

IN THE COURT OF COMMON PLEAS
PIKE COUNTY, OHIO
GENERAL DIVISION

STATE OF OHIO,

*

Case No.: 2018CR000155

Plaintiff,

*

JUDGE RANDY D. DEERING

vs.

*

GEORGE WAGNER, IV,

*

Defendant.

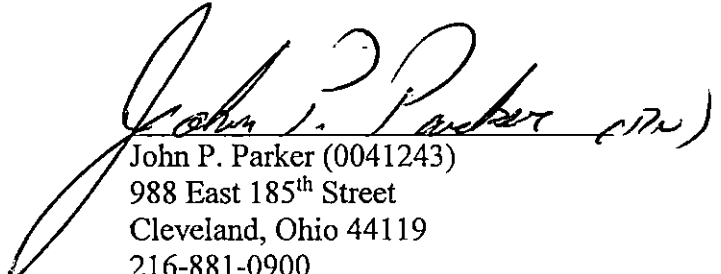
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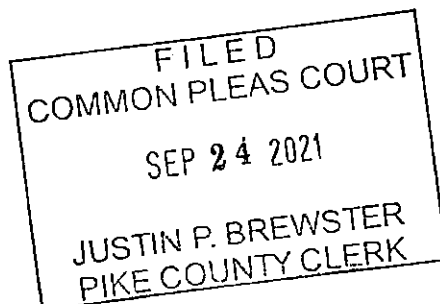
MOTION # 73


MOTION TO DISMISS AGGRAVATED MURDER COUNTS AND/OR DEATH SPECIFICATIONS

Now comes the defendant, by and through undersigned counsel, who hereby respectfully requests that Counts 1-8 (Aggravated Murder) and/or the death specifications for the reasons set forth in the attached Memorandum.

Respectfully submitted,


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MEMORANDUM IN SUPPORT

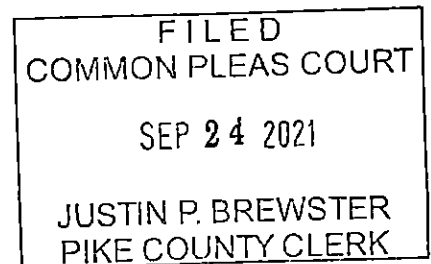
Recently provided discovery makes it clear that George Washington Wagner IV did **NOT** shoot and kill any of the victims. Yet the State insists on proceeding with this case a capital case unless and until Jake Wagner testifies for the State to its satisfaction. Thus, the State seeks to hold the death penalty over the head of George Wagner who did not kill anybody while it has struck a remarkable plea bargain with the actual killer of at least five victims who also shot a sixth victim.

The Bill of Particulars filed July 18, 2019, states with respect to the Aggravated Murder counts (1-8) that George Washington Wagner IV shot each victim named personally. See Paragraph 2 of counts 1-8, Bill of Particulars.

It is now clear that such a claim is factually false and untrue. George Washington Wagner IV shot nobody. The State knows the Bill of Particulars is false and that George Wagner shot nobody.

In April of 2021, the Ohio Attorney General issued its annual Capital Crimes Report. See <https://www.ohioattorneygeneral.gov/2020CapitalCrimesReport>

Page 6 of the new Report makes clear that the AG endorses Recommendation 17 of the Death Penalty Task Force Report released in 2014 and organized by Chief Justice O'Conner. Recommendation 17 requires that for any capital prosecution to be fair in Ohio the evidence must consist of at least one of three types of evidence:



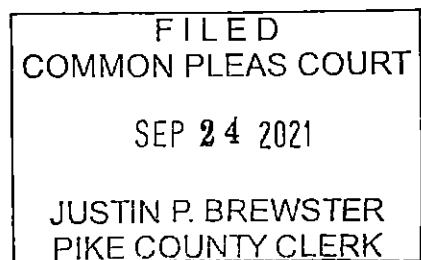
1. DNA or other biological evidence linking a defendant to the murder;
2. A video recorded voluntary confession by the defendant; or
3. A video recording conclusively linking the defendant to the murder.

In this case, even after a thorough investigation and more than five years since the crimes, the State has none of this evidence.

As the Ohio AG's Report makes clear, there lacks confidence in many quarters in Ohio's ability to administer fairly the death penalty. Without at least one of the three types of evidence listed in Recommendation 17, this court must use its discretion and dismiss the death specifications in this case; further due to the recently disclosed evidence that George Washington Wagner IV killed nobody and the fact State has given the actual killer of five victims a life plea deal then the court must dismiss Counts 1-8 in their entirety.

Ohio law supports the court's exercise of its discretion in dismissing the capital specifications and counts 1-8. It must be noted that since Ohio has reinstated capital punishment, only one in eight persons sentenced to death has actually been executed. In short, pursuing capital punishment in this case does not guarantee that George Wagner will be executed even if the death penalty is imposed by a jury and this court. It is extremely unlikely a jury or judge would impose death on George Wagner when he killed nobody and the State gave the actual killer of at least five victims a life plea deal.

The Ohio AG's report released in April 2021 calls Ohio's death penalty system "lethargic" and "costly." Since Ohio re-established the death penalty in 1981, 336 people have been sentenced to death; 111 of those people have either been removed from death row by the courts or through clemency; 56 people have been executed; 140 people remain on death row.



Since 1974, 440 people have been sentenced to death in Ohio according to a new DPIC (Death Penalty Information Center) report; 215 people (almost half) have been removed from death row and been re-sentenced to life or less or exonerated. Courts have overturned convictions or death sentences in 194 cases. Only 12.7% of Ohio prisoners sentenced to death since the 1970's have been executed.

Eleven people have been wrongfully convicted and sentenced to death who have later been exonerated. One exoneration for every 5.1 executions. Ohio's death penalty is more error prone than average when compared to other states. See <https://deathpenaltyinfo.org/news/report-83-of-death-sentences-have-not-resulted-in-executionsunder-ohios-lethargic-death-penalty>

Criminal Rule 48 and the Court's Inherent Power to Dismiss in the Interest of Justice.

The trial court may dismiss a case "in the interests of justice." State v. Busch (1996), 76 Ohio St.3d 613; State v. Rodriguez, 2008 Ohio 3377 (para. 9-10).

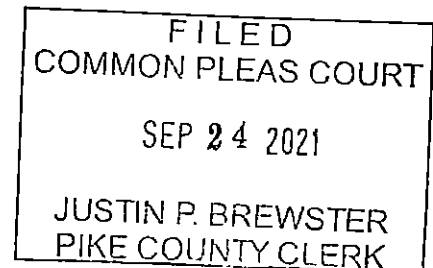
As the Busch opinion makes clear:

Trial courts are on the front lines of administration of justice in our judicial system, dealing with the realities and practicalities of managing a caseload and responding to the rights and interests of the prosecution, the accused, and victims. A court has the 'inherent power to regulate the practice before it and protect the integrity of its proceedings.

Busch at 615. See also State v. Dixon, 14 Ohio App.3d 396 (1984); State v. Sutton, 64 Ohio App.2d 105 (1979); State v. Tyren, 91 Ohio Misc. 2d 67, 697 N.E.2d 293 (CP 1998) (a court may dismiss an indictment where the state's actions make prosecution unconscionable).

A state trial court's authority to dismiss an indictment is similar to that of a federal court's supervisory power. See United States v. Struckman, 611 F.3d 560, 574 (9th Cir. 2010);

United States v. Goodson, 204 F.3d 508, 514 (4th Cir. 2000).



Courts in other states have the inherent power to dismiss an indictment in the interest of justice. State v. Echols, 793 P.2d 1066, 173 (Alaska App. 1990); People v. Orin, 13 Cal.3d 937, 533 P.2d 193, 199 (1975); State v. Moriwake, 65 Hawaii 47, 55, 647 P.2d 705 (1982); State v. Brummage, 435 N.W.2d 337, 340-41 (Iowa 1989); State v. Cummins, 257 Mont. 491, 850 P.2d 952, 953 (1993); State v. Abbati, 99 N.J. 418, 432, 493 A.2d 513 (1985).

Here, Mr. Wagner is only asking the court to dismiss counts 1-8 (Aggravated Murder) and the related death specifications, but reserves the right to ask the court to dismiss the entire case for lack of sufficient evidence at the appropriate time or for other distinct legal reasons.

Ohio Constitution

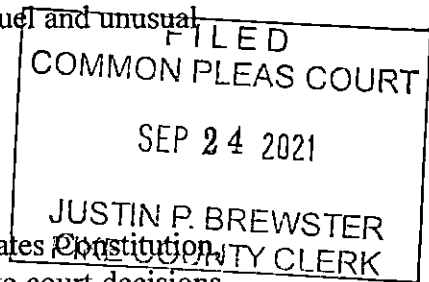
The Due Process Clause and the cruel and unusual punishment clause of the Ohio Constitution prohibit the imposition of the death in this case. The Ohio Constitution is an independent force for the protection of the rights of its citizens. See Article I, Sections 10. State v. Mole, 2016 Ohio 5124 (the new federalism) Article I, Section 9 (no cruel and unusual punishment inflicted).

As the Court explained in Arnold:

In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, **state courts are unrestricted in according greater civil liberties and protections to individuals and groups.**

Arnold v. Cleveland, 67 Ohio St. 3d 35 (1993), paragraph one of the syllabus (emphasis added)

Although the cruel and unusual punishments clause of the Ohio Constitution, Art. I, Section 9, uses the same words as its federal counterpart, this Court has “never determined that



these words mean the same thing.” State v. Scott, 91 Ohio St. 3d 1263, 1264, 2001-Ohio-99 (2001) (Pfeifer, J., concurring).

To the contrary, the Court has insisted that Ohio’s version “**provides unique protection for Ohioans.**” In re C.P., 131 Ohio St. 3d 513, 529 (2012) (emphasis added). Indeed, the Ohio Constitution provides “protection independent of the protection provided by the Eighth Amendment.” Id.

Moreover, “this [C]ourt is not bound by federal court interpretations of the federal Constitution in interpreting our own Constitution.” Humphrey v. Lane, 89 Ohio St. 3d 62, 68 (2000). See also State v. Smith, 2020-Ohio-4441, ¶¶ 27-34 (Ohio September 22, 2020) (“[E]ven if the provisions were initially understood to provide functionally the same protections, *we are not bound to mirror subsequent United States Supreme Court decisions delineating the scope of the protection.*”) (emphasis added); State v. Broom, 146 Ohio St. 3d 60, 74, 2016-Ohio-1028, ¶ 55 (2016); Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018).

As the AG’s Report makes clear, the death penalty in Ohio, even when imposed by a court, is rarely carried out and thus is cruel and unusual. Only about 1 in 8 persons sentenced to death in Ohio have actually been executed.

How fair can it be to put a man through the ordeal of a capital trial when the State knows he is not the actual killer of any of the victims? And the State has given a life sentence to the actual killer of at least 5 of the 8 victims?

In addition, how fair can it be to force the taxpayers to pay for the preparation and presentation of a capital case under these unique circumstances? It is well known that special protections exist for a defendant in a capital case and the costs of a capital case are much higher

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than a non-capital case. Here, George Wagner killed nobody. Yet the State insists through its public filings that he did so (See Bill of Particulars) and seeks the death penalty.

The Ohio Constitution prohibits the ordeal that the defendant has endured and must continue to endure as he fights for his life.

Article I of the Ohio Constitution: Bill of Rights

Inalienable rights.

§1 All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

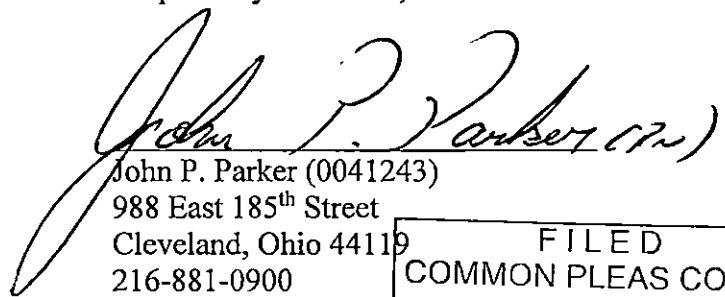
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Evolving Standards of Decency

The evolving standards of decency of the U.S. Constitution and the Ohio Constitution cannot allow the prosecution for Aggravated Murder under these peculiar facts and the possible imposition of the death penalty. Trop v. Dulles, 356 U.S. 86 (1958); Article I Sections 9 and 10 of the Ohio Constitution. Arnold, Mole, supra.

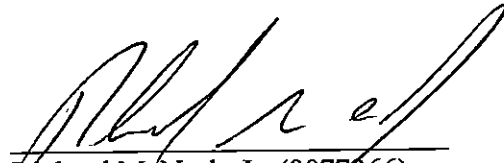
This Court must exercise its authority under Crim Rule 48, the Ohio Constitution, the federal Constitution and its inherent authority and dismiss Counts 1-8 and/or the death specifications for George W. Wagner IV. The interests of justice demand such a decision.

Respectfully submitted,



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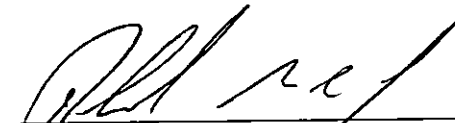


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COUNSEL FOR GEORGE WAGNER, IV

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss Aggravated Murder Counts and/or Death Specifications, Motion Number 73, has been served upon Rob Junk, Pike County Prosecutor, by email at rob.junk@pikecounty.oh.gov, Assistant Prosecutor Angela Canepa by email at pikespecial@gmail.com, D. Andrew Wilson by email at andy.wilson@governor.ohio.gov this 24th day of September 2021.



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Attorney for George Wagner, IV

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