**No. _____**

---

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

---

EARL JONES,
*Petitioner*,

v.

OHIO,
*Respondent*.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO COURT OF APPEALS, FIRST APPELLATE DISTRICT

---

# PETITION FOR WRIT OF CERTIORARI

---

**OFFICE OF THE OHIO PUBLIC DEFENDER**

PETER GALYARDT
Asst. Ohio Public Defender
(*Counsel of Record)*

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
peter.galyardt@opd.ohio.gov

*Counsel for Petitioner, Earl Jones*

## QUESTION PRESENTED

Whether a reviewing court must consider all the evidence in determining whether inferences from basic facts to ultimate facts are reasonable to prove an ultimate fact beyond a reasonable doubt.

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceeding other than those listed in the caption.

Pursuant to Rule 29.6, petitioner states that no parties are corporations.

## RELATED PROCEEDINGS

*State v. Jones*, No. B-1602671, Judgment Entry, Sentence, Incarceration, Court of Common Pleas, Hamilton County, Ohio (Nov. 22, 2017);

*State v. Jones*, No. B-1602671, Judgment Entry, Sentence, Incarceration, Nunc Pro Tunc, Court of Common Pleas, Hamilton County, Ohio (Dec. 21, 2017);

*State v. Jones*, 151 N.E.3d 1059 (Ohio Ct. App. 2020);

*State v. Jones*, 182 N.E.3d 1161 (Ohio 2021);

*State v. Jones*, 176 N.E.3d 767 (Ohio 2021).

## TABLE OF CONTENTS

**Page No.**


Question Presented ..... i

Parties to the Proceedings and Corporate Disclosure Statement ..... ii

Related Proceedings ..... ii

Table of Contents ..... iii

Table of Authorities ..... iv

Petition for Writ of Certiorari ..... 1

Opinions Below ..... 1

Jurisdictional Statement ..... 1

Relevant Constitutional and Statutory Provisions ..... 2

Introduction ..... 2

Statement of the Case ..... 7

Reason for Granting the Petition:

This Court should issue a GVR order because the Supreme Court of Ohio's decision conflicts with this Court's decision in *Jackson*. ..... 12

Conclusion ..... 24

Appendix:

Appendix A: Supreme Court of Ohio decision ..... A-1

Appendix B: Supreme Court of Ohio reconsideration denial ..... B-1

Appendix C: Appellate court decision ..... C-1

Appendix D: Trial court judgment entry of sentence ..... D-1

Appendix E: Trial court nunc pro tunc judgment entry of sentence ..... E-1

Appendix F: Letter extending time to file Petition for Writ of Certiorari ..... F-1

## TABLE OF AUTHORITIES

**Page No.**

**CASES:**

*Jackson v. Virginia*, 443 U.S. 307 (1979) ..... *passim*

*Lawrence v. Chater*, 516 U.S. 163 (1996) ..... 12

*State v. Jones*, Hamilton Common Pleas No. B-1602671, Judgment Entry (Nov. 22, 2017) ..... 1

*State v. Jones*, Hamilton Common Pleas No. B-1602671, Judgment Entry (Dec. 21, 2017) ..... 1

*State v. Jones*, 151 N.E.3d 1059 (Ohio Ct. App. 2020) ..... 1

*State v. Jones*, 176 N.E.3d 767 (Ohio 2021) ..... 1

*State v. Jones*, 182 N.E.3d 1161 (Ohio 2021) ..... 1

*State v. Palmer*, 687 N.E.2d 685 (Ohio 1997) ..... 19,21

*State v. Taylor*, 676 N.E.2d 82 (Ohio 1997) ..... 19,21

*Victor v. Nebraska*, 511 U.S. 1 (1994) ..... 13,14,24

*Youngblood v. West Virginia*, 547 U.S. 867 (2006) ..... 12

**CONSTITUTIONAL PROVISIONS:**

Fifth Amendment, United States Constitution ..... 2

Fourteenth Amendment, United States Constitution ..... 2

**STATUTES:**

28 U.S.C. § 1257 ..... 1

Ohio Revised Code § 2903.01 ..... 2,11

Ohio Revised Code § 2903.02 ..... 11

Ohio Revised Code § 2923.12 ..... 11

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Earl Jones respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio.

## OPINIONS BELOW

The Supreme Court of Ohio's decision is reported at 182 N.E.3d 1161, and reprinted at App. A-1. The Supreme Court of Ohio's reconsideration denial is reported at 176 N.E.3d 767, and reprinted at App. B-1. The Ohio Court of Appeals decision is reported at 151 N.E.3d 1059, and reprinted at App. C-1. The Court of Common Pleas, Hamilton County, Ohio, No. B-1602671, judgment entry is not reported but is reprinted at App. D-1. Finally, the Court of Common Pleas, Hamilton County, Ohio, No. B-1602671, nunc pro tunc judgment entry is not reported but is reprinted at App. E-1.

## JURISDICTIONAL STATEMENT

The Supreme Court of Ohio's decision was issued September 23, 2021, its reconsideration denial was issued November 23, 2021, and the Honorable Justice Brett Kavanaugh extended the time to file a petition for writ of certiorari until April 22, 2022. *See* App. A; App. B; App. F. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution reads:

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

Section 1 of the Fourteenth Amendment to the United States Constitution reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code § 2903.01(A) reads: "No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy."

## INTRODUCTION

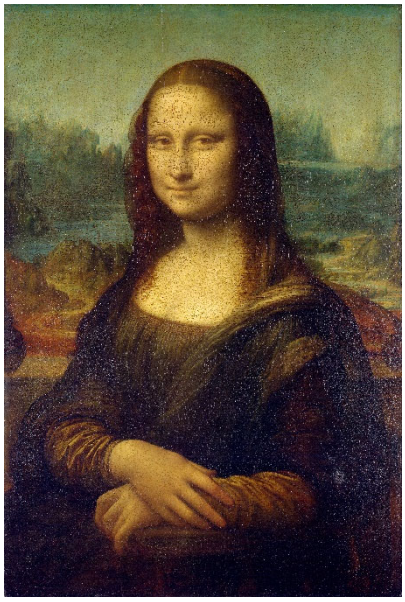
This is an aggravated-murder case in which Ohio's First District Court of Appeals, Hamilton County, reversed petitioner's conviction for insufficient evidence as to the prior-calculation-and-design element of aggravated murder. App. C. The

appellate court properly considered only reasonable inferences from *all* the evidence in its determination in line with this Court's directive in *Jackson v. Virginia*, 443 U.S. 307 (1979). App. C, at ¶ 12-26. The prosecution appealed to the Supreme Court of Ohio, and that court narrowly reversed the lower appellate court, through a vote of four-to-three, with the fourth vote concurring in judgment only with no opinion. App. A. In doing so, the Supreme Court of Ohio's rationale and conclusion both contravene and conflict with *Jackson* due to unreasonable inferences and failing to consider *all* the evidence. *Id.* at ¶ 18-27. Petitioner asks this Court to grant certiorari, vacate the Supreme Court of Ohio decision, and remand to that court for a proper sufficiency review under *Jackson*.

The Supreme Court of Ohio's error can be envisaged through the following demonstration.

The painting below appears to be an abstract or monochromatic piece of art—possibly a landscape.

Instead, it is the top-right segment of this.



Removed from its contextual whole, any portion can appear to be something it is not. The Supreme Court of Ohio used this myopic sleight of hand with the evidence in this case to support its prior-calculation-and-design conclusion. This Court's decision in *Jackson* prohibits such a manipulation, for it demands inferences to be reasonable based upon the combined and cumulative force of *all* the evidence. *Jackson*, 443 U.S. at 319, 325-326. Viewing evidence in the light most favorable to the prosecution, as required by *Jackson*, does not mean that evidence can be handpicked to be considered in isolation, but that distortion is precisely what the Supreme Court of Ohio did here. App. A, at ¶ 16, 18-27.

The following chart illustrates how the evidence was reduced to make a prior-calculation-and-design inference appear reasonable, when such an inference is plainly unreasonable once *all* the evidence is reckoned with. Jones is petitioner,

Neri is the man Jones killed, and Prather is both the mother of Jones's son, and the woman Jones and Neri were in dispute over.

| **The Supreme Court of Ohio's Hand-Picked Slice of Evidence** | **The Remaining Whole of the Evidence** |
|---|---|
| Jones rescheduled and relocated the planned fight to coincide with the time and location at which he would pick up his son. App. A, at ¶ 22, 26. | Prather altered the location of the exchange of her and Jones's son on the night in question from Jones's apartment to her house because Prather's sister refused to drive the son to Jones's apartment; Neri lived with Prather and was in constant, real-time communication with her, Jones knew this, and Jones therefore understood that he could not arrange a fight at a crosstown location to which he never intended to appear as was his *modus operandi* in avoiding a physical confrontation with Neri because Neri knew he was going to pick up his son from Prather's house on the night and time in question; Neri arranged for his friends to be in cars on the street in front of Prather's house at the time of Jones's arrival; Prather kissed Neri upon Jones's arrival as Neri went outside to confront Jones; Prather purposely kept her son from going outside to his father, instead sending him upstairs upon Jones's arrival, because she anticipated the expected confrontation between Neri and Jones was inappropriate for the child; and Prather's family members did not facilitate the exchange of the son to prevent contact between Neri and Jones as was their standard practice on the night in question. App. C, at ¶ 2-7, 12-26. |
| Jones parked his car in a no-parking zone against the flow of traffic, left the engine running, and left his driver-side door open. App. A, at ¶ 22, 26. | Due to the severe animosity between Jones and Neri, which escalated monumentally on the morning of the events that led to this case due to Jones's public disclosure of provocative photos of |

| | |
|---|---|
| | Prather, all exchanges of the son were expedited to avoid contact between the two men, but that did not occur this night; and immediately after shooting Neri Jones called 9-1-1 while driving directly from Prather's house to the nearest sheriff station for his peaceful surrender to law enforcement during which he fully complied with all commands. App. C, at ¶ 2-7, 12-26. |
| Jones pocketed the gun rather than leaving it in the car. App. A, at ¶ 24, 26. | The gun was a double-action revolver and Jones reasonably believed Neri had threatened gun violence against Jones and actively carried a gun while searching for Jones in the recent days leading up to the night in question. App. C, at ¶ 2-7, 12-26; Tr. 592. |
| Jones took several steps toward Neri. App. A, at ¶ 20, 26. | Jones went to the house to pick up his son, who was in the house rather than outside with Prather or a member of her family to facilitate the exchange, so Jones walked toward the house, from which Neri exited and aggressively walked from the front door of the house, down the walkway, and down the driveway toward Jones while taking his sweatshirt off and clenching his fists preparing to fight, to which Jones calmly responded, "Can I get my kid?," after which Neri continued toward Jones before Jones fired the gun. App. C, at ¶ 2-7, 12-26; Tr. 1028, 1248. |
| Witnesses testified that Jones fired after Neri turned and ran. App. A, at ¶ 25-26. | The physical evidence showed wounds only to the front of Neri's body and the testimony described three shots in quick succession with Neri simultaneously turning away. App. C, at ¶ 2-7, 12-26; Tr. 1167-1169, 1173-1174, 1248. |

Put simply, the five identified facts—even when considered in combination and cumulatively and in the light most favorable to the prosecution—properly viewed as part of the contextual whole of basic-fact evidence do not support a

reasonable inference of prior calculation and design. App. C, at ¶ 21 ("It defies logic to conclude that Jones's plan was to shoot Neri in the front yard of his ex-girlfriend's house with witnesses around and his child present.").

## STATEMENT OF THE CASE

Jones and Prather are the biological parents of their son. App. C, at ¶ 2. After their son's birth, Jones and Prather continued to date for three years, but eventually ended their relationship in October 2015. *Id*. In December 2015, Prather began dating Neri. *Id*. Neri lived with Prather and her family, including her son, between January and May of 2016. *Id*.

There was instant animosity between Jones and Neri. *Id*. at ¶ 3. Jones regularly used racial epithets to describe Neri, and targeted both Neri and Prather with vulgar insults. *Id*. Because of the relationship between Jones and Neri, Prather and her family took various steps to reduce the chances for confrontation. *Id*. For instance, Prather's mother acted as an intermediary for the pick-up and drop-off of their son. App. C, at ¶ 3. Prather's mother would drop their son off at Jones's apartment and she would meet him outside when he returned the child to the Prather house. *Id*. All involved attempted to make transfers of the son quick, because Prather's family wanted to reduce the time Jones had to wait there to diminish the chances that he and Neri would see each other. *Id*.

Jones and Neri also had a history of arranging fist fights that never occurred. App.C, at ¶ 4. Frequently, Jones would tell Neri to meet him at a specific location, Neri would go to that location, yet Jones would not show. *Id*. This occurred on May

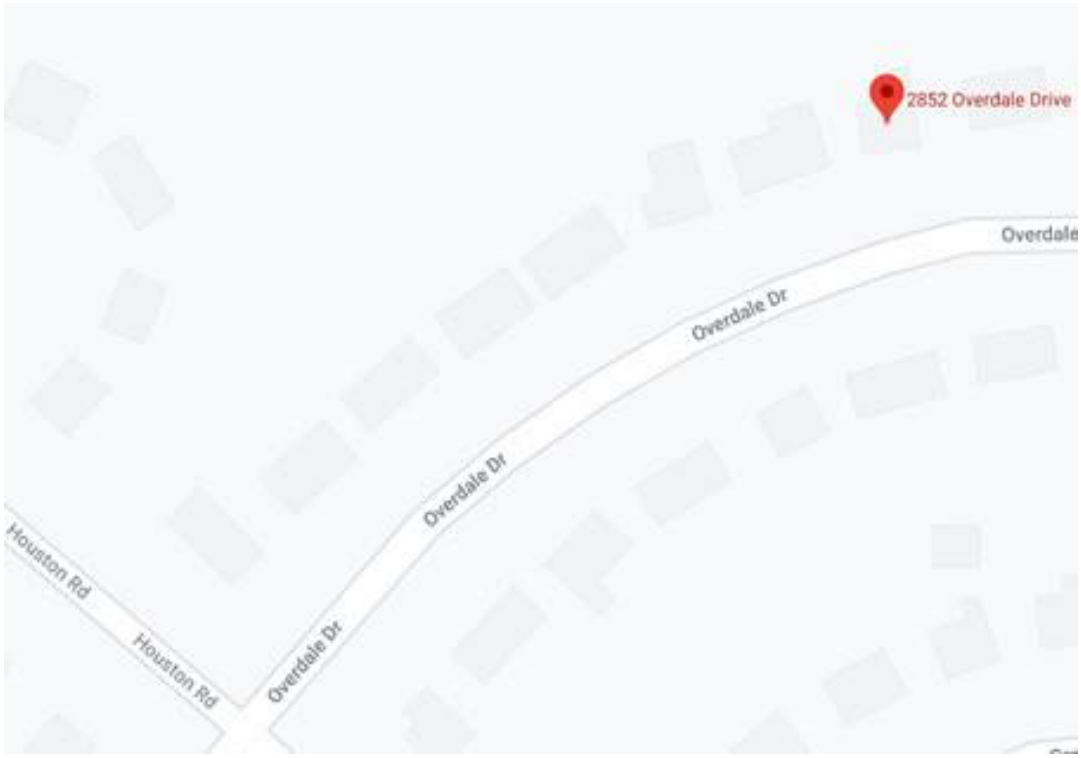
16, 2016, the day of the events that led to this case. App. C, at ¶ 4. Throughout the morning and early afternoon that day, Jones and Neri exchanged several taunting and derogatory text messages. *Id.* During the exchange, Neri asked Jones if he wanted to fight. *Id.* Jones texted yes and stated that he would be in the area the following day to pick up his son. *Id.*

Around 4:00 p.m., Jones asked Prather if he could get their son that night instead of the following day, and whether Prather could bring their son to his apartment. *Id.* at ¶ 5. Prather agreed to move up the scheduled exchange and stated that her sister would drop their son off at Jones's apartment. *Id.* Ultimately, though, Prather's sister refused to take the son to Jones when she found out that Jones had posted half-naked pictures of Prather on social media earlier in the day. *Id.*

As a result, Prather instead offered Jones to pick their son up from her house at 8:00 p.m. *Id.* Jones agreed and immediately texted Neri to reschedule the previously arranged fight to occur at the same time he would be at Prather's house. *Id.* Neri agreed to meet Jones at the end of the street, a place Jones never traveled to that evening in line with his previous pattern of avoidance when it came to fighting. *Id.*; *see also id.* at ¶ 4.

The arranged location for this alleged fight was at the corner of Overdale Drive and Houston Road in Hamilton County, Ohio. Tr. 755. Prather lived at 2852 Overdale Drive. *Id.* at 649. The map and satellite image below illustrate the two

locations, and demonstrate that there are seven houses between Prather's house and the corner in question:




At 7:29 p.m., Jones messaged Prather to ask when he should leave. Prather responded, "I thought you were gonna be here by 8." App. C, at ¶ 6. Jones replied, "Making sure you'll still be home by 8." *Id.* At 7:55 p.m., Jones again messaged Prather stating, "I'm stopping by my friend's house first, who lives around the corner from you." *Id.* Finally, Jones called Prather at 8:09 p.m. to confirm that he had left his friend's house and was on his way to her house. *Id.*

Jones arrived at Prather's house around 8:10 p.m. *Id.* at ¶ 7. Jones parked his car on the right side of the street in front of Prather's mailbox, an area designated as a no parking zone. *Id.* Jones pocketed a loaded firearm and got out of the car, leaving the engine running and the driver's side door open. *Id.*

Prather testified that when she saw Jones arrive, she kissed Neri as he exited the house to confront Jones, and she ordered her son upstairs because he didn't need to go outside. Tr. 758. In other words, she anticipated a confrontation inappropriate for her son.

According to some prosecution witnesses, Neri was outside standing in the yard when Jones arrived. App. C, at ¶ 7. Per other prosecution witness testimony, Neri came out of the house as Jones walked toward the front door. *Id.* All prosecution witnesses who saw Neri move toward Jones stated that he removed his hooded sweatshirt as he did so. Tr. 1028, 1248. At that time, Jones asked, "Can I get my kid?" *Id.* Neri continued toward Jones who then pulled the firearm out of his pocket and shot Neri three times in quick succession. App. C, at ¶ 7. Jones immediately returned to his car, called 9-1-1 to report the shooting stating that he shot in

self-defense, and drove directly to the local sheriff's station to peacefully surrender, complying with all commands in the process. *Id*.

At trial, Jones argued that he believed Neri was reaching for a gun and fired out of fear for his life and in self-defense. App. C, at ¶ 8, 54. The jury decided against self-defense, perhaps because evidence was prejudicially excluded by the trial court, and found Jones guilty of all charges against him: one count of aggravated murder in violation of Ohio Revised Code § 2903.01(A), one count of murder in violation of Ohio Revised Code § 2903.02(A), one count of felony murder in violation of Ohio Revised Code § 2903.02(B), and one count of carrying a concealed weapon in violation of Ohio Revised Code § 2923.12(A)(2). *Id*. at ¶ 8, 36, 42-45, 48-58, 68-79. Jones was sentenced to life without the possibility of parole. *Id*. at ¶ 8; *see also* App. D; App. E. He appealed and raised nine challenges, of which the court found the following dispositive: sufficiency, constitutional right to present a complete defense, misleading and substantially more prejudicial than probative photographs, and cumulative error. App. C, at ¶ 12-26, 36, 42-45, 48-58, 68-79. The other challenges were declared moot and Jones was granted a new trial. *Id*. at ¶ 81.

The prosecution appealed the sufficiency reversal on the prior-calculation-and-design element of aggravated murder. App. A, at ¶ 14-15. The other reversal grounds were not appealed. *Id*. at ¶ 28-31. The Supreme Court of Ohio misinterpreted this Court's holding in *Jackson v. Virginia* to determine that a jury could reasonably infer the ultimate fact of prior calculation and design from five identified basic facts. *Id*. at ¶ 16, 18-27. Based upon that conflicting decision, the court

vacated the appellate court's sufficiency reversal and remanded for a new trial at which Jones would again face the aggravated-murder charge. *Id*. at ¶ 28-31. Jones's timely reconsideration request was denied. App. B. Later, the Honorable Justice Brett Kavanaugh extended the time to file this petition for writ of certiorari until April 22, 2022. App. F. This timely petition follows.

## REASONS FOR GRANTING THE PETITION

Petitioner Jones now seeks further review in this Court and offers the following reasons why a writ of certiorari is warranted:

### I. This Court should issue a GVR order because the Supreme Court of Ohio's decision contravenes and conflicts with this Court's decision in *Jackson*.

Procedurally, although GVR orders are typically used in the intervening-authority context, this Court has used them for state court decisions that contravene or completely conflict with this Court's existing precedent. *Lawrence v. Chater*, 516 U.S. 163, 166-168 (1996); *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006). And GVR orders, it has been observed, have many advantages: (1) assisting the lower court by flagging an issue that might not have received due consideration, (2) assisting this Court by permitting lower courts to weigh in prior to granting plenary review, and (3) conserving this Court's scarce resources. *Lawrence* at 167. Hence, a "GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal." *Id.* at 168. Because the Supreme Court of Ohio's decision in this case contravenes

and conflicts with this Court's established decision in *Jackson*, a GVR order is appropriate.

Substantively, the Supreme Court of Ohio detailed five basic facts that occurred before and while Jones shot Neri, which it claims aggregate to allow for a jury to reasonably infer the ultimate fact of prior calculation and design: (1) Jones rescheduled and relocated the previously planned fight to coincide with the time and location at which he would pick up his son, (2) Jones parked his car in a no-parking zone against the flow of traffic, left the engine running, and left his driver-side door open, (3) Jones pocketed the weapon rather than leaving it in the car, (4) Jones took several steps toward Neri, and (5) witnesses testified that Jones fired after Neri had turned and ran. App. A, at ¶ 22, 24, 25-26. The court considered the cumulative effect of these five basic facts in isolation and failed to examine *all* the evidence. *Id.* at ¶ 16, 18-27.

But this Court's decision in *Jackson v. Virginia* makes clear that inferences from basic facts to ultimate facts must be reasonable based upon the combined and cumulative force of *all* the evidence. *Jackson*, 443 U.S. at 319, 325-326; *see also Victor v. Nebraska*, 511 U.S. 1, 21-22 (1994). The Supreme Court of Ohio confused this reasonableness of inferences vis-à-vis the combined and cumulative force of *all* the evidence with "credibility or effect in inducing belief." App. A, at ¶ 16. Yet the appellate court, in properly reversing the aggravated-murder conviction, made no credibility determination. App. C, at ¶ 12-26. Instead, while properly viewing *all* the evidence in the light most favorable to the prosecution, that court recognized

that the totality of the evidence here made clear that once the jury disbelieved Jones's self-defense claim, the prosecution proved only an intentional killing beyond a reasonable doubt. *Id*. Indeed, the only way to conclude prior calculation and design, beyond a reasonable doubt, is to improperly handpick facts and view them in isolation from the remaining evidence as the Supreme Court of Ohio did in violation of *Jackson*. App. A, at ¶ 16, 18-27; *see also Jackson*, 443 U.S. at 319, 325-326; *see also Victor* at 21-22.

For ease, the five basic facts are taken individually below, but that is not to suggest that those facts are not to be considered in the aggregate. They are. The proper aggregate under *Jackson*, however, is not just the cumulation of those five basic facts as considered by the Supreme Court of Ohio, but rather the combination of those five basic facts in combination with *all* the other basic facts in evidence. *Jackson*, 443 U.S. at 319. In this case, the evidence also includes basic facts that were unlawfully excluded from the trial as described in part I.A.3 below.

**A. The basic facts cannot be viewed in isolation.**

Although it is easy enough to reasonably accept inferences of prior calculation and design from the cumulative effect of the five identified facts in isolation, as demonstrated below, the entirety of basic facts of record here demonstrate that such inferences are not reasonable. Again, *Jackson* demands that the entirety of the evidence be considered when drawing ultimate facts from basic facts. *Jackson*, 443 U.S. at 319.

### 1. The rescheduling and relocation of the exchange and fight.

The first of the five identified cumulative facts is Jones rescheduled the exchange of his son with Prather and his fight with Neri, and he contacted Prather several times to arrange and confirm the pick-up time and location. App. A, at ¶ 22. But that ignores the following facts, all of which demonstrate that an inference of prior calculation and design is not reasonable.

The first important basic fact ignored by the Supreme Court of Ohio is that the scheduling and rescheduling of the exchange was fluid and the prosecution's evidence made clear that fluidness was attributable to Jones, Prather, and Prather's sister. App. C, at ¶ 4-5. Originally, the plan was for Jones to pick up his son on May 17, 2016, the day after the events that led to this case. *Id*. at ¶ 5. Jones altered that and asked Prather to drop their son off at his apartment the evening of May 16, 2016. *Id*. at ¶ 4. Prather agreed and stated that her sister would drop the son off at Jones's apartment. *Id*. at ¶ 5. But Prather's sister refused to do so when she learned that Jones had posted provocative pictures of Prather on social media that morning. *Id*. Prather then offered that Jones could pick their son up from her house at 8:00 p.m. *Id*. Jones later confirmed that pick-up time by text, then texted Prather to inform her that he was going to stop at a friend's house before going to her house so he would be a little late, and finally called when leaving his friend's house to let Prather know he was on his way. *Id*. He arrived at Prather's house around 8:10 p.m. *Id*.

The next three important basic facts disregarded by the Supreme Court of Ohio are interrelated: (1) Neri lived with Prather and was in constant, real-time communication with her, (2) Jones knew this, and (3) Jones therefore understood that he could not arrange a fight at a crosstown location to which he never intended to appear as was his *modus operandi* in avoiding a physical confrontation with Neri because Neri knew he was going to pick up his son from Prather's house on the night and time in question. App. A, at ¶ 18-27; App. C, at ¶ 2-7, 12-26.

Another important basic fact that the Supreme Court of Ohio failed to consider was that Neri arranged for his friends to be in cars on the street in front of Prather's house at the time of Jones's arrival. Tr. 935, 938, 1242.

The Supreme Court of Ohio next ignored the basic facts that Prather first kissed Neri upon Jones's arrival as Neri went outside to confront Jones, then purposely kept her son from going outside to his father, instead sending him upstairs upon Jones's arrival, because she anticipated the expected confrontation between Neri and Jones was inappropriate for the child. Tr. 758.

The final set of basic facts relative to this identified fact that the Supreme Court of Ohio took no notice of was that Prather's family members did not, on the night in question, facilitate the exchange of the son to prevent contact between Neri and Jones as was their standard practice. App. C, at ¶ 3.

Whatever reasonable inferences can be drawn from the combined and cumulative force of *all* these basic facts—perhaps that Neri, Prather, and Prather's family had reached their limit with Jones's verbal abuse and antics, and decided to

allow a confrontation in the hope that the abuse would stop and the animosity between Jones and Neri run its course—it is not reasonable to infer prior calculation and design to kill from the isolated facts that Jones rescheduled the exchange of his son with Prather and his fight with Neri, and he contacted Prather several times to arrange and confirm the pick-up time and location.

**2. The parking of the car.**

The second of the five identified cumulative facts is Jones parked his car in a no-parking zone against the flow of traffic, left the engine running, and left his driver-side door open. App. A, at ¶ 22, 26. But, as the appellate court found, such an inference is not reasonable when considering the combined and cumulative effect of *all* the evidence because (1) the prosecution's evidence made clear that due to the severe animosity between Jones and Neri, which escalated monumentally on the morning of the events that led to this case due to Jones's public disclosure of provocative photos of Prather, all exchanges of the son were expedited to avoid contact between the two men, and (2) immediately after shooting Neri Jones called 9-1-1 while driving directly from Prather's house to the nearest sheriff station for his peaceful surrender to law enforcement during which he fully complied with all commands. App. C, at ¶ 3, 5, 7. This full context demonstrates the absurdity of inferring prior calculation and design from the basic facts surrounding Jones's car maneuvering.

**3. Jones's pocketing of the gun.**

Although the Supreme Court of Ohio recognized that mere possession of a gun is insufficient under state law to prove prior calculation and design, it

nonetheless put great weight in Jones's possession of the gun as he approached Prather's house and concluded that this third of the five identified cumulative facts supported a reasonable inference of prior calculation and design in this instance. App. A, at ¶ 24; *see also* App. C, at ¶ 23.

Allegedly Jones's standard practice of carrying a gun was somehow enhanced when he chose to bring it to "a fistfight." App. A, at ¶ 24. This characterization completely ignores the import of *all* the evidence. As explained in part I.A.1 above, the objective, real-time text messages establish that Jones reasonably did not anticipate confronting Neri at Prather's house, but rather Neri and Prather arguably orchestrated the encounter. Regardless, even if Jones did believe it possible to run into Neri at the house, *all* the evidence, including evidence improperly excluded by the trial court, demonstrates that Jones reasonably believed that Neri had not only recently threatened him with gun violence on social media, but Neri had also had a gun on his person while searching for Jones in the days leading up to the event in question. App. C, at ¶ 48-58, 68-79. In other words, hardly a "fistfight," at least for a reasonable person in Jones's shoes. Indeed, Jones is receiving a new trial due to the trial court's prejudicial error on these evidentiary issues. *Id.*; App. A, at ¶ 28-29. And the prosecution conceded that was the appropriate result, as it made no attempt to appeal that holding. App. A, at ¶ 28. Thus, an inference of prior calculation and design based upon the combined and cumulative force of *all* these basic facts is patently unreasonable.

Next, the Supreme Court of Ohio's reliance on *State v. Palmer*, 687 N.E.2d 685 (Ohio 1997), and *State v. Taylor*, 676 N.E.2d 82 (Ohio 1997), fares no better. In *Palmer*, the revolver was a single action, meaning that the hammer had to be cocked for the gun to fire, but the revolver in this case was a double action, meaning that the gun fired solely through pulling the trigger, so there was nothing deliberative about arming the gun here like there was in *Palmer*. *Palmer*, 687 N.E.2d at 706-707; Tr. 592 (explaining that if the .38 special used in this case had bullets in it, the gun would fire simply by pulling the trigger). Most important, the conclusion in *Palmer* that the cocked gun led to an inference of a plan to kill rested on other basic facts in that record, those being that the shooting was an execution-style, two-shots-to-the-head killing, an inherently calculative act designed for one guaranteed purpose and inconsistent with an instantaneous eruption of events. *Palmer* at 707. So too with *Taylor*. There, after shooting the victim three times resulting in non-fatal injuries, the accused walked up to point-blank range and shot four more times, thereby executing the man. *Taylor* at 676 N.E.2d at 91. Again, an implicitly scheming act guaranteed to kill and inconsistent with an instantaneous eruption of events. *Id*. Here, however, Jones's actions on the night in question do not carry any innate elements of a plan to kill, but rather, only a split-second intent to kill consistent with an instantaneous eruption of events. App. C, at ¶ 23.

Put simply, no other basic facts in this record combine with the gun possession to establish the basis for a reasonable inference of prior calculation and design.

#### 4. Jones's steps toward Neri.

The fourth of the five identified cumulative facts is that Jones took several steps toward the house where he was going to pick up his son, which was the very same house from which Neri exited and approached Jones. App. A, at ¶ 20. The son was not outside waiting for Jones so his movement toward the house is indicative of nothing more than his purpose for being there—to pick up his son. And, again, as explained in part I.A.1 above, the objective, real-time text messages establish that Jones reasonably did not anticipate confronting Neri at Prather's house, but rather Neri and Prather arguably orchestrated the encounter.

Moreover, Jones's steps were also matched—if not overwhelmed—by Neri's own pursuit, for prosecution witnesses described that Neri exited the house and aggressively walked from the front door of the house, down the walkway, and down the driveway toward Jones while taking his sweatshirt off and clenching his fists preparing to fight. Tr. 1028. As Neri approached, Jones calmly responded, "Can I get my kid?" Tr. 1248. Neri continued toward Jones, and it was then that Jones pulled the gun from his pocket and fired. *Id.*

Against this holistic basic-fact backdrop, Jones's walking from his car toward Prather's house for the distinct purpose to pick up his son during which Neri aggressively approached and impeded his progress, cannot reasonably be relied upon to support a prior-calculation-and-design conclusion. Such a deduction is plainly not rational, especially in light of Jones's calm question: "Can I get my kid?" Tr. 1248; *see also* App. A, at ¶ 36 (Donnelly, J., dissenting).

### 5. Jones's firing after Neri turned.

The last of the five identified cumulative facts is that Jones fired after Neri had turned from him. The court stated: "Here, the evidence showed that Jones shot Neri once and then continued to fire at him as he ran away." App. A, at ¶ 25. But the physical evidence belies that assertion. Although Neri undoubtedly turned as he realized he was being shot at, he was shot multiple times—in quick succession—and all the wounds were to the front or side of his body: his hand, his arm, and his torso. Tr. 1167-1169, 1173-1174, 1248. This was not a pursuit like those in *Palmer* and *Taylor*. *Palmer*, 687 N.E.2d at 707; *Taylor*, 676 N.E.2d at 91. While reasonable to infer an intent to kill from the multiple shots and Neri's retreat, the combined and cumulative effect of *all* the evidence does not support a reasonable inference of prior calculation and design from these facts. Prior calculation and design is a distinct plan, and nothing about this harried, instantaneous shooting demonstrates such a preordained scheme. App. C, at ¶ 12-26.

## B. The entirety of this record demonstrates that the jury could not reasonably infer prior calculation and design beyond a reasonable doubt.

The following facts cannot be ignored:

1. The scheduling and rescheduling of the exchange was fluid and the prosecution's evidence made clear that fluidness was attributable to Jones, Prather, and Prather's sister. App. C, at ¶ 4-5.
2. Neri lived with Prather and was in constant, real-time communication with her. App. C, at ¶ 2-7, 12-26.

3. Jones knew the information explained in number 2 above. *Id*.

4. Jones understood that he could not arrange a fight at a crosstown location to which he never intended to appear, as was his *modus operandi* in avoiding a physical confrontation with Neri, because Neri knew he was going to pick up his son from Prather's house on the night and time in question. *Id*.

5. Neri arranged for his friends to be in cars on the street in front of Prather's house at the time of Jones's arrival. Tr. 935, 938, 1242.

6. Prather first kissed Neri upon Jones's arrival as Neri went outside to confront Jones, then purposely kept her son from going outside to his father, instead sending him upstairs upon Jones's arrival, because she anticipated the expected confrontation between Neri and Jones was inappropriate for the child. Tr. 758.

7. Prather's family members, on the night in question, did not—despite the all-time high level of animosity due to Jones's public disclosure of provocative photos of Prather earlier that morning—facilitate an expedited exchange of the son to prevent contact between Neri and Jones as was their standard practice. App. C, at ¶ 3, 5.

8. Immediately after shooting Neri Jones called 9-1-1 while driving directly from Prather's house to the nearest sheriff station for his peaceful surrender to law enforcement during which he fully complied with all commands. App. C, at ¶ 7, 24.

9. Jones reasonably believed that Neri had not only recently threatened him with gun violence on social media, but Neri had also had a gun on his person while searching for Jones in the days leading up to the event in question. App. C, at ¶ 48-58, 68-79.

10. Jones's actions on the night in question do not carry any innate indicia of a plan to kill. App. C, at ¶ 12-26; App. A, at ¶ 36 (Donnelly, J., dissenting).

11. Jones's son was not outside waiting for him upon his arrival at the house, so Jones had to approach to pick up his son, which was his purpose for going to the house on the night in question. App. C, at ¶ 20; Tr. 758.

12. Jones's steps were matched—if not overwhelmed—by Neri's own aggressive pursuit from the front door of the house, down the walkway, and down the driveway toward Jones while taking his sweatshirt off and clenching his fists preparing to fight. Tr. 1028.

13. Before shooting, Jones calmly asked Neri: "Can I get my kid?" Tr. 1248.

Because these basic facts cannot be divorced from this record, a jury could not reasonably infer prior calculation and design from the Supreme Court of Ohio's five identified cumulative facts because the combined and cumulative force of *all* the evidence demonstrates that inference to be unreasonable. Using that proper framework leads to one conclusion, which was articulated by the appellate court as: "It

defies logic to conclude that Jones's plan was to shoot Neri in the front yard of his ex-girlfriend's house with witnesses around and his child present." App. C, at ¶ 21. The faulty process used by the Supreme Court of Ohio to contrarily decide this issue contravenes and conflicts with this Court's decision in *Jackson*. App. A, at ¶ 18-27; *see also Jackson*, 443 U.S. at 319, 325-326; *Victor*, 511 U.S. at 21-22.

## CONCLUSION

For all these reasons, this Court should issue a GVR order due to the contravention of, and conflict with, *Jackson*.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

/s/ *Peter Galyardt*
PETER GALYARDT
Asst. Ohio Public Defender

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
peter.galyardt@opd.ohio.gov

*Counsel for Petitioner, Earl Jones*

**No. _____**

---

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

---

EARL JONES,
*Petitioner*,

v.

OHIO,
*Respondent*.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO COURT OF APPEALS, FIRST APPELLATE DISTRICT

---

**APPENDIX TO**

**PETITION FOR WRIT OF CERTIORARI**

---


Supreme Court of Ohio decision,
*State v. Jones*, 182 N.E.3d 1161 (Ohio 2021). .....App. A

Supreme Court of Ohio reconsideration denial,
*State v. Jones*, 176 N.E.3d 767 (Ohio 2021). .....App. B

Appellate court decision,
*State v. Jones*, 151 N.E.3d 1059 (Ohio Ct. App. 2020).....App. C

Trial court judgment entry of sentence,
No. B-1602671, Court of Common Pleas,
Hamilton County, Ohio (Nov. 22, 2017). .....App. D

Trial court nunc pro tunc judgment entry of sentence,
No. B-1602671, Court of Common Pleas,
Hamilton County, Ohio (Dec. 21, 2017).....App. E

Letter extending time to file Petition for Writ of Certiorari,
Application No. 21A399, Feb. 9, 2022.....App. F