must be in dispute; and fourth, the evidence must allow the jury to rationally acquit the defendant on the greater charge and convict on the lesser charge. See *Yazzie*, 188 F.3d at 1185. While we have held that a trial court's decision on whether the evidence justifies a lesser included offense instruction is reviewed for an abuse of discretion, we have also pointed out that 'this . . . is no broad ranging discretion but is focused narrowly on whether there is any evidence fairly tending to bear on the lesser included offense.' *Humphrey*, 208 F.3d at 1206. '[A] defendant is always entitled to an instruction giving his theory of defense if supported by the evidence.' *Yazzie*, 188 F.3d at 1185 (quoting *United States v. Moore*, 108 F.3d 270, 273 (10th Cir. 1997)). 'In conducting this review, we must give full credence to defendant's testimony.' Id. Moreover, HN13 the defendant is entitled to the instruction even if the evidence supporting it is weak and 'depends on an inference of a state of facts that is ascertained by believing defendant as to part of his testimony and prosecution witnesses on the other points in dispute.' *Humphrey*, 208 F.3d at 1207-08. Mr. Brown easily satisfied the first two elements of the lesser included offense inquiry. First, he made a proper request for the involuntary manslaughter instruction. Second, HN14 involuntary manslaughter is a lesser included offense of second degree murder, the crime with which he was charged. See *United States v. Begay*, 833 F.2d 900, 901 (10th Cir. 1987) ... We also conclude Mr. Brown met the third prerequisite, which requires that the element differentiating the two offenses be in dispute. HN15 Second degree murder and involuntary manslaughter both involve the unlawful killing of a human being. See United States v. Wood, 207 F.3d 1222, 1228 (10th Cir. 2000). 'The difference between them is the requisite mens rea.' Id. Second degree murder is a general intent crime requiring malice aforethought, an element that may be established, inter alia, 'by evidence of conduct which is reckless and wanton, and a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm.' Id. (quoting *United States v. Soundingsides*, 820 F.2d 1232, 1237 (10th Cir. 1987)). 'The concepts of depraved heart and reckless and wanton, and a gross deviation from a reasonable standard of care are functionally equivalent in this context.' Id. HN16 Involuntary manslaughter, as applicable to this case, is 'the unlawful killing of a human being without malice . . . in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.' 18 U.S.C. § 1112(a). 'The defendant's acts must amount to gross negligence, defined as wanton or reckless disregard for human life.' *Wood*, 207 F.3d at 1228...As the cited authorities demonstrate, HN17 while 'the distinction between involuntary manslaughter and second-degree murder is that the former does not require malice aforethought, the definitions of malice aforethought and without due care and circumspection developed in our case law . . . use overlapping terminology: both refer to reckless and wanton behavior.' Id. at 1229. 'The substantive distinction is the severity of the reckless and wanton behavior: Second-degree murder involves reckless and wanton disregard for human life that is extreme in nature, while involuntary manslaughter involves reckless and wanton disregard that is not extreme in nature.' Id. (citing cases); see also *Yazzie*, 188 F.3d at 1187 (in instructing on involuntary manslaughter,

court must distinguish extreme mental state evincing wanton or reckless disregard for human life allowing inference of malice aforethought from less extreme state of mind required for lesser included offenses)...The government's theory of the case was that Mr. Brown was angry with Mr. Roy, that he intended to use the knife and to inflict the wound, and that the force he used was fueled by rage and anger. The government argued to the jury that Mr. Brown's acts were callous, wanton and reckless. In requesting an instruction on involuntary manslaughter, Mr. Brown asserted that the death of Mr. Roy occurred during an imperfect self-defense, i.e., that Mr. Brown inadvertently caused the death while defending himself, a lawful act, but did so in an unlawful manner by using excessive force. Whether Mr. Brown acted with the extreme recklessness and wantonness necessary to establish malice aforethought is therefore the disputed element here...We thus turn to the fourth criteria governing a defendant's entitlement to a lesser included offense to determine whether a jury could rationally convict Mr. Brown of second degree manslaughter and acquit him of second degree murder. In making this assessment, we bear in mind that the instruction must be given if there is any evidence to support it, even if that evidence is weak and contradicted, that we must give full credence to Mr. Brown's testimony, and that 'there may be some evidence of a lesser offense even though this depends on an inference of a state of facts that is ascertained by believing defendant as to part of his testimony and prosecution witnesses on the other points in dispute.' *Humphrey*, 208 F.3d at 1208 (quoting *Belton v. United States*, 127 U.S. App. D.C. 201, 382 F.2d 150, 155 (D.C. Cir. 1967), and omitting citations and internal quotations, and adding emphasis)...Our cases recognize that HN18 under section 1112(a), a defendant may commit involuntary manslaughter if he acts in self-defense but is criminally negligent in doing so. See, e.g., *Yazzie*, 188 F.3d at 1186; *United States v. Benally*, 146 F.3d 1232, 1237 (10th Cir. 1998); *Begay*, 833 F.2d at 901. In *Yazzie* we held that an involuntary manslaughter instruction was required when, during a melee involving several participants, the defendant stabbed the victim three times after the victim was knocked to the ground. Evidence supporting the instruction included the victim's threatening body language, his violent nature, the defendant's belief that the victim was armed, the fact that the defendant was five feet six inches tall and weighed 180 pounds while the victim was six feet five inches tall and weighed 280 pounds, and the fact that all of the participants had been drinking. We held this evidence sufficient to support the instruction despite evidence of the brutality of the attack, evidence that the victim was just searching for a 'party,' and testimony tending to show that the defendant had not seen a weapon or been told about a gun...In *Benally*, the victim was also killed during a melee involving the defendant and other participants, all of whom had been drinking. We held that an involuntary manslaughter instruction was required by the defendant's testimony that his participation in the fight was minimal, that he struck the victim when the victim punched him only because he did not want to be hit again, and that he did not intend to hurt or kill anyone. We concluded that this evidence supported the instruction despite conflicting testimony that the defendant kicked the victim in the head and side until restrained and hit him in the face until held back."

In *United States v. Brown*, 287 F.3d 965 at 977: "We conclude that this evidence, while contradicted to some degree by other testimony and by Mr. Brown's prior statement to Agent Hammergren, is nonetheless sufficient to allow the jury to find that while Mr. Brown was criminally negligent in attempting to defend himself with a knife, he did not act with the extreme reckless and wanton disregard for human life required to support a conviction for second degree murder. The district court erred in taking the *mens rea* issue from the jury by refusing to instruct on involuntary manslaughter. HN19 'If there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter.' *Humphrey*, 208 F.3d at 1207 (quoting *Stevenson v. United States*, 162 U.S. 313, 323, 40 L. Ed. 980, 16 S. Ct. 839 (1896) and adding emphasis)."

In *State v. Call*, 1996 Ohio App. LEXIS 174 at 1-5: "Defendant, John W. Call, was convicted of Murder and Kidnapping in 1974. His conviction was affirmed by this court in 1975...In 1978, Call filed a motion claiming the ineffective assistance of counsel. The trial court treated

this motion as a petition for post-conviction relief, and dismissed the motion for the reason that the record failed to exemplify the claimed ineffective representation...In 1986, Call filed a petition to vacate his sentence, but this petition was overruled for the reason that the record failed to support his contention, among others, that he was denied the effective assistance of counsel at his trial...In March, 1995, Call filed another motion to vacate his conviction. The trial court granted the State's motion for summary judgment, and dismissed the petition upon the grounds that it was barred by the doctrine of ***res judicata***. Specifically, the trial court found that Call's contention that his conviction was not supported by sufficient evidence, or was against the manifest weight of the evidence, could and should have been the subject of a direct appeal, so that his failure to raise those issues on appeal, or the adverse judgment of this court on appeal, precluded raising them in a petition for post-conviction relief. With respect to the ineffective assistance of trial counsel claim, the trial court found that this issue had been raised in Call's previous petitions for post-conviction relief, and had been resolved adversely to him. Therefore, the trial court found that this claim was also barred by the doctrine of ***res judicata***. Accordingly, the trial court dismissed the petition. From the dismissal of this petition, Call appeals...We agree with the trial court that any matters that he could have raised on direct appeal, or any matters that were raised on direct appeal and resolved adversely to Call, are barred by the doctrine of ***res judicata***...Call's claim of ineffective assistance of trial counsel depends upon matters outside of the record. Accordingly, it could not have been determined on direct appeal...The trial court cited ***State v. Castro*** (1979), 67 Ohio App. 2d. 20, 425 N.E.2d 907, for the proposition that HN1 the doctrine of ***res judicata*** is applicable to consecutive post-conviction proceedings. Castro is based upon ***State v. Perry*** (1967), 10 Ohio St. 2d 175, 226 N.E.2d 104. ***Perry*** was decided on May 3, 1967. Later that year, the statute regulating post-conviction relief, R.C. 2953.23(A), was amended to read as follows: HN2 Whether a hearing is or is not held, the court may, in its discretion and for good cause shown, entertain a second petition or successive petitions for similar relief on behalf of the petitioner based upon the same facts or on newly discovered evidence...The above-quoted provision providing for successive petitions for post-conviction relief based upon the same facts used to support a previous petition for post-conviction relief was not in the statute at the time that ***State v. Perry*****, supra,** was decided...In view of the amendment to R.C. 2953.23(A), we agree with Judge Whiteside in his opinion in ***State v. Perdue*** (1981), 2 Ohio App. 3d 285, 441 N.E.2d 827, that HN3 a trial court has discretion to entertain a second or successive petition for post-conviction relief even when it involves the same issue and the same facts that were previously raised by the petitioner, and resolved adversely to the petitioner, in a previous petition for post-conviction relief...From the decision of the trial court in the case before us, it is clear that the trial court erroneously concluded that it did not have discretion to entertain Call's third petition for post-conviction relief. Because the trial court erred when it so concluded, and because we cannot determine this error to have been harmless, Call's assignment of error is sustained, and the judgment of the trial court is ***Reversed***. This cause is remanded for the trial court to exercise its discretion to determine whether it wishes to consider Call's claim of ineffective assistance of trial counsel. If the trial court should decide to exercise its discretion not to entertain this claim, the trial court may again dismiss Call's petition for post-conviction relief, noting its exercise of discretion."

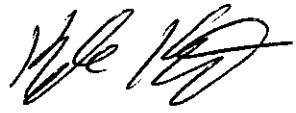
CONCLUSION

Every cited authority was decided prior to my trial date of February 6-10, 2017. The United States Supreme Court and other inferior Court's following the rules promulgated by the United States Supreme Court decided the law enforcement occurring in the cases conflicted with the rules promulgated by the United States Supreme Court. The decisions rendered by the Courts following the rules gave no further force and effect to the conflicting laws. The rules promulgated by the United States Supreme Court are not being enforced through the judges of the Kingdom of Judah. The law enforcement officers, the prosecution, are blatantly violating the rules promulgated by the United States Supreme Court and promoting slavery with no way for the indigenous oppressed poor man to protect himself against the blatant corrupt law enforcement officials placed in charge of his protection.

In accordance with the Supremacy Clause of the United States Constitution the laws being enforced in my case are *Ex Post Facto*. The laws being enforced in my case are prohibited by Article 1 Section 9 Clause 3. The laws being enforced in my case are prohibited by Article 1 Section 10 Clause 1. The laws being enforced in my case are contrary to Due Process of law interpreted through the Bill of Rights. The laws being enforced in my case are causing involuntary servitude contrary to Due Process of Law and that is slavery. Slavery is to be prohibited through Constitutional Amendment 13. The laws being enforced in my case are contrary to my civil rights and Due Process of Law guaranteed through Constitutional Amendment 14. To ignore my claims in this petition is the equivalency of endorsing slavery.

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Kyle Z. Kurtz – Pro Se

January 26, 2022