CLIFTON JACKSON AFFIDAVIT AND APPENDIX OF EXHIBTS ARE NUMBERED [first two cover pages of affidavit unnumbered, iii-lxiii] IN ROMAN NUMERAL. EXHIBIT PAGES ARE CROSS REFERENCED AS APPENDIX [Appendix Pages are numbered1-655] PAGES. AFFIDAVIT AND EXHIBITS ARE IN SUPPORT OF 26B MOTION TO REOPEN STATE OF OHIO v. CLIFTON JACKSON, CASE NO. 11CR083104, NINTH DISTRICT COURT OF APPEALS CASE NO. 14CA010555, Not Limited Too.

EXHIBIT

AAN

EXHIBITS A-AAAE IN SUPPORT OF CLIFTON JACKSON ENCLOSED AFFIDAVIT AND APPENDIX PREPARED MARCH OF 2016 OF A DETAILED TIME LINE OF FACTUAL EVENTS BETWEEN JUNE 14th, 2011 AND OCTOBER OF 2015 TO THE BEST OF MY LAYMEN LEGAL ABILITIES.
THIS EXHIBIT "AAN" IS REFERENCED IN ¶ 130 not limited too.

IN THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO

CASE NO. 14 CA 010555

STATE OF OHIO

Plaintiff-Appellee,

vs.

CLIFTON JACKSON

Defendant-Appellant.

AN APPEAL FROM THE COURT OF COMMON PLEAS OF LORAIN COUNTY

ASSIGNMENTS OF ERROR
AND
BRIEF OF APPELLANT

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ISSUES PRESENTED FOR REVIEW

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STATEMENT OF THE CASE

Defendant was indicted on August 11, 2011 charged with a count of trafficking in drugs, a first degree felony with a specification. Count two charged possession of drugs, also a first degree felony with a specification. Count three charged possession of criminal tools, a fifth degree felony.

Defendant, in the course of the proceedings filed a motion to suppress on November 4, 2011.

On June 5, 2012 the motion to suppress was heard in part and continued for further hearing.

The court denied the motion to suppress on September 28, 2012. Defendant filed a motion for reconsideration in a supplement to the motion for reconsideration. That motion was denied on December 11, 2012. A trial was set for January 28, 2014, which was reset to February 11, 2014. A motion to dismiss and a motion to preclude was filed by defendant on February 7, 2014 and overruled on February 10, 2014.

Thereafter a trial commenced on February 13, 2014. At trial the jury returned a verdict of guilty as to count one making an additional finding that the substance was one thousand (1000) grams or more of cocaine together with a finding that defendant was a major drug offender with respect to the second specification on count one. The jury found that defendant did not use his ownership interest in the One Thousand Two

Hundred Sixty Two Thousand ($1,262) in cash in the commission of a felony drug offense. A similar finding of guilt was as to count two, possession of the same drugs. Defendant was also found guilty of possession of criminal tools.

On February 13, 2104 defendant was sentenced to eleven (11) years as the court merged count two into count one. Defendant was also sentenced to eleven (11) months on count three, all sentences to be served concurrently. Defendant was also ordered to pay a mandatory fine of Ten Thousand Dollars ($10,000) and his driver's license was suspended for two (2) years.

Thereafter a notice of appeal was filed bringing this matter before this court for a review.

STATEMENT OF FACTS

SUPPRESSION HEARING (JUNE 4, 2012)

The court conducted a hearing on a motion to suppress on June 4, 2012. At that hearing two witnesses testified, Trooper Christopher Beyer and Trooper Michael Trader. Trooper Beyer stopped defendant's vehicle, Trooper Trader was the K-9 officer who was summoned to the scene with his dog Argo for a walk around.

Beyer testified that on the early morning hours of June 14, 201,1 a clear day with light traffic, he observed a silver Toyota Camry drive past him following a motor home. He believed that the Toyota was following the motor home too closely. Beyer

was at mile marker 133. He said the Toyota was traveling two to three car lengths behind the motor home. His assessment was based on some by a reconstruction unit concerning the speed and the estimated distance needed to stop safely. (Tr.4-5). Beyer caught up with the Toyota after he passed the Baumhart Road mile marker 135. (Tr.5). Defendant's Toyota was stopped at mile marker 137 at 8:44a.m. (Tr.9). Beyer asked defendant for his license, registration and insurance. He was given defendant's New York driver's license. (Tr. 6-7). Beyer noted that defendant was from Buffalo, New York. Thereafter he asked him where he was headed to and who owned the vehicle. Defendant stated he was coming from his mother's home in Beloit, Michigan. (Tr.7). According to Beyer's recollection the vehicle was rented by Latrice Thomas.

Beyer looked at the rental agreement **"which can be a little bit cumbersome and quite large and fine print ..."** In any event, Beyer did not save a copy of the rental agreement. (Tr.21). When Beyer returned to his vehicle he immediately radioed for Trooper Michael Trader and his K-9 dog Argo. (Tr.10). Trader arrived at approximately 8:50 a.m. Beyer re-approached the Toyota and ordered asked defendant to come back with him while the vehicle was being walked around. Beyer, who was having problem with his video, estimated that Trooper Trader arrived five to six minutes after being summoned. (Tr.11). Trader was specifically called by

Beyer to do a K-9 sniff of the vehicle because Beyer **"felt that it would be a good idea for him to come in and see if there wasn't something more going on."** (Tr.12). According to Beyer, defendant took a long time to get out of the vehicle in a very slow and deliberate manner. Defendant grabbed two or three cell phones, placed them in his pocket and locked the Toyota before exiting **"which is all very strange"**. (Tr.13).

The state LEADS system was down at that time. It was re-activated at approximately 8:59 or 9:00 a.m. (Tr.14). Trooper Beyer was able to overhear from his the audio system in his vehicle defendant make a phone call from the rear of the police vehicle. (Tr.15). Beyer testified that the vehicle indicated there was something in the vehicle, a search of the vehicle was undertaken.

In the trunk a large duffle bag was found. The contents tested positive for cocaine. There were two kilograms in it. (Tr.16). As defendant asked for representation there was no talk with Beyer about what he had found. (Tr.17).

State's Exhibit 2, a video from Beyer's car, was then played in portions for the court. (Tr.19-20). Beyer testified that when the Toyota initially passed, he did not activate the camera. It was only when Beyer caught up with the Toyota did he activate the camera. (Tr.19). The distance was two miles before that the camera was activated. In any event, traffic was light as this was a clear warm morning. (Tr.20).

State's Exhibit 3 was a traffic citation given to defendant for following too close. (Tr.20-21). Because Beyer did not make a copy of the rental agreement, he could only remember that defendant's name was not on the rental agreement. The rental agreement was not save or copied. (Tr.21-22). Beyer's recording stopped at mile marker 135 which was when Beyer caught up to the vehicle and activated the video. This was a few miles. (Tr.24). Beyer agreed that when defendant changed lanes he used his turn signal or blinker and passed the motor home at which time Beyer was able to make a traffic stop. (Tr.26). Beyer agreed that the statute that he claimed was violated when he stated he should not follow more than what was reasonable or prudent. It says nothing about following a vehicle on the Ohio Turnpike. (Tr.27).

Beyer admitted that when defendant passed the vehicle, his driving created no unsafe operation. (Tr.27-28). Defendant produced his license, registration and the rental agreement. (Tr.28). Defendant, when questioned by Beyer, said he was getting off at either Stoney Ridge, Stoney Brook or Stoney Point a road off of I-480. This was an unfamiliar location to Beyer. (Tr.28-29).

After Trooper Trader did his walk around Beyer was told there was a positive K-9 alert. Beyer did not observe that alert. (Tr.30). Beyer reluctantly admitted that other than traffic patrol he was on a crime patrol team which targets quality of life

violations such as warrants, drugs and other crimes. He had omitted to state that initially when questioned by the prosecutor concerning his duties. (Tr.32).

Trooper Michael Trader was next called. His primary responsibility was management of his K-9 Argo. (Tr.34-35). That training included narcotics detection, criminal apprehension, tracking, area searches, article searches, building searches, obedience training consisting of 200 hours. (Tr.35).

Trader was called to assist Trooper Beyer on a traffic stop to do a free-air sniff of the Toyota with his K-9, Argo. (Tr.36). An alleged alert by the K-9 was at the driver's side rear door because the dog allegedly scratched when the odor of drugs are detected. (Tr.37). Based on this, Argo was rewarded with a toy although a toy was not the reward on every occasion. The dog is rewarded every time for giving a positive indication. (Tr.38). Trader said defendant was not on the Toyota rental agreement. Thus, defendant had no expectation of privacy nor any legal reason to be in the Toyota. Trader based this opinion on a case either from the Lakewood Municipal Court or Lake County Common Pleas Court. (Tr.40-41). Trader was informed that a Lorain County Common Pleas Court judge had found that Argo and Trader were not reliable in detecting cocaine based on a dog sniff. (Tr.43). The court took the matter under advisement. (Tr.47).

TRIAL EVIDENCE

After a jury was selected and opening statements given, the state called Trooper Christopher Beyer, member of the Ohio Highway Patrol since 2012 (Tr. 87-88). Beyer admitted that his assignment was to look for narcotics primarily. He was working on the Turnpike alone in his vehicle along with Trooper Mike Trader who was in another issued vehicle. Trader was the K-9 officer (Tr. 89). Beyer testified that he saw a Toyota following a motor home too close. Beyer caught up to the vehicle at mile marker 135 at that time, then turned on his car video recorder. The Toyota was traveling legally at 65 miles per hour limit. Defendant was traveling 60-65 miles per hour. Beyer testified that when he turned on his lights, the video went on, but there was no audio at that time.

The prosecutor played exhibit 1, which was the video recording while Beyer narrated certain events shown on the video (Tr. 92-93, Ex. 1). Beyer testified that he first observed the Toyota at mile marker 133. He stopped the Toyota at mile marker 137, a distance of approximately 3 ½ miles. (Tr. 95-96). Beyer testified, without objection, that he had a reasonable articulable suspicion to detain the Toyota and defendant because defendant was driving a third party rented car. Defendant said he was coming from visiting a sick family member (Tr. 98).

Beyer was unable to obtain any information over the state's LEADS system

because it was down at that time. When defendant was stopped, he complained that there was no reason to stop him (Tr. 132). After the Toyota was stopped, defendant told Beyer that the Toyota was rented by a cousin. He then he said it was his girlfriend Latrice. A rental agreement was produced. However, Beyer did not preserve or keep the rental agreement or any copy of the rental agreement (Tr. 99 120).

Beyer, after stopping the Toyota radioed for Trooper Mike Trader who arrived shortly thereafter. At that point, defendant was asked to exit the Toyota and sit in the rear of the patrol car while the K-9 dog walk around the outside of the car. According to Beyer, defendant had two cell phones. Beyer said the officers were conducting a probable cause search. The dog gave an indication of something amiss so the Toyota was searched. (Tr. 103-05). In the trunk of the Toyota a duffel bag was found which contained two kilos or 4.4 pounds of cocaine hydrochloride (Tr. 106). Beyer identified various photographs that were taken at the arrest scene and the Toyota with items found in the Toyota (Tr. 110-12). Beyer also identified Exhibit 13, which was a photocopy of defendant's New York driver's license and Exhibit 12, which was the citation given to defendant for the alleged traffic violation. All of these exhibits were admitted without objection (Tr. 112-13).

Beyer admitted that although he may have read the rental agreement, he did not

retain the rental agreement, nor did he copy the rental agreement (Tr. 119-20). His assignment that day was to look for drivers with narcotics. He claimed he had no prior information concerning defendant's Toyota. Beyer admitted that defendant was black. He denied that defendant was not targeted because of his race (Tr. 122).

Beyer testified that although he could not produce or save the rental agreement he stated that defendant's name was not on the rental agreement. Defendant initially told him that his cousin had rented the Toyota, and later said it was his girlfriend. Defendant told Beyer he was coming from the Detroit/Beloit area to Cleveland. He would get off Interstate 480 to go to another location (Tr. 126-27). According to Beyer, defendant was removed for officer safety. Defendant's answer to any questions by Beyer was slow and deliberate. Defendant complained that there was no reason for the stop.(Tr. 132). After being stopped, defendant stated that he was a collection agent, and that was why he had money on his person.

Trooper Mike Trader was the K-9 officer who came to the scene with his K-9 Argo at Beyer's request. (Tr.140-49). Trooper Christopher Beyer to do walk around the Toyota. (Tr.154). Argo went to the left driver's side rear quarter panel and scratched, which according to Trader gave him probable cause to search the Toyota. In the trunk of the Toyota was a duffel bag with two kilos of cocaine, (Tr.154-55), identified as Exhibits 3 and 14. (Tr.155).

Argo was a high strung canine. Argo started at the left rear and went counter clockwise in doing the walk around of the Toyota. (Tr.157-58).

The court adjourned on February 11, 2014 and reconvened in the morning of February 12, 2014. The court noted that defendant was not present. It informed the jury that defendant was not present but was on his way to court. (Tr.168-69).

The prosecutor called Det. Geno Taliano, a 10 year member of the Lorain County Drug TASK Force. (Tr.170). Taliano and S/A Kayla Szczepinski met with Troopers Beyer and Trader. Taliano testified that Szczepinski advised defendant of his ***Miranda*** rights. After speaking to defendant concerning his ***Miranda*** rights, defendant declined to speak. (Tr.172).

Taliano denied that there was any prior intelligence in his office concerning the defendant. Defense counsel then questioned Taliano about defendant not wanting to speak after being advised of his constitutional rights. (Tr.178).

S/A James Goodwin, a member of the Drug Enforcement Agency, was called by the Highway Patrol. As a result Dets. Taliano and Szczepinski were dispatched to speak to defendant to determine see if he would cooperate. However they were unable to get any cooperation from defendant. (Tr.180). Goodwin was requested to take possession of the cocaine. It was returned yesterday and opened on February 11, 2014. (Tr.189-90).

Dr. Timothy Husk, a forensic chemist with the Drug Enforcement Agency next testified. (Tr.194). During his testimony, the court asked defendant in the presence of the jury whether he had his cell phone on. Defendant said he had no cell phone but had an ankle bracelet which had low power. This was the reason why it was making a sound. (Tr.196).

Thereafter, in the presence of the jury, Husk was qualified as an expert. (Tr.196-97). According to Husk the gross weight of the substance seized from defendant's vehicle was 2274 grams. The net weight was 2001 grams of cocaine hydrochloride. (Tr.200, 202).

At that point the state, subject to the admission of exhibits, rested. Defendant made a motion for judgment of acquittal which was denied. (Tr.208, 208-09).

After the jury was excused the court questioned defendant concerning his late arrival at 9:10 a.m on February 12, 2014. Defendant stated he had car trouble. He was not familiar with the area. Defendant said he made calls to his attorney which were missed. (Tr.209). Defendant stated he car would not start and the only way he could get his car started was to have the car jumped with another car. Defendant, who did not live in the area, was staying at a private home in Lorain. Defendant testified that he told his attorney that he was only five (5) minutes away. He had left for court around 8:15 a.m. (Tr.210-13). At that point the court asked defendant whether he

objected to witnesses being heard while he was not present. Defendant objected to this procedure. (Tr.213-14). At that point defense counsel requested that Trooper Christopher Beyer and Mike Trader be recalled which the court denied. (Tr.216, 226-27).

The defense rested. Closing arguments were given by the prosecutor and defense. (Tr.328). After closing arguments, the court instructed the jury. (Tr.240).

On February 12, 2014 defendant was found guilty of trafficking in cocaine. The jury found defendant not guilty concerning the forfeiture of $1,260 in cash,. Defendant was also found guilty of counts two and three. (Tr.263-64).

After short recess the court proceeded with sentencing and stated that under the current statute there was no discretion. A maximum mandatory sentence of eleven (1) years was required. (Tr.267-68). The court sentenced defendant. (Tr.271-72)

ARGUMENT

I

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED HIS MOTION TO SUPPRESS.

Defendant filed a motion to suppress. The court conducted a hearing on that motion on June 4, 2012. In an puzzling entry filed by the court, the first paragraph reads that the motion to suppress has been **"denied."** In the last paragraph the court states that the motion to suppress has been **"granted."** In any event, the court was in error in overruling the motion to suppress.

The sole basis that the court articulated for upholding the stop of defendant's vehicle was:

> Based upon the observation of Trooper Beyer that the Defendant was traveling at a rate of 60-65mph, and following 2-3 car lengths behind a motor home, the Court concludes that there was probable cause for the stop of Defendant's vehicle. (Order @ p.2)

However that basis was clearly insufficient to justify the stop. The alleged statutory basis for claiming a traffic violation was anything but clear. Ohio Rev. Code §4511.34(A).

Trooper Christopher Beyer based the stop because defendant was following 2-3 car lengths behind another vehicle on the Ohio Turnpike while driving in an eastbound direction. This was a clear day with light traffic. There was no evidence of a collision or a near collision. Defendant was able at another point to pass the vehicle that he was following, which according to Beyer was too closely at 2-3 car lengths. (Tr.4-5). Defendant's vehicle was followed for at least two miles, Beyer testified that he was at mile marker 133 and caught up with defendant's vehicle at mile marker 135. However he did not stop defendant's vehicle until mile marker 137. (Tr.4-5). Defendant was stopped and detained for an unusually long period of time at this location. There was no objective basis for the stopping defendant's vehicle. The stopping of the vehicle was clearly unconstitutional.

This case is closely analogous to a case decided by this court in ***State v. Harper***, Case No. 12-CA-0076-M, 2014-Ohio-347. In ***Harper***, again, an Ohio State Trooper stopped a vehicle traveling northbound on I-71 for allegedly following a tractor trailer too closely in violation of §4511.34. Addressing the issue of whether the vehicle was following another vehicle too closely this court reversed.

In this case, there was clearly no basis for stopping defendant's vehicle. The denial of the motion to suppress resulted in a denial of due process of law and must be reversed.

Moreover this case is factually indistinguishable from ***State v. Lewis***, 12CA010146, 2012-Ohio-5114, which was a companion case to ***State v. Davenport***, 11CA010136, 2012-Ohio-4427.

In ***Lewis***, a highway patrolman officer stopped a vehicle with a California license plate that was allegedly following too closely behind a tractor trailer. Lewis was the driver of the vehicle, and passenger, Davenport was in the vehicle. The vehicle was rented to Davenport's girlfriend who was not present at the time of the stop, Lewis identified as additional driver. Lewis informed the officer that he was traveling to Buffalo, New York. While stopped, the trooper called for a K-9 unit to walk around the vehicle as he ran the licenses for both Lewis and Davenport. It was determined that neither had any outstanding warrants, so a warning for traffic

violation was issued. When the second trooper, a K-9 officer, arrived at the scene, both Lewis and his passenger, Davenport, were placed in the back of the trooper' s cruiser, while a walk around of the vehicle was performed by the K-9. An alert was made to the left rear door seam. As a result a block of marijuana was found in the trunk.

Lewis filed a motion to suppress, which was denied. He entered a plea of not guilty. On appeal, the conviction was reversed. The court determined that the prolonged delay to have the car examined by a drug interdiction dog was improper. This court, relying on ***State v. Davenport,*** ruled the search illegal.

Similarly, in the present case, similar circumstances exist. The prolongation of the stop to allow a K-9 dog to arrive to examine or sniff around the vehicle was improper. Based on these case, defendant's motion to suppress should have been granted.

II
DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE PROSECUTOR OFFERED EVIDENCE OF DEFENDANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS.

The prosecutor presented Det. Geno Taliano, a member of the Lorain County Drug TASK Force. (Tr. 170). Taliano was summoned to the Milan Highway Patrol post along with S/A Kayla Szczepinski. (Tr.171). Taliano testified that

Szczepinski advised defendant of his ***Miranda*** rights. After advising defendant of his rights, defendant stated he would not speak.

> A. Special agent Szczepinski attempted to interview Clifton Jackson, who was the suspect in the investigation, advised him of his Miranda rights, both verbally and written form. He signed the form, understood that, understood the rights, and opted not to speak with us, so there was no question. (Tr.172).

This was absolutely a violation defendant's constitutional rights. Defense counsel may not have objected to this evidence and later exacerbated the error by asking Taliano whether defendant chose not to speak. (Tr.178). This constitutional violation can be recognized as plain error.

In ***Doyle v. Ohio***, 426 U.S.610 (1976), the Supreme Court ruled that use of a defendant's failure to make a statement after having been advised of his rights it would be constitutional error. This was the same error committed in this case. Defendant had no need to make a statement. Defendant was in custody. He would have to have been advised of his rights and could have declined to make a statement. He had already asked for representation. (Tr.17, 6/14/12). ***Wainwright v. Greenfield***, 474 U.S. 284, 291 (1986) (Doyle **"rests on 'the fundamental unfairness of implicity assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial"'**) (quoting ***South Dakota v. Neville***, 459 U.S. 553,

565 (1983)); *see* ***e.g. United States v. Mooney***, 315 F.3d 54, 61 n.1 (1st Cir. 2002) (prosecutor's comment on defendant's choice not to talk to police after his arrest was fundamental error); ***Hassine v. Zimmerman*** 160 F.3d 941, 959 (3d Cir. 1998) (prosecutor's attempt to elicit testimony as to defendant's post-arrest, post ***Miranda*** silence improper); ***Gravely v. Mills***, 87 F.3d 779, 786-88 (6th Cir.1996) (prosecutor's reference to defendant's post-arrest post-***Miranda*** silence was improper); ***Fields v. Leapley***, 30 F.3d 986, 990-91 (8th Cir. 1994) (prosecutor's use of defendant's invocation of ***Miranda*** rights was improper because invocation of ***Miranda*** rights considered **"silence"** rather than voluntary **"statements"** for ***Miranda*** purposes); ***Killian v. Poole***, 282 F.3d 1204, 1211 (9th Cir.2002) (prosecutor's repeated comments that defendant's post-arrest silence indicated she had **"something to hide"** were improper); ***Hill v. Turpin***, 135 F.3d 1411, 1416-19 (11th Cir. 1998) (prosecutor's references to defendant's post-***Miranda*** request for counsel was and assertions of right to silence were improper).

The Court of Appeals for Cuyahoga County has held that **"the defendant's refusal to give a statement to the police is inadmissible evidence."** ***State v. Williams***, 64 Ohio App.2d 271, 274, 413 N.E.2d 1212, 1216 (1979). **"Post-arrest silence is inherently ambiguous since the silence may reflect only the defendant's exercise of his constitutional right to remain silent."** syllabus

(citing ***Doyle v. Ohio***, 426 U.S. 610, (1976). The Court of Appeals in ***Williams,*** reversed the defendant's conviction based upon questioning similar to that in this case.

In ***State v. Sabbah***, 13 Ohio App.3d 124, 468 N.E.2d 718 (1982), the defendant was convicted of murder. During trial he was questioned by the prosecutor as to why he had not stated at any point prior to his trial testimony that he had acted in self-defense. The Court of Appeals ruled that this was prejudicially erroneous requiring a new trial. See ***United States v. Wycoff***, 545 F.2d 679, 682, (9th Cir.1979), *cert denied* 429 U.S. 105 (1977)

III
DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED HIS MOTION TO DISMISS BASED ON THE VIOLATION OF THE SPEEDY TRIAL STATUTE

Defendant was indicted for these offenses on August 11, 2011. He was arrested on June 14, 2011. Trial did not commence until February 11, 2014. The trial was approximately three and a half (3-1/2) years after the defendant was indicted. At one point, defendant did not waive his statutory time for a speedy trial. While certain periods of time during the course of the proceedings were tolled to decide a motion to suppress, defendant was not brought to trial within the 270 days as required by §2945.71 of the Ohio Revised Code. Defendant filed a

motion to dismiss because he had not been brought to trial within the statutory period of time required by §§2945.71 to 2945.73 of the Ohio Revised Code. The court summarily overruled this motion.

When defendant **"...alleged in his motion that he was incarcerated 'solely on this pending charge' and then demonstrated he was not brought to trial within the limits imposed by the triple-count provision, he presented a *prima facie* case for discharge. At that point a burden of production arose whereby the state became obligated to produce evidence demonstrating [defendant] was not entitled to be brought to trial within the limits of R.C.2945.71(E). ..."** ***State v. Butcher***, 27 Ohio St.3d 28, 30-31, 500 N.E.2d 1368, 1370 (1986).

Section 2945.71 to 2945.73 of the Ohio Revised Code are mandatory and must be strictly complied with by the trial court. ***State v. Cloud***, 122 Ohio App.3d 626, 702 N.E.2d 500 (1977). This **"strict enforcement has been grounded in the conclusion that the speedy trial statutes implement the constitutional guarantee of a public speedy trial. "** ***State v. Pachay***, 64 Ohio St.2d 218, 221, 416 N.E.2d 589, 591 (1980).

The Ohio Supreme Court has noted that any attempt to circumvent the speedy trial provisions through any form of machination would violate

defendant's speedy trial rights. ***State v. Pudlock***, 44 Ohio St.2d 104, 106, 338 N.E.2d 524, 525 (1975) (**"practices which undercut the implementation of the 'speedy trial' provisions within R.C.2945.71 and 2945.73 must not be employed to extend the requisite time periods."**); ***State v. Lee***, 48 Ohio St.2d 208, 209, 357 N.E.2d 1095, 1096 (1976) (**"Practices which are used to undercut R.C.2945.71 and 2945.73 must not be used to extend the requisite time limits. ..."**). ***State v. McDonald***, 153 Ohio App.3d 679, 683-84, 795 N.E.2d 701, 703-04 (2003). See ***Barker v. Wingo***, 407 U.S. 514, 530-33 (1972).

IV
DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

The record reflects a number of errors and omissions by defense counsel which deprived defendant of his Sixth Amendment right to effective assistance of counsel guaranteed by the Constitution. ***Strickland v. Washington***, 466 U.S. 366. 687-88 (1984). See ***Padilla v. Kentucky***, 130 S.Ct.1473, 1480-81 (2010); ***Yarbough v. Gentry***, 540 U.S. 1, 5 (2003); ***McMann v. Richardson***, 397 U.S. 759, 771 n.14 (1970).

1. Defense Counsel Was Deficient Concerning Not Requesting A Continuance Or Taking Other Corrective Action When Defendant Was Tardy At The Second Day Of Trial Late.

As noted, this trial occurred in February during the height of the polar

vortex which was blanketing northeastern Ohio with extremely cold temperatures. While the court believed that it was going to start at 8:30 a.m. court did not convene until shortly before 9:00 a.m. Defendant appeared at 9:15 a.m. when he ran into the courtroom. (Tr.212). Defense counsel said nothing other than stating that he had made some calls to defendant. (Tr.213).

However, when the court adjourned and out of the presence of the jury, questioned defendant, defendant stated that he did have contact with defense counsel and informed defense counsel that he was late because he had car trouble. Defendant, who is not from the Lorain County area was staying at a home Lorain, Ohio which was ten or fifteen minutes away from the courthouse. (Tr.211-12). Defendant had car trouble and did have a communication with defense counsel concerning his predicament and inability to arrive on time. However defense counsel did not convey this to the court nor did defense counsel seek any corrective or ameliorative action seeking a short delay to allow defendant to appear. Instead defense counsel allowed the proceedings to proceed without the presence of defendant which was a constitutional right under the Sixth Amendment and Rule 43 of the Ohio Rules of Criminal Procedure. (Tr. 212-13).

2. Defense Counsel Provided Ineffective Assistance Of Counsel When Counsel Failed To Object To Testimony Concerning The Defendant's Refusal To Give A Statement After Being Advised Of His *Miranda* Rights

The record shows that defendant was interviewed by S/A Kayla Szczepinski. After being advised of his rights declined to give a statement. (Tr. 172). Defense counsel failed to object.

This certainly was ineffective assistance of counsel for failure to object. See ***Burns v. Gammon***, 260 F.3d 892, 897 (8th Cir.2001)

This error was compounded when S/A Goodwin testified that Taliano and Szczepinski were dispatched to determine if defendant would cooperate with law enforcement. Defendant declined. (Tr.180). This was at least indirect comment on defendant's right to silence. Defendant had been advised of ***Miranda*** rights and did not speak. Even at the scene of his arrest, defendant had requested counsel when approached by Trooper Beyer. (Tr.17, 6/4/12). **Accord** ***State v. Pawlar***, Case No. 99555, 2014-Ohio-2175.

Counsel's allowance of improper evidence concerning defendant exercising his constitutional right of silence under the Fifth Amendment deprived of the effective assistance of counsel.

Other cases in analogous situation have so concluded.

A claim that defense counsel conducted certain trial strategies does not complete the analysis. A court **"cannot stop there, for we must also assess if**

this strategy was itself constitutionally deficient." ***Washington v. Hofbauer***, 228 F.3d 689, 704 (6th Cir.2000). As one court has recognized, **"the label 'strategy' is not a blanket justification for conduct which otherwise amounts to ineffective assistance of counsel."** ***Lovett v. Foltz***, 884 F.2d 579, at *4 (per curiam)(unpublished). **"[E]ven deliberate trial tactics may constitute ineffective assistance of counsel if they fall 'outside the wide range of professionally competent assistance.'"** ***Martin v. Rose***, 744 F.2d 1245, 1249 (6th Cir.1984).

Under no view could this be considered reasonable trial strategy. At best, this represents a situation where **"the lawyer in the case, at best, occupied a space next to his client. ..."** ***Matthew v. Abramajtys***, 319 F.3d 780, 789 (6th Cir.2003).

The singular, if not cumulative effect of the omissions by defense counsel, certainly deprived petitioner of his Sixth Amendment right to effective assistance of counsel. To say petitioner was not prejudiced is to ignore the obvious.

In other cases, courts have ruled that a criminal defendant has been denied effective assistance of counsel. In ***Mackey v. Russell***, Case No. 02-4237 (6th Cir. Aug. 9, 2005), the court ruled that when defense counsel failed to object to the introduction of evidence that the criminal defendant had guns at his home, failed

to object to the introduction by the prosecution of a witness's extra judicial acts to argue guilt by association, failed to object to a prosecution's closing argument that the decedent, an off duty policeman, was legally permitted to carry a service gun into a bar and failed to object to the prosecution's references to the criminal defendant's post-arrest silence, deprived the criminal defendant of effective assistance of counsel.

Similarly, in ***Girts v. Yanai***, 501 F.3d 743 (6th Cir. 2007), a writ of habeas corpus was granted to an Ohio prisoner because defense counsel failed to object to statement made by the prosecutor during closing argument concerning the defendant's failure to testify or inform the police concerning what had happened.

The court failed to consider ***White v. McAninch***, 235 F.3d 988 (6th Cir.2000), which is closely analogous to this case. In ***White***, defense counsel offered evidence that the defendant and child rape victim had intercourse which was not charged as an offense. Defense counsel did not seek or request a limiting instruction. Habeas corpus relief was awarded as defense counsel's **"strategy 'of failing to object to, and affirmatively eliciting, testimony regarding an uncharged' act of sexual intercourse between [petitioner] and the victim falls well below an objective standard of reasonableness."** 235 F.3d at 997. Counsel's performance prejudiced the defendant in ***White*** because **"the**

uncharged act of sexual intercourse between [petitioner] and victim were so egregious as to undermine our confidence that [petitioner's] trial produced a just result." 235 F.3d at 999.

3. Defense Counsel Was Deficient To Not Fully Cross-Examine Christopher Beyer Rather Than Seeking A Recall At The End Of The Trial

As noted counsel requested that Troopers Beyer and Trader be recalled. (Tr.226). Although it was proper to seek a recall counsel could have examined Beyer concerning the legality of the stop as Beyer testified that he had a **"reasonable articulable suspicion"** that criminal activity was afoot. (Tr.97-98).

Moreover, any discrepancies in Beyer's report that he gave to Det. Taliano concerning the sequence of events and where he first saw the Toyota and stopped the Toyota could have been explored during the cross-examination of Beyer. Counsel should have asked Beyer whether he agreed with Taliano's report concerning the stop and what was heard at the stop. (Tr.178-79). ***State v. Riggins***, 35 Ohio App.3d 579 N.E.2d 397 (1986).

4. Defense Counsel Was Deficient In Not Objecting To Various Legal Conclusions And Other Improper Evidence

For instance, there was no objection to Trooper Christopher Beyer testifying that he had a **"reasonable articulate suspicion"** that criminal activity was afoot. (Tr.97-98). Moreover, this led Beyer to conclude to various clues that this was

more than a routine traffic violation for following too close.

Moreover Trooper Mike Trader testified that he had a **"probable cause"** to search the vehicle. (Tr.155).

Later, during the testimony of S/A James Goodwin defense counsel did not object to Goodwin testifying that other detectives went to see defendant to see if he would cooperate in the investigation. Goodwin testified that they were unable to get any cooperation from defendant. (Tr.188). This would indicate that defendant exercised his right of silence and would be an adverse comment on that. Defense counsel should have objected to this. Even when defendant was stopped on the turnpike he requested representation. (Tr.17, 6/4/12).

V

DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE WHEN THE COURT WOULD NOT EITHER RE-OPEN THE EVIDENCE TO ALLOW RECALL OF WITNESSES OR HAVE WITNESSES RECALLED WHO TESTIFIED DURING DEFENDANT'S ABSENCE.

On the second day of trial, the court noted that defendant was not present. (Tr.168-69). Counsel gave no explanation as to defendant's absence even though counsel had information concerning defendant tardiness but did not take his call or ask the court for some time to take defendant's call. (Tr.211-12). Defendant objected to taking testimony in his absence. (Tr.213-14).

Defendant did enter the courtroom at 9:10 a.m. which was, at most, 25

minutes after the court convened the proceedings. (Tr.190, 192). Defense counsel requested a recall of Troopers Christopher Beyer and Mike Trader. (Tr.216). The court stated it would not allow any recall. However the effect of this denial was to deny defendant his right to present a defense which is constitutionally guaranteed. The Sixth Amendment grants to a defendant the right to offer evidence or testimony of favorable witness and to compel their attendance at trial. **("In all criminal prosecutions the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor.")** U.S. Const. Amend.VI. ***Washington v. Texas***, 388 U.S. 14, 17-18 (1967).

A recall of the witnesses was proper. Any implicating evidence only arose which Det. Taliano was questioned about in his report referred conversations with Trooper Beyer. (Tr.178-79). However, Beyer testified before Taliano. (Tr.82), and the report by Taliano only arose on cross-examination of Taliano. It would be proper to recall Beyer to examine him on those inconsistencies. (Tr.178-79).

Moreover, even if the stop and search was explained, Beyer had testified that he had a **"reasonable articulatable suspicion" ...** that there was **"something more criminal down there."** (Tr.97).

Trooper Trader also testified the he could do a probable cause search. (Tr.155)/

This court has reversed a conviction in a criminal case where defendant was not allowed to present evidence in his favor. ***State v. Ott***, 133 Ohio App.3d 532, 729 N.E.2d 391 (1999).

VI
DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO BE PRESENT WHEN THE COURT COMMENCED TRIAL WHEN DEFENDANT BELATEDLY APPEARED ON THE SECOND DAY OF THE TRIAL.

On the second day of the trial which was apparently to commence at 8:30 on February 12, 2014. Accordingly defendant was not present. (Tr.168). The court informed the jury that defendant was not present but was on his way.

Nevertheless, defense counsel did not object the case continuing. Later the court noted defendant did appear and questioned defendant concerning his tardiness. (209). When defendant was questioned the court noted that he arrived at 9:10 which was approximately 25 minutes after the court did commence the trial in this case. Defendant stated he had car trouble and was not familiar with the area. It must be noted that at this time in February, northeastern Ohio was in the mist of a polar vortex and the temperatures were quite cold. (Tr.209). Defendant noted that he made calls to his attorney but did not connect. Defendant stated that his car would not start because it was too cold and he had to get a cable jump in order to start his car. Defendant was staying in a private home in Lorain, Ohio

which was only approximately ten or fifteen minutes from the courthouse. (Tr.210-11). Defendant stated that he did tell his attorney. At that point the attorney did admit he talked to defendant who stated he was only five (5) minutes away but failed to inform the court.

> MR. AUFDENKEMPE: I know we did talk when I came back to the Court and said he was five minutes away, and at that time he did say something about car trouble. I didn't give him much of an opportunity to talk to me because the Court was starting. (Tr.212).

At that point the court asked defendant if he objected to the trial going forward without his presence and he stated that he objected. (Tr.213-14).

This violated defendant's constitutional right to be present. Counsel should have informed the court that he had a conversation with defendant and that he was five (5) minutes away or at least ask for a short continuance or a delay in the commencement of the trial. The right to be present is not only a right secured by the Sixth Amendment to the United States Constitution but also Rule 43 of the Ohio Rules of Criminal Procedure. This certainly was not a willful absence of defendant nor did defendant abscond because he readily appeared on the second day of the trial. ***Washington v. Texas***, 388 U.S.14 (1967). In all criminal prosecutions the accused shall enjoy that right.

Rule 43 of the Ohio Rules of Criminal Procedure provides that the defendant **"must be physically present at every stage of the criminal**

proceeding and trial, including ..., the imposition of sentence, ... " Defendant's physical presence may only be waived in the following circumstances as provided by Rule 43(A)(2) of the Ohio Rules of Criminal Procedure:

It is only defendant's ***voluntary*** absence that deprives him of this Sixth Amendment to be present. ***Taylor v. United States***, 414 U.S. 17, 19 (1973). Since counsel had information which would excuse defendant's tardiness, counsel should have so informed the court or at least requested time to answer defendant's call before allowing the trial to proceed in defendant's absence. See ***State v. Carr***, 104 Ohio App.3d 699, 663 N.E.2d 340 (1995).

Federal courts have ruled that a defendant was entitled to be present even at sentencing. See ***United States v. Torres-Palma***, 290 F.3d 1244, 1247-48 (10th Cir. 2002)(remanding for resentencing where judge appeared via videoconference); ***United States v. Lawrence***, 248 F.3d 300, 305 (4th Cir.2001) (vacating sentence where defendant appeared via videoconference); ***United States v. Navarro***, 169 F.3d 228, 238-39 (5th Cir. 1999) (vacating sentence where judge appeared via videoconference). See ***Terrell v. United States***, 564 F.3d 442 (6th Cir. 2009).

VII
DEFENDANT WAS DENIED A FAIR TRIAL WHEN THE JURORS WERE INFORMED THAT DEFENDANT WAS UNDER RESTRAINT.

On February 12, 2014 during the testimony of Dr. Timothy Husk, the court asked defendant, in the presence of the jury, whether he had his cell phone on him. Defendant said he had no cell phone. He did have an ankle bracelet which was on low power. This was the reason that it was making a sound. This compromised defendant's presumption of innocence as the jury would know that defendant was under some sort of restraint. While a deputy may not have been present at this time the fact that defendant had an ankle bracelet would indicate that he under some form of restraint. When the court questioned defendant concerning the sound, the court should have excused the jury or defense counsel should have objected or requested a sidebar.

The Due Process Clause prevents the government from taking certain security measures during a trial that are prejudicial to a defendant in the absence of some essential government interest. The government may not use physical shackles on a defendant unless there is special need such as a special security concern or escape risk. ***Deck v. Missouri***, 544 U.S. 622, 628 (2005). See ***Estelle v. Williams***, 425 U.S. 501, 512 (1976).

The use of a ankle bracket would indicate to a reasonable jury that defendant presented some sort of security risk and would impair the presumption of innocence.

VIII

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN HE WAS SENTENCED FOR A FELONY VERSION OF POSSESSION OF CRIMINAL TOOLS AND THE VERDICT DID NOT SUPPORT A FELONY VERSION.

The third count of the indictment charged defendant with possession of criminal tools. It alleged:

> _____That CLIFTON JACKSON, on or about June 14, 2011, at Lorain County, Ohio, did possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally in violation of Section 2923.24(A) of the Ohio Revised Code contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio. The substance, device, instrument, or article involved in the offense was intended for the use in the commission of a felony.
>
> However on the jury verdict returned in this case only found as follows:
>
> > Verdict on Count Three of the indictment: We the Jury, find the defendant, Clifton Jackson, guilty of possession criminal tools, as charged in Count Three of the indictment. This is signed by all 12 jurors. (Tr.264)

Since the jury failed to make a specific finding concerning that the criminal tools were used in the commission of a felony this verdict can only constitute a misdemeanor offense. Possession of criminal tools, under §2923.24© of the Ohio Revised Code, is a first degree misdemeanor unless the items are intended for use in the commission of a felony which then becomes a felony of the fifth degree. Since defendant was sentenced as a felony to eleven (11) months, even though it

may be concurrent, he was improperly sentenced for the felony version of possession of criminal tools.

In ***State v. Pelfry***, 112 Ohio St.3d 422, 860 N.E.2d 735 (2007), the issue before the court whether a defendant could be sentenced for a greater offense where the jury verdict form neither contained the degree of the offense or that any aggravating element has been found by the jury. The jury verdict submitted to the jury merely incorporates the language of the indictment. In ***Pelfry*** the defendant was charged with tampering with records which offense would be a third degree felony if governmental records were the subject of the tampering. The Court of Appeals ruled that the failure to object to the jury instructions did not authorize the court to sentence defendant for a third degree felony rather than a misdemeanor, which would be the lowest degree. In so ruling:

> Pursuant to the clear language of R.C.2945.75, a verdict form signed by the jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating elements has been found to justify convicting defendant of a greater degree of a criminal offense.

In ***State v. Ligon***, 179 Ohio App.3d 544, 902 N.E.2d 1011 (2008), the defendant was indicted and charged with a fourth degree felony and a second degree felony along with fifth degree felony, a first degree felony and a second degree felony. At trial defendant was found guilty and sentenced to various terms