

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	Case No. 98-1891
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
ELWOOD JONES,	)	
	)	
Defendant.	)	<u>THIS IS A DEATH PENALTY CASE</u>

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DEFENDANT JONES'S MEMORANDUM IN OPPOSITION TO  
THE STATE'S MOTION TO SET EXECUTION DATE

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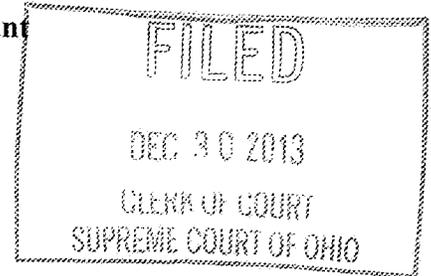
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<sup>1</sup> The U.S. Court of Appeals for the Sixth Circuit appointed counsel from the Federal Public Defender's office to represent Elwood Jones on January 18, 2013, replacing his former counsel, Gary W. Crim and Michael L. Monta.

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## **I. Introduction**

Defendant Elwood Jones requests this Court deny the State's motion to set an execution date or, alternatively, hold the motion in abeyance. Jones's post-conviction DNA-testing proceedings are not concluded. Contrary to the State's assertion, the Hamilton County Court of Common Pleas has indicated that it intends to order additional pieces of evidence tested, and this testing has the potential of exonerating Jones. In short, granting the State's motion would be premature.

## **II. Background**

Elwood Jones was sentenced to death after being convicted for the 1994 murder of Rhoda Nathan, a guest at the hotel where he worked as a custodian. He has always maintained his innocence and absolutely denied involvement in Ms. Nathan's death.

### **A. The Crime, investigation, and trial**

Ms. Nathan was found unconscious on the floor of the hotel suite she occupied at the Embassy Suites Hotel in Blue Ash, Ohio, on September 3, 1994. She had been badly beaten and two of her teeth had been knocked out. Blood was found in several places in the room. Ms. Nathan was also without a necklace that family and friends said she wore constantly. No one witnessed the attack.

#### **1. The evidence raises serious concerns that Elwood Jones is innocent.**

Elwood Jones had been working in the hotel on that day, and he voluntarily submitted to police questioning. Several other employees reported seeing Elwood working that day and remembered him being clean and acting normally.

A cut on Elwood's hand that he received while taking out trash on the morning of Ms. Nathan's death later became infected, and he sought treatment and workers compensation for his

injury. After police learned about Elwood's cut, they focused on him as a suspect. Police searched Elwood's car, and his and a friend's residences, and questioned him at the station. But none of the blood, fingerprint, or trace evidence collected from the scene of the crime, nor from Elwood's car, clothing, or other possessions, matched him with the crime scene or the victim. To this day, zero forensic evidence ties Elwood to Ms. Nathan's homicide.

Other evidence, however, raises serious concerns that he may have been wrongfully convicted, as he has always insisted.

A police officer reported finding a pendant that looked like the victim's necklace when he searched a toolbox in the trunk of Elwood's car, but a mechanic had worked on that car and accessed that toolbox after Ms. Nathan's murder, and had not seen the pendant in the toolbox at that time. Police did not arrest Elwood, nor did prosecutors seek to indict him, when they learned that this officer said he found the pendant in Jones's toolbox. No fingerprints or blood were found on the pendant.

Police also found a so-called "master key" in Elwood's possession that was able to open the door to Ms. Nathan's hotel room. But virtually anyone at the hotel, employee or guest, could obtain a "master key," because if anyone lost his or her key, maintenance replaced it with a master key.

The State attempted to argue at trial that bruises on Ms. Nathan's body matched objects to which Elwood had access. But one of those objects was a walkie-talkie, which was available to virtually all hotel employees, and no physical evidence ever linked a particular walkie-talkie to Jones or the victim. Moreover, although the State has routinely overstated the results of alleged expert analysis of Ms. Nathan's bruises, the 'analysis' is far from reliable or scientific.

To begin, the State's experts examined only photographs taken during the autopsy of the marks on the victim's body. One State expert testified that the bruise on the victim's body was not sufficiently unique to determine whether it was made by a walkie-talkie or some other object. Another State expert testified that the size and configuration of the walkie-talkie with a carrying case was consistent with the wound, but could not say definitively that that particular type of walkie-talkie caused the bruise. A third State expert said only that he could not rule out a correspondence between the encased walkie-talkie and the bruising. And finally, the deputy coroner examined a photograph of the body and a walkie-talkie and testified that the wound was merely consistent with the rectangular shape of the walkie-talkie. None of these four experts, therefore, were able to conclude that the hotel walkie-talkie definitively caused the bruising on the victim.

In the same vein, the State attempted to use expert testimony to establish that door chains found in Jones's car matched marks on Ms. Nathan's body. But only one of the State's experts who examined photographs of the victim's body opined as to whether the door chains could have caused any of the bruising patterns, and the most he could determine was that "correspondences in shape and scale" existed between the chain and the marks on the victim's body. He found the marks "do not imply a chain," however, and ultimately, he was unable to tell whether the chains actually made the marks.

Finally, prosecutors argued that because the cut on Elwood's hand was infected with bacteria commonly found in human mouths, Elwood must have injured his hand and inoculated it with the bacteria by striking and knocking out Ms. Nathan's teeth. But Ms. Nathan was never tested to see whether she actually had the bacteria in her mouth. Furthermore, it is just as likely that Elwood's own mouth could have been the source of the infection.

More importantly, the coroner's report revealed that Ms. Nathan had tested positive for hepatitis B during her autopsy. Hepatitis B, like the bacteria that infected Elwood's cut, can pass through human bites and infect an individual. So had Elwood Jones struck Ms. Nathan with his hand as the State alleged, he would have had a good possibility of contracting hepatitis B. Yet because Jones has never tested positive for hepatitis B, it is unlikely that a bite from Ms. Nathan caused his hand infection. So no evidence links Jones's infected hand to the victim, and the only evidence relevant to contact between her mouth and his hand actually points in the other direction, suggesting that the bacteria in his wound did *not* originate in her mouth.

**2. The State waited for more than a year after questioning Elwood following Ms. Nathan's death before indicting him.**

Even though the police appeared to have found evidence that the State considers definitive in linking Elwood to the crime, they released him after questioning at the station, and did not arrest him after the officer reported finding the pendant in his car. In fact, for more than a year after the evidence was gathered and Elwood had been questioned by police, he remained free, living and working in the area. He was not indicted until September 27, 1995. Elwood was tried and sentenced to death the next year.

**B. Post-conviction DNA proceedings**

Represented by counsel from the Ohio Innocence Project, Elwood applied for DNA testing on November 18, 2010, in the Hamilton County Court of Common Pleas. *See State v. Jones*, Case No. B-958578. The court signed an Entry Retaining Counsel noting that counsel from the Ohio Innocence Project represented Elwood Jones on November 23, 2010.

The State moved to dismiss the application on the grounds that the it was filed by attorneys for the Ohio Innocence Project while Jones was then represented (in federal-habeas

litigation) by attorneys Gary Crim and Michael Monta. Because “[c]ounsel for the Respondent presumed that Crim and Monta would have entered an appearance on Jones’s behalf in” the DNA action, but did not do so, the State argued that the Ohio Innocence Project attorney did “not represent Jones and therefore ha[d] no standing to request DNA testing”. The court denied that motion on August 5, 2011.

On February 17, 2012, the court entered an order for DNA testing of several items of evidence: both of the victim’s teeth that had been knocked out; the victim’s fingernail clippings and scrapings; the pendant; and a piece of curtain containing a blood stain. This order provided that Elwood reserved the right to request the court to authorize DNA testing of additional items as permitted under Ohio law.

None of the results from this initial set of tests implicated Elwood Jones in any way. Although the State argued at trial that Elwood’s hand infection came about as a result of him knocking out Ms. Nathan’s teeth, neither tooth had his DNA on it. Nor was any of Elwood’s DNA found on the victim’s fingernails, their scrapings, or on the stain on the curtain.

Because the results did not identify any alternate suspect either, Elwood moved to test the additional items recovered from Ms. Nathan’s hotel room that contain biological evidence. He argued this testing was warranted because the remaining evidence may implicate the true murderer, and because, consistent with Elwood’s continual assertion of innocence, the initial testing had not provided any connection between Elwood and the crime.

At a status conference on December 11, 2013, the court indicated it would order additional items that might contain biological evidence tested for DNA. These items include stains found on bedding, furniture, walls, carpet, and objects in the hotel room, as well as hairs found in the room and on the victim.

During the December 11 conference, the court instructed Elwood's counsel from the Ohio Innocence Project, Donald Caster, to submit a proposed order for this testing. Attorney Caster has provided the draft order to the prosecutor. On December 20, the prosecutor stated to Attorney Caster that his investigator was out of the office, and that he needed the investigator to tell him the location of evidence and how long it will take to send that evidence to DNA Diagnostics Center, the lab that is to test the samples. The prosecutor also communicated that, apart from this remaining information he needs to obtain from his investigator and his general objection to additional testing, he has agreed to the proposed order. Accordingly, as soon as the prosecutor has gotten the information from his investigator, counsel will submit the order to the court. Elwood Jones will file the order with this Court once the Hamilton County Court of Common Pleas enters it.

**III. This Court should deny the State's motion or hold it in abeyance.**

Serious questions exist about whether Elwood Jones was wrongfully convicted for Ms. Nathan's murder. No eyewitnesses, no confession, and no forensic evidence link Elwood to her death. He has steadfastly maintained his innocence throughout, and the additional DNA testing conducted so far has not implicated him, nor confirmed the State's theories about the crime.

The State misleadingly characterizes the initial DNA testing results as "not implicat[ing] another suspect *other than Jones*." Motion to Set Execution Date at 4 (emphasis added). Contrary to any suggestion that the testing pointed only to Jones and no one else, *no DNA testing has implicated Jones at all*.

Moreover, the State has not completely and accurately communicated the status of the DNA litigation before the Hamilton County Court of Common Pleas. It has merely indicated that Jones "now seeks additional DNA testing," *id.*, but, as noted, the court has told the parties it

will order such testing, despite the State's objections. The court did so on December 11, 2013, a full week before the State filed its motion to set a date.

From the start, the State's opposition to Elwood's DNA-testing requests has lacked a good-faith basis. The State filed a meritless motion to dismiss his application based on the fact that his counsel, whose representation had been recognized by a court order, did not "represent" Jones and lacked "standing" to seek testing on his behalf.

Likewise, the State has now inexplicitly moved to set an execution date, knowing full well that more testing is coming. Without a word about the Hamilton County Court of Common Pleas' status conference where the parties learned that the court would be ordering additional testing, the State also mischaracterizes the upcoming testing as a "fishing expedition." The State suggests that because Ms. Nathan was found in a "public" hotel room, DNA testing would not be outcome determinative. The State ignores the fact that the court intends to order testing of materials visibly covered with blood spatter. As hotel cleaning staff do not generally fail to remove visible blood stains, these blood deposits more likely than not arose from the attack on Ms. Nathan.

Elwood Jones's life is at stake, and the State has continued its pattern of pursuing finality over justice. Because its motion to set Elwood's execution is premature as potentially exonerative DNA testing remains to be completed, this Court should deny or hold it in abeyance pending the outcome of litigation that could make his execution moot.

#### **IV. Conclusion**

Because Elwood Jones's post-conviction DNA-testing proceedings are still ongoing, and because the recently ordered testing has the potential to exonerate Jones, obviating the need to set an execution date at all, this Court should deny the State's motion to set an execution date or,

alternatively, hold the motion in abeyance until state and federal proceedings in this case are complete.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on December 30, 2013, a copy of the foregoing was sent via first class, United States mail, to each of: Joseph T. Deters and Ronald W. Springman, Jr. 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, Counsel for Plaintiff State of Ohio.

  
**Carol A. Wright**  
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