

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, :  
 :  
 -vs- : Case No. 2005-2264  
 :  
 NICOLE DIAR, :  
 :  
 Defendant-Appellant. : **DEATH PENALTY CASE**

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ON APPEAL FROM THE COURT OF  
APPEALS OF LORAIN COUNTY, CASE NO. 04CR065248

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**MERIT BRIEF OF APPELLANT NICOLE DIAR**

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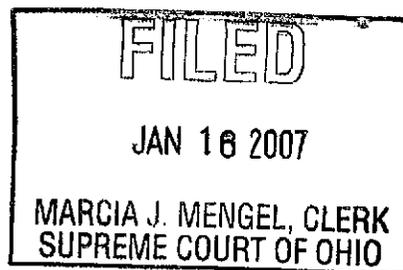
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## **PREFACE**

Appellant Nicole Diar hereby provides the following key to describe citations to the record made in this brief:

Citation to trial transcripts (T.p. \_\_\_\_\_).

## STATEMENT OF FACTS AND CASE

In May of 2003, Nicole Diar moved into 914 West 10<sup>th</sup> Street with her four year old son Jacob Diar. During the three month span that Nicole called West 10<sup>th</sup> Street home, she realized that the neighborhood was not particularly safe and attempted to take appropriate measures.

Prior to Nicole moving in, the Lorain Fire Department investigated a fire in the garage at 914 West 10<sup>th</sup> and determined that it had been intentionally set. (T.p. 1393). Nicole's next door neighbor, Leroma Penn, was a twice convicted felon. (T.p. 1479). Nicole was the victim of a burglary and theft in August. (T.p. 1854). Pry marks on the front door indicated signs of a forced entry sometime after Nicole moved into the house. (T.p. 1860). Around the time of the August break-in, Nicole noticed that her house and car keys were missing. (T.p. 1854). Two money orders were also stolen from Nicole, forcing her to place a stop payment order on them.

Nicole told her landlord that she was going to change the locks to feel safe. (T.p. 1866). On August 26, 2003, Nicole's next door neighbor, Leroma Penn, came over to help change the locks. (T.p. 1484-85). After changing the locks that evening, Leroma returned later with drinks. Based on her testimony, Jacob could be seen inside the house lying on the couch at that time. (T.p. 1488). Leroma and Nicole sat on the front porch until almost 1:00 a.m. (T.p. 1489). Nicole then went in and laid down with Jacob on the couch. Leroma left and locked the front door behind her. (T.p. 1490).

Later on that morning, 914 West 10<sup>th</sup> Street was the site of a tragic fire. As Leroma was coming upstairs from her basement, she heard someone yelling, "Ro." (T.p. 1495). Nicole was outside and her house was on fire. (T.p. 1496). She could not find Jacob. (Id.) Leroma called 9-1-1.

Leroma's husband, Edgar Penn, was in bed at the time when he heard his wife scream. (T.p. 1551). He heard a "life or death" scream that presumably came from Nicole. (T.p. 1568). Even though Edgar testified that his normal routine is to get up very early in the morning, he said that he was still in bed this particular morning. (T.p. 1566-67). Edgar looked out the window and saw the fire. (T.p. 1552). Nicole said that Jacob was in the living room, but the smoke was too thick to gain entrance by the front door. Edgar went to the rear of the house, kicked in the back door, and testified that the fire felt like a "blowtorch." (T.p. 1553, 1558). He was not able to get into the house.

The Lorain Fire Department arrived at the scene a few minutes after 9:00 a.m. (T.p. 1303). A firefighter testified that Nicole told him to look upstairs for Jacob. (T.p. 1307). Nicole asked the firemen present to get Jacob out of the house. (T.p. 1331, 1407). She was visibly upset. (T.p. 1325).

After the fire was put out, the firemen made a grim discovery. Inside the house was Jacob's lifeless body, found in a first floor bedroom. (T.p. 1368). The assistant fire chief asked a paramedic to inform Nicole that her child was dead. (T.p. 1426). The paramedic took Nicole to an ambulance and told her the dreadful news. (T.p. 1428, 1431). Nicole leaned over and put her head on the paramedic's shoulder. She also hugged her mother and sobbed. (T.p. 1431-21, 2467).

The paramedic said Nicole was sad at the scene but not "hysterical." (T.p. 1433). She further testified that it is not unusual for people not to cry at the scene of a tragedy, since people cope with death in different ways. (T.p. 1436). Reports indicate that Nicole did in fact cry at the scene and was "very upset." (T.p. 1437, 1459, 1462-63).

Nicole's family wanted her to leave the scene. After speaking with a detective, Nicole left with her mother. (T.p. 1441). Later that day, she went to the hospital. (T.p. 2438-39). A nurse on duty noticed an odor of smoke on Nicole, and she was treated for smoke inhalation. (T.p. 2439-40). That evening, detectives interviewed Nicole at her parent's house. (T.p. 2061). They took her clothes, which were later introduced as evidence at the trial. (T.p. 2094).

An investigation conducted by the State Fire Marshall and a private investigator determined that the fire had been deliberately set, and gasoline was used as the accelerant. (T.p. 1635, 1819). The week after the fire, Nicole voluntarily went to the Lorain Police Department to be interviewed at length. (T.p. 2105). The interview quickly turned into an interrogation with the goal of obtaining Nicole's confession. (T.p. 2074; State's Exhibit 23). Detectives asked Nicole about the fire and provided her with false information, claiming that Jacob had suffered blunt force trauma to the head. (T.p. 1706, 1714, 2106). Despite several hours of intense interrogation, Nicole denied having killed her son.

On October 21, 2003 the coroner who performed the autopsy on Jacob released his Coroner's Verdict. (T.p. 1686, State's Exhibit 14). In it, the coroner determined that the cause of Jacob's death was "homicidal violence of an undetermined origin." (T.p. 1681). The coroner ruled out a hematoma to the back of the head, as was indicated to Nicole by the detectives who interviewed her. The investigation into the fire and death of Jacob continued to focus on Nicole as the primary suspect.

### **The Indictment**

On April 30, 2004, a Grand Jury indicted Nicole for the aggravated murder of her son. The aggravated murder charge included a death specification for the murder of a child under the age of thirteen, O.R.C. § 2929.04(A)(9). Nicole was also charged with Corrupting Another With

Drugs under O.R.C. § 2925.02(A)(4)(b), two counts of Felonious Assault under O.R.C. § 2903.11(A), Murder under O.R.C. § 2903.02(B), two counts of Aggravated Arson under O.R.C. § 2929.02(A), and Tampering With Evidence under O.R.C. § 2921.12(A)(1). Nicole retained Jack Bradley as her legal counsel. John Pyle served as co-counsel. On May 5, 2004 Nicole was arraigned with bond set at \$2 million. (Pre-trial, May 12, 2004, p. 3). Defense counsel filed a motion to reduce bond and the trial court reduced it to \$1 million. (Pretrial, June 9, 2004, p. 5). Nicole eventually posted bond.

Prior to trial, Diar's attorneys filed a Motion in Limine seeking to exclude prejudicial and irrelevant testimony the State intended to offer. Defense Counsel argued that poor parenting skills did not equate to a motive to commit murder. The motion also sought to prohibit testimony about Diar's actions at a bar on the day of her son's funeral. The prejudicial impact of such testimony far outweighed any probative value that could have aided the jury in both phases of the trial. Despite this motion, the trial court admitted the testimony.

The prejudicial testimony in regards to Diar's parenting skills was further compounded by the fact that the trial court overruled defense counsel's Motion For Relief From Prejudicial Joinder. Due to the numerous counts in Diar's indictment, various unrelated fact patterns were present in relation to each charge. The unconstitutionally conjoined offenses unduly burdened Diar's ability to defend against the capital count in her indictment.

### **The Trial**

On October 3, 2005, the State's case-in-chief began. The prosecution proceeded on the theory that Nicole was a bad mother who had tired of her son and wanted to be rid of the constraints of motherhood. (T.p. 2765). The prosecutor called Jacob's teenage babysitters to testify that Nicole told them to give Jacob medicine, which the State had alleged was codeine.

(T.p. 1874, 1888, 1927-28). The witnesses recounted an incident where Nicole allegedly told babysitters to give Jacob medicine. Police officers told one of the babysitters that the medicine was Codeine, and she subsequently testified so. (T.p. 1911). The medicine made Jacob sick. (T.p. 1875).

In July 2003, Jacob became ill and was taken to the hospital. A witness for the State said she saw Nicole at the hospital appearing agitated. (T.p. 1963). Jacob had gastrointestinal problems. (T.p. 1267). The witness overheard Nicole say, "This is making me a nervous wreck." (T.p. 1965).

The State then called witnesses who said that on the night of Jacob's funeral, they saw Nicole out at a bowling alley and at a local bar called Jack and Diane's. (T.p. 2052, 1973, 1982, 2247). The witnesses said that Nicole was singing karaoke and line-dancing at the bar. (T.p. 1975, 1983, 2016-17, 2251).

The State presented a witness who worked at a drive-thru beverage store. She said that two days after Jacob's death, Nicole came through the drive-thru in a limousine. Nicole's brother drove the vehicle. (T.p. 2163). According to the employee, Nicole stuck her head out the window and said she wanted liquor. (T.p. 2164).

The jurors were subjected to gruesome crime-scene and autopsy photographs. (T.p. 1690). The coroner testified that the cause of death was "homicidal violence of an undetermined origin." (T.p. 1681). He further testified that Jacob was not alive at the time of the fire. (T.p. 1682). Jacob had no soot on his teeth, tongue, mouth, in the back of his throat, in his lungs, or in his nostrils. (T.p. 1702-03). The coroner ruled out a hematoma to the back of the head. (T.p. 1687). Furthermore, no drugs were found in Jacob's system. (T.p. 1684, 1715). The coroner could not determine if Jacob had been smothered or drowned. (T.p. 1698).

Conflicting reports came from the fire investigators who testified for the State. Assistant State Fire Marshal Lee Bethune's written report indicated that the fire originated in the first floor bedroom. (State's Exhibit 11). But when he testified, Bethune said that the living room was the area of origin. (T.p. 1635-36). His report further indicated that the "fire never ignited in the living room," which he later admitted was wrong. (T.p. 1649). Genevieve Bures, a private fire investigator who worked for an insurance company, testified that the area of origin was the bedroom, which contradicted Bethune's revised testimony. (T.p. 1745). Later in her direct testimony, she said that the fire started in the carpeting in the living room and progressed to the dining room and bedroom. (T.p. 1819). An electrical expert who worked with Bures (T.p. 1741) said that the fire did not start in the living room and worked its way over to the bedroom. (T.p. 1840). He said the area of origin, "the location of the area where the fire originated," was the dining room. (T.p. 1839).

With inconclusive and conflicting reports from their expert witnesses, the State made the trial a referendum on Nicole's character. (T.p. 1266). The defense attempted to counter the State's theory of the case, albeit in a limited manner. The defense presented a witness who testified that Nicole was "sobbing" in the ambulance at the scene of the fire and was noticeably upset. (T.p. 2467). Other defense witnesses testified to the good relationship between Nicole and her son. (T.p. 2459, 2493, 2511, 2552, 2661). Defense counsel called Nicole's mother to testify at the trial phase. Lead counsel elicited testimony on Nicole's childhood burn injury, but in a very restricted manner. (T.p. 2522-25). During its case-in-chief, the defense called social worker Linda Powers to testify about Nicole's "character." (T.p. 2710). Defense counsel did not call her to testify at the mitigation hearing. Counsel did not attempt to have Powers qualified as

an expert, even though she has the requisite training and experience as a medical social worker who has worked with burn survivors for fourteen years. (T.p. 2681-82).

Nicole's father, Edward, testified that after Nicole had Leroma change her locks, one of the new keys was missing. There should have been a total of four keys for two locks that had been changed, but there were only three keys found in Nicole's purse after the fire. (T.p. 2604). Mr. Diar turned the keys over to the police. (T.p. 2639).

### **The trial phase verdict.**

On October 17, 2005, the jury returned guilty verdicts on all counts and specifications. (T.p. 2896-99). The trial court then revoked Nicole's bond. (T.p. 2901).

### **The penalty phase and verdict.**

On November 1, 2005, a mitigation hearing was held. Defense counsel presented two witnesses: A psychologist, Dr. McPherson (T.p. 2992). and Nicole's mother, Marilyn Diar. (T.p. 3043). Dr. McPherson diagnosed Nicole with a Personality Disorder, Not Otherwise Specified, with borderline and dependency-related traits. (T.p. 3005).

The prosecutor argued to the jury that the mitigating evidence was "absolutely, positively weak." (T.p. 3066). The jurors deliberated for approximately seven hours. (T.p. 3074, 3075, 3077, 3084). They returned with a recommendation of death. (T.p. 3085-86). Nicole's attorneys requested a pre-sentence investigation report and a continuance to allow the trial court adequate time to independently weigh the aggravating circumstance against all available mitigating factors. This request was denied after the trial court stated it "has its own mind made up as far as what it will do." (T.p. 3088). The trial court never conducted an independent weighing of the aggravating circumstance and mitigating factors and failed to consider all available mitigating evidence. (T.p. 3087-89). This appeal followed.

## Proposition of Law No. I

A defendant's right to a reliable capital sentencing hearing is violated when the trial court fails to properly instruct the jury at the penalty phase. U.S. Const. Amends. VIII, XIV; Ohio Const. Art. 1 §§ 9, 16.

### **A. Introduction**

The instructions given to the jury in the penalty phase of Appellant Diar's trial were so constitutionally deficient that there can be no confidence that Appellant's sentence is reliable. The trial court repeatedly failed to give the jury guidance in determining the appropriate sentence in this case. Criminal defendants have the right to expect that the trial court will give accurate and complete jury instructions. State v. Williford, 49 Ohio St. 3d 247, 251, 551 N.E. 2d 1279, 1283 (1990). Unfortunately this did not happen in Appellant's case.

### **B. The Instructions**

At the close of the presentation of evidence at the penalty phase, the trial court instructed the jurors. In the instructions, the court listed the possible sentences. (T.p. 3069). The court told the jurors that the State must prove beyond a reasonable doubt "that the aggravating circumstances of which the defendant was found guilty is [sic] sufficient to outweigh the factors in mitigation of imposing the death sentence. The defendant does not have any burden of proof." The court then gave the jurors an instruction on reasonable doubt. (T.p. 3069-70).

The court then told the jurors that "mitigating factors are factors about an individual or an offense that weigh in favor of a decision that a life sentence rather than a death sentence is appropriate. Mitigating factors include the age/youth of the offender, and as well as [sic] any other factors that are relevant to the issue whether or not—whether the defendant should be sentenced to death, along with the defendant's lack of prior criminal conviction and adjudications of delinquency." (T.p. 3070-71).

The court concluded with an instruction on the defendant's right to remain silent, stipulations by the parties as to evidence, comments on note-taking by the jurors, instructions on the verdict forms, an instruction on refraining from discussing the deliberations or disclosing the verdict prior to announcing it in open court, an instruction as to questions during deliberations, and an instruction as to alternate jurors. The court did not dismiss the alternates prior to deliberations. (T.p. 3071-73).

The court then said, "When all twelve, and I repeat, all twelve jurors agree on a verdict, all of you sign, in ink, one and only one of these three [sic] verdict forms." (T.p. 3073).

This was the sum total of the guidance given to the jurors in deciding the sentence to be imposed on Nicole Diar.

**C. The instructions given to the jurors at the penalty phase were impermissibly flawed and resulted in an unconstitutional and unreliable death sentence.**

There were numerous flaws in the instructions which rendered the sentence of death in this case unreliable and unconstitutional.

**1. The court failed to instruct the jurors that a solitary juror could prevent imposition of the death penalty.**

The court failed to instruct the jurors that a solitary juror could prevent imposition of the death penalty. In fact, the instructions stressed a unanimous verdict. In Ohio a solitary juror may prevent a death penalty recommendation by finding that the aggravating circumstance in the case does not outweigh the mitigating factors. The jury need not be unanimous in finding death is inappropriate before considering the life sentences. State v. Brooks, 75 Ohio St. 3d 148, 159-160, 661 N.E.2d 1030, 1040-42 (1996); State v. Madrigal, 87 Ohio St. 3d 378, 393-395, 721 N.E. 2d 52, 67-69 (2000). The court failed to so instruct the jury.

**2. The trial court failed to instruct the jury that it did not have to be unanimous to find mitigating factors.**

The United States Supreme Court has held that jurors do not have to unanimously agree on the question of whether the capital defendant's evidence does, in fact, establish a relevant mitigating factor. Mills v. Maryland, 486 U.S. 367, 384 (1988). Accord McKoy v. North Carolina, 494 U.S. 433, 444 (1990). Indeed, an individual juror must be free to assign to a mitigating factor whatever weight the juror believes that the defendant's mitigation deserves. Mills, 486 U.S. at 382; McKoy, 494 U.S. at 443. Despite this constitutional imperative, the jury in this case was not so informed.

The penalty phase instructions failed to inform Appellant's jury that it was up to each individual juror to decide for himself or herself whether Appellant had met her burden of going forward to establish the existence of any mitigating factor. Moreover, these instructions did not inform the jury that it was up to each individual juror to decide for himself or herself how much weight to assign to any particular mitigating factor.

**3. The trial court failed to give the jury guidance on what to do if they found that the aggravating circumstance and mitigating factors were of equal weight.**

O.R.C. § 2929.03(D)(1) states that the aggravating circumstance(s) must *outweigh* the mitigating factors. The prosecutor has the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death. Thus, if the jury finds that the aggravating circumstance and mitigating factors are of equal weight, they must impose a life sentence.

- 4. The court failed to merge the aggravated murder counts prior to sentencing and failed to correctly instruct the jurors in weighing the aggravating circumstance.**

The trial court failed to merge the aggravated murder counts prior to the penalty phase. At the conclusion of the trial phase, the jury convicted Appellant of two counts of aggravated murder for one victim. The trial court did not instruct the jury that the aggravated murder counts which charged Appellant under both O.R.C §§ 2903.01(A) and (C) were merged into a single count for purposes of sentencing. Each aggravated murder count carried a single specification that the offender purposely caused the death of another who was under thirteen years of age and the offender was the principal offender.

This Court has recognized that when a capital defendant is given two separate sentences for killing a single victim, a court should declare a merger of the two convictions such that a single sentence remains for the homicide. State v. Hawkins, 66 Ohio St. 3d 339, 346, 612 N.E.2d 1227, 1232 (1993); State v. Huertas, 51 Ohio St. 3d 22, 28, 553 N.E.2d 1058, 1066 (1990). Therefore, when a defendant is convicted of two counts of aggravated murder for the killing of a single victim, a trial court should require the state to elect one of the counts for the purpose of the penalty phase. The trial court should then eliminate the other counts from the jury's consideration. State v. Cooney, 46 Ohio St. 3d 20, 544 N.E.2d 895 (1989).

In the present case, Appellant Diar was convicted of two counts of aggravated murder for one victim. Pursuant to this Court's holdings, the trial court should have required the State to choose which of the aggravated murder charges it would proceed to use in the sentencing determination. As a result of the trial court's failure to merge the aggravated murder counts prior to sentencing the jury considered two aggravated murder counts each with a specification.

The trial court gave the jury no instruction to inform them not to stack aggravating circumstances from multiple counts against the mitigation. When a capital defendant is convicted of more than one count of aggravated murder, the penalty for each individual count must be determined separately. Only the aggravating circumstance(s) related to a given count may be considered and weighed against the mitigating factors in determining the penalty for that count. State v. Cooley, 46 Ohio St. 3d 20, 544 N.E.2d 895 (1989), paragraph 3 of the syllabus; State v. Poindexter, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988); State v. Hooks, 39 Ohio St. 3d 67, 529 N.E.2d 429 (1988).

That the jury was confused in the weighing process is evidenced by their question during deliberations. Defense counsel's request for a further clarifying instruction to the jurors was overruled. (T.p. 3078).

In this case the jurors were not instructed that if there were multiple counts of aggravated murder, they were to weigh only the aggravating circumstance for each count against all of the mitigating factors collectively and weigh each count independent of any other counts. This impermissibly tipped the scale in favor of death.

**5. The trial court referred to “circumstances” when there was only one aggravating circumstance for each count.**

In the instructions to the jury, the court listed the possible sentences. (T.p. 3069). The court told the jurors that the State must prove beyond a reasonable doubt “that the aggravating circumstances of which the defendant was found guilty is [sic] sufficient to outweigh the factors in mitigation of imposing the death sentence. The defendant does not have any burden of proof.” The court then gave the jurors an instruction on reasonable doubt, which also referred to aggravating “circumstances”. (T.p. 3069-70). This increased the danger that the jurors would double count the aggravating circumstance against the mitigating evidence.

**6. The trial court never defined the aggravating circumstance.**

In the sentencing phase of a capital trial, the aggravating circumstance(s) against which the mitigating evidence is to be weighed are limited to the specifications of aggravating circumstance(s) set forth in O.R.C. § 2929.04(A)(1) through(10) that have been alleged in the indictment and proved beyond a reasonable doubt. State v. Wogenstahl, 75 Ohio St. 3d 344, 662 N.E. 2d 311 (1996), paragraph one of the syllabus. The instructions must inform the jury what aggravating circumstances the jury is to consider and must identify them specifically. See State v. Hutton, 53 Ohio St. 3d 36, 51, 559 N.E.2d 432, 449 (1990). Jurors cannot weigh aggravating circumstances against mitigating factors if they don't know what the aggravating circumstances are. Without any instruction defining "aggravating circumstances," the jury was left "with untrammelled discretion to impose or withhold the death penalty." Id., 53 Ohio St. 3d at 51, 559 N.E. 2d at 449 (Brown, J., dissenting), citing Gregg v. Georgia, 428 U.S. 153, 196 (1976) at fn. 47.

**7. The trial court advised the jury that their verdict was a recommendation.**

During the instructions, when the court was listing the possible sentences to the jurors, the court said, "During your deliberations you will *recommend* that Nicole Diar be sentenced to one of the following..." After listing the sentencing options, the court continued, "In order for you to decide that the sentence of death shall be *recommended* upon Nicole Diar..." (T.p. 3069). Trial counsel objected. (T.p. 3075).

It is error for the jury to be advised that their sentencing verdict is a recommendation, to suggest that a verdict of death is not binding on the court, or that a verdict of death is subject to automatic appeal. Although O.R.C. § 2929.03 states that a "jury shall recommend" the sentence to be imposed on the offender, this Court has repeatedly stated that "because of the possible risk

of diminishing jury responsibility, '...we prefer that in the future no reference be made to the jury regarding the finality of their decision... .' State v. Williams, 23 Ohio St.3d 16, 22, 490 N.E. 2d 906, 912 (1986), quoting State v. Jenkins, 15 Ohio St. 3d 164, 202-203, 473 N.E.2d 264, 298-99 (1984).

Nothing in the court's instruction cautioned the jurors that the court's use of the term "recommend" should not "diminish their responsibility or lessen their task." State v. Smith, 87 Ohio St. 3d 424, 438, 721 N.E.2d 93, 110 (2000). The trial court's instruction diminished the sense of responsibility to be felt by the jurors. "...[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe, as the jury was in this case, that the responsibility for determining the appropriateness of the defendant's death rests elsewhere," Caldwell v. Mississippi, 472 U.S. 320, 329 (1985).

**8. The trial court failed to adequately define mitigation**

This Court has frequently described a mitigating factor as one that "lessens the moral culpability of the offender or diminishes the appropriateness of death as the penalty." State v. DePew, 38 Ohio St. 3d 275, 292, 528 N.E.2d 542, 560 (1988), quoting State v. Steffen, 31 Ohio St.3d 111, 129, 509 N.E.2d 383, 399 (1987). Mitigation must be defined so as to focus the jury on the defendant's moral culpability and not the defendant's legal culpability. The court failed to so instruct the jurors and also failed to adequately instruct the jurors as to O.R.C. § 2929.04 (B)(7), consideration of any other factors in mitigation of the imposition of the sentence of death. The court's instruction stressed death rather than life.

Although all of the mitigation is collectively weighed against the aggravating circumstance(s), the jury should be informed that a single mitigating factor may be enough to

balance the weighing process in favor of a life sentence. The jury should also be informed that it is the quality of the weighing factors that matter and not their quantity.

**9. The trial court failed to instruct the jurors that the aggravated murder was not an aggravating circumstance.**

The death penalty may not be imposed for the homicide itself. See State v. Jenkins, 15 Ohio St. 3d 164, 1678, 473 N.E.2d 264, 281 (1984) The instructions must inform the jury that the aggravated murder is not itself an aggravating circumstance. State v. Henderson, 39 Ohio St. 3d 24, 26, 528 N.E. 2d 1237, 1240 (1988).

**10. The trial court, by failing to instruct properly, allowed the jury to determine what trial phase evidence was relevant to support the aggravating circumstance**

It is the trial court's responsibility, not the jury's, to determine what evidence is relevant to the penalty phase. The trial court erred in admitting all the evidence from the trial phase into the penalty phase and allowing jurors to consider all evidence without making a relevancy determination. State v. Getsy, 84 Ohio St. 3d 180, 201, 702 N.E. 2d 866, 887 (1998); State v. DePew, 38 Ohio St. 3d 275, 528 N.E.2d 542 (1988), paragraph one of the syllabus and 282-283, 287, 551-552, 555 ("only those exhibits and photos relevant to the (particular) aggravating circumstance (the offender was found guilty of committing)" are to be introduced by the State at the penalty phase.)

Thus, the jury had no rational frame-work to discern what trial phase evidence was relevant to its weighing process. A jury instruction that leaves the legal issue of relevance to the jury is improper. Issues of fact are for the jury but issues of law are for the court. See Scaccuto v. State, 118 Ohio St. 397, 161 N.E. 211 (1928); O.R.C. § 2945.03. Whether evidence is relevant is a legal question for the trial court to determine. See Ohio R. Evid. 104; O.R.C. § 2945.03.

There is a “reasonable likelihood” that the court’s abdication of the determination of relevance to the jury allowed the jury to rely on the homicide, and the fire which occurred after Jacob Diar’s death, as sentencing factors. See Boyde v. California, 494 U.S. 370, 380 (1990).

**11. The trial court failed to dismiss the alternates when the jury retired to deliberate.**

Ohio R. Crim. P. 24 (F)(2) requires that all alternate jurors be discharged at the time the trial jury begins its deliberations in the sentencing phase. The trial court failed to dismiss the alternates when the jury retired to deliberate. (T.p. 3074). State v. Gross, 97 Ohio St. 3d 121, 152, 776 N.E. 2d 1061, 1097 (2002).

**D. Ineffective assistance of counsel**

On November 1, 2005, defense counsel filed Proposed Sentencing Hearing Jury Instructions. The instructions were truncated and inadequate to protect Appellant’s rights under the Eighth and Fourteenth Amendments. Further, counsel failed to make all necessary objections during the court’s instructions to the jury. Counsel thereby rendered ineffective assistance. Strickland v. Washington, 466 U.S. 668 (1984).

**E. Conclusion**

There are a number of problems with the way this case was presented to the jury. It was particularly important for the jury to be instructed correctly in the penalty phase because the court admitted prejudicial and irrelevant evidence during the trial phase of Diar’s trial (Proposition of Law III), the prosecutor committed egregious acts of misconduct in both phases of the trial (Proposition of Law IV), the State introduced prejudicial and improper character and other acts evidence, and the trial court failed to limit the use of this evidence (Proposition of Law V), gruesome and cumulative photographs and video were admitted into evidence in the trial phase and penalty phase (Proposition of Law VIII), and the trial court failed to grant defense

counsel's motion to sever counts unrelated to the aggravated murder counts (Proposition of Law XI). The jury was then given virtually no guidance as to how to impose a sentence.

Capital punishment differs from lesser forms of punishment in kind because of its extreme finality. Resultantly, the Eighth Amendment requires a heightened degree of reliability in the application of the death penalty. Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976). See also Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring).

Although jurors are capable of understanding capital sentencing procedures, it is axiomatic that jurors must first be properly instructed. Mills, 486 U.S. at 377, n.10. And, in capital sentencing hearings it is the ultimate responsibility of the trial court to properly instruct the jury as to its role at the penalty phase. Kelly v. South Carolina, 534 U.S. 246, 256 (2002). This is a responsibility "that exists independently of any question from the jurors or any other indication of perplexity on their part." Id. Here, however, the trial court failed to fulfill its responsibility to accurately inform the jurors of their role at the penalty phase. See Dugger v. Adams, 489 U.S. 401, 407-08 (1989); California v. Ramos, 463 U.S. 992, 1010 (1983).

The fact that the trial court's instructions did not properly guide the jury according to the dictates of the law leads to the conclusion that Appellant Diar's jury arrived at her sentence in an unconstitutional manner. Ohio's statutory scheme for imposition of the death penalty is a response to United States Supreme Court decisions requiring that the death penalty be imposed in a rational, consistent manner. Eddings v. Oklahoma, 455 U.S. 104, 111 (1982), Lockett v. Ohio, 438 U.S. 586 (1978). A state that allows the death penalty "has a constitutional obligation to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (emphasis added); see also, Barclay v. Florida, 463 U.S. 939, 958-59 (1983) ("Since Furman v. Georgia, 408 U.S. 238

(1972), this Court's decisions have made clear that States may impose this ultimate sentence only if they follow procedures that are designed to assure reliability in sentencing determinations." (Stevens, J., concurring) (citation omitted in original, emphasis added)).

To that end, jury discretion in sentencing is channeled so as to limit the possibility that a death sentence will be imposed without thorough, proper consideration. Gregg v. Georgia, 428 U.S. 153, 189 (1976). In Ohio, that consideration is defined as a weighing of the aggravating circumstances present against the mitigating factors with a requirement that the jury find, beyond a reasonable doubt, that the statutory aggravating circumstance outweighs all of the mitigating factors. O.R.C. § 2929.03. In this case, the jury was not informed of the correct legal standards to use in deciding whether or not to impose a death sentence.

At Appellant Diar's sentencing hearing the jury was improperly charged. This charge resulted in a death verdict hopelessly weighted on the side of death; thus her sentence lacks the certainty and reliability required by the Eighth Amendment. Her death sentence must be reversed.

## Proposition of Law No. II

The trial court's imposition of the death sentence failed to comply with the mandatory language of Ohio's death penalty statute, Revised Code Title 29, resulting in a death sentence imposed in an arbitrary and capricious manner and a constitutionally deficient sentencing opinion. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16, 20.

### **A. Introduction**

The trial court in Diar's capital case imposed a sentence of death in an arbitrary and capricious manner after completely ignoring the mitigating evidence that was presented during the penalty phase. The trial court had specific duties under O.R.C. § 2929.03 to conduct an independent weighing of the aggravating and mitigating circumstance(s) and to specifically state in the sentencing opinion why the aggravating circumstance Diar was found guilty of was sufficient to outweigh these mitigating factors. These mandatory duties were completely ignored by the trial court. The trial court's abandonment of these mandatory duties constituted such severe violations of Diar's constitutional rights that independent reweighing cannot serve as an adequate remedy. Diar's sentence of death must be vacated.

### **B. Facts**

#### **1. Penalty Phase Sentence**

At the conclusion of the penalty phase in Nicole Diar's capital trial, the jury returned with a verdict of death. (T.p. 3085) Following the recommendation, defense counsel requested a presentence investigation report and a continuance so that the trial court could conduct an independent weighing of whether the aggravating circumstance did outweigh the mitigating circumstances:

Mr. Bradley: "Judge, we would ask that the Court have a presentence report investigation prepared. Under the current sentencing scheme in the State of Ohio, there are certain factors that the Court must consider in

imposing sentence on felonies for a person who has never before been convicted of a felony, nor served a prison sentence.

And the Court cannot properly consider those factors, I don't believe, without having a presentence investigation and report. And so we're asking that the Court do that before it imposes sentence, because some day, as we go through the appellate process, there may be reversals of the sentence handed down by the jury, and then these sentences that this Court hands down could be very significant.

And without benefit of a presentence report and the Court weighing the factors that are supposed to be considered under the statute, and also, we believe the sentencing memorandum by us on those particular counts that the Court has to sentence on, should be considered by the Court in imposing sentence." (T.p. 3087-3088)

The trial court responded to this request by stating, "And the Court has its own mind made up as far as what it will do, as far as that part is concerned." (T.p. 3088) Diar's other attorney, Mr. Pyle, was then given an opportunity to speak on her behalf.

Mr. Pyle: "And I'd ask you to continue this matter for further review by yourself, because the statute provides that at this point, as the prosecutors have told the jury many times, that their verdict is merely a recommendation to you, and that there is a time allowed for you to do an independent weighing of whether the aggravating circumstance does, in fact, outweigh the mitigating circumstances which have been proven. And so we'd ask you to continue this matter for sentencing." (T.p. 3089)

The State urged the trial court to proceed with sentencing; "We're asking to go forward today. I think the Court was able to weigh the factors in its own mind during the time the jury was deliberating as well, so that should not be a problem." (T.p. 3090) The trial court agreed with the State and proceeded to sentence Nicole Diar to death. (T.p. 3092) No time was ever allocated by the trial court to conduct its own independent weighing of whether the aggravating circumstance did outweigh the mitigating circumstances that had been proven. The trial court never considered a presentence investigation report, as requested by defense counsel, but did order a post-sentence report on Diar's behalf. (T.p. 3087, 3088, 3091).

## 2. Sentencing Opinion Deficiencies

At the sentencing phase of Diar's trial, mitigating evidence was presented. Counsel for Diar opened by discussing a 1995 psychiatric admission that generated a report which stated Diar suffered from "anger, frustration, and impulsivity." (T.p. 2980)

Dr. McPherson, a clinical and forensic psychologist, testified on behalf of Diar. In great detail, Dr. McPherson testified about children who are victims of severe trauma and the psychological problems they subsequently suffer from. (T.p. 2992-3001) Dr. McPherson specifically discussed how the trauma Diar suffered from as a child, "does involve the factors that can make a person vulnerable to psychological or psychiatric problems." (T.p. 3001)

The role of family support was also discussed in conjunction with how that plays a role in a child's mental health recovery from a severe physical trauma. Dr. McPherson testified that Diar did not receive the type of "parenting that children in her situation need to support and enhance their coping capacities." (T.p. 3003).

Diar was also subjected to a cognitive and personality assessment. Based on these tests, Dr. McPherson testified that Diar suffered from a personality disorder with borderline and dependency related traits. (T.p. 3005) This diagnosis:

"signifies that there are ways in which her personality organization is flawed and has – and that her coping mechanisms, her skills for managing the world are not – are maladaptive, and are not operating at levels necessary to sustain the kind of behavior and functioning that we would like to see in people."  
(T.p 3005)

Based on her evaluation, Dr. McPherson testified that Diar's capacity to cope with stress in life was substantially diminished by the extreme trauma and pain she suffered as a child. (T.p. 3009) Dr. McPherson went on to testify that Diar "was handicapped from the time that her body was so scarred" (T.p. 3009)

Marilyn Diar was also called as a mitigation witness at the sentencing phase and she expressed love and support for her daughter. (T.p. 3044) Photographs were also admitted into evidence that showed the jury and trial court the severity of Diar's scarring that she suffered from as a youth. (T.p. 3044) Marilyn Diar testified that the pictures were an accurate depiction of her daughter. (T.p. 3044)

The trial court's O.R.C. § 2929.03(F) sentencing opinion made no mention of the aforementioned mitigating evidence offered on Diar's behalf. Likewise, the sentencing opinion made no discussion of the post-sentence report ordered by the trial court. In fact, the post-sentence report had yet to even be filed, and therefore could not have been properly weighed against the lone aggravating circumstance.

### **C. Applicable Law**

The death penalty differs in kind from all other forms of punishment. See Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976). It must, therefore, be imposed in a manner that is as reliable as is humanly possible. See id. To be reliable, the sentencing process must permit consideration of the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. Id. An arbitrarily imposed death sentence is not reliable. See, generally, Furman v. Georgia, 408 U.S. 238 (1972).

The means by which arbitrariness in capital sentencing proceedings is eliminated is through the enactment and **strict enforcement** of a valid capital sentencing scheme, devised by the legislature. See, generally, Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976). In conjunction with these United States Supreme Court decisions, Ohio's General Assembly incorporated specific factors into Revised Code Title 29, Ohio's death penalty statute.

Effective October 19, 1981, these provisions were adopted with the intent to comply with the aforementioned cases and reduce the arbitrary and capricious imposition of death sentences. In State v. Jenkins, this Court upheld Ohio's new statutory framework for capital punishment. 15 Ohio St. 3d 164, 179, 473 N.E.2d 264, 281 (1984).

Ohio's bifurcated sentencing procedure for capital offenses, designed to reduce arbitrary and unreliable punishment, is laid out in O.R.C. § 2929.03(D). Pursuant to this section, when the defendant is tried to a jury and the jury determines that the aggravating circumstances outweigh the mitigating factors, it then makes a recommendation to the court that the sentence of death be imposed. Under these circumstances, however, the trial court still retains the responsibility for making the final decision as to whether to impose the death penalty, because the jury's recommendation of a death penalty is not binding upon the court. The court would then be required to make a separate weighing of the aggravating circumstances and mitigating factors before imposing the sentence of death. See O.R.C. § 2929.03(D).

O.R.C. § 2929.03(D)(3) describes the procedure by which the **court makes a separate determination, weighing the mitigating factors and aggravating circumstances, before imposing the death penalty recommended by the jury.** The court, after such a recommendation, has the authority to make a different finding than the jury, with the result that the court could impose a life sentence upon the defendant, rather than the death sentence recommended by the jury. During this separate and independent review, trial courts are "required to consider all relevant mitigating evidence." Jenkins at 289.

Revised Code Title 29 considers a pre-sentence investigation relevant mitigating evidence. Under O.R.C. § 2929.03(D)(1), a defendant has the right to request a pre-sentence investigation on his or her behalf. If requested, the mandatory language of O.R.C. §

2929.03(D)(1) makes it clear that a trial court “shall require a pre-sentence investigation to be made.” Likewise, the trial court also has a mandatory duty to:

“...consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death,” See O.R.C. § 2929.03(D)(1)

The Jenkins opinion specifically addressed other provisions of Title 29, including O.R.C. § 2929.03(F), stating their purpose “is to provide the reviewing courts with some basis for reviewing the proportionality of the imposition of the death sentence in comparison with sentences entered in similar cases.” 15 Ohio St.3d 164, 208, 473 N.E.2d 264, 303 (1984).

Written in clear and plain language, O.R.C. § 2929.03(F) states:

(F) The court or the panel of three judges, when it imposes sentence of death, **shall** state in a separate opinion its **specific findings** as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

Based on the unambiguous language of O.R.C. § 2929.03(F), this Court has recently stressed the “**crucial role** of the trial court’s sentencing opinion in evaluating all of the evidence, including mitigation evidence, and in carefully weighing the specified aggravating circumstances against the mitigating evidence in determining the appropriateness of the death penalty.” State v. Roberts, 110 Ohio St. 3d 71, 850 N.E.2d 1168, 2006-Ohio-3665. This Court also addressed the issue of a deficient sentencing opinion by stating the “cumulative errors reflect grievous violations of the statutory deliberative process.” State v. Green, 90 Ohio St. 3d 352, 365 738 N.E.2d 1208, 1224 (2000).

## **D. Argument**

### **1. Penalty Phase Sentence**

Prior to the sentencing phase of Diar's trial, Assistant Prosecuting Attorney Mr. Nolan argued for a strict interpretation of Revised Code Title 29; "It's not a matter of second guessing it. It is an issue of following the statute as it is this day." (T.p. 2932) The assistant prosecutor was specifically referring to O.R.C. § 2929.03(D) which states that a jury's verdict of death is merely a recommendation. According to Mr. Nolan, regardless of the jury's verdict, "they impose nothing" and it "doesn't get any simpler than that." (T.p. 2928). Mr. Nolan made it clear to the trial court that "You impose the sentence." *Id.*

Subsequent to this, the jury deliberated on a penalty for Diar and returned with a "recommendation" of death. (T.p. 3085). As previously laid out in the facts, counsel for Diar requested a pre-sentence investigation report prior to sentencing in accordance with O.R.C. § 2929.03(D)(1). (T.p. 3087-3088). Defense counsel also reminded the trial court that the jury's verdict was a recommendation and that O.R.C. § 2929.03(D)(3) allowed time for an independent weighing of whether the aggravating circumstance did outweigh the mitigating circumstances beyond a reasonable doubt. (See T.p. 3089).

Based on precedent from the Supreme Court of the United States, the Ohio Supreme Court, and the mandatory language of O.R.C. § 2929.03(D), it is clear what the trial court's subsequent actions should have been. A reliable sentencing process would have permitted consideration of the "character and record of the individual offender." Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976). As required by State v. Jenkins, the trial court should also have conducted its own independent review and considered all relevant mitigating evidence.

15 Ohio St.3d 164, 473 N.E.2d 264, (1984). In accordance with O.R.C. § 2929.03(D)(3), all of this should have occurred **after** receiving the jury's recommendation of death. O.R.C. § 2929.03(D)(1)'s language also created mandatory duties for the trial court to order and consider a pre-sentence investigation report prior to actual sentencing.

Unfortunately, the trial court abandoned these essential duties and sentenced Diar to death immediately following the jury's recommendation, without ever conducting its own independent review. The record makes this clear. (See T.p. 3088-3094). Pursuant to O.R.C. § 2929.03(D), the trial court was required to make a separate and independent weighing of the aggravating circumstances and mitigating factors before imposing the sentence of death. Instead, the jury's "recommendation" was immediately carried out, disregarding constitutionally indispensable procedures designed to protect against unreliable and arbitrary death sentences such as this one.

The trial court's decision to ignore defense counsel's request for a pre-sentence investigation was also indicative of an unreliable sentencing phase. O.R.C. § 2929.03(D)(1) unequivocally states that if requested by the defendant, a trial court shall order the report and shall consider it prior to sentencing. The trial court, who already had "its own mind made up as far as what it will do," instead ordered a "post-sentence report." (T.p. 3088, 3091)

The Lorain County Docket displays the inherent flaw of this decision. Diar requested the pre-sentence investigation report on the same day the jury returned with a recommendation of death, which was immediately imposed by the trial court, November 2, 2005. Two days later the trial court submitted its O.R.C. § 2929.03(F) sentencing opinion. The post-sentence report was not even filed in Lorain County until March 20, 2006. Under the provisions of Title 29, this report was designed to aid the trial court's consideration of evidence "relevant to the mitigation

of the imposition of the sentence of death.” See O.R.C. § 2929.03(D)(1). The mandatory language of this statute gives the trial court no discretion. If requested, a trial court shall order the report and shall consider it prior to sentencing.

By the time this report was ultimately filed in Lorain County, Nicole Diar had already spent one hundred and thirty-three days (133) on death row at the Ohio Reformatory for Women. Likewise, the report was filed months after the trial court had already written its O.R.C. § 2929.03(F) sentencing opinion. It can therefore be considered fact that the trial court failed to consider all mitigating evidence submitted on Diar’s behalf.

The trial court would have been wise to follow “the statute as it is this day.” (T.p. 2932) Instead of following constitutionally indispensable procedures and the mandatory language of Title 29, the trial court bowed to requests from the State. The trial court never conducted its own independent weighing of the aggravating and mitigating circumstances and failed to consider all relevant evidence.

## **2. Sentencing Opinion**

Under the death penalty provisions of O.R.C. Title 29, the trial court had a mandatory duty to specifically state why the aggravating circumstance Diar was found guilty of was sufficient to outweigh the mitigating factors. Instead of fulfilling that duty, the trial court wrote a sentencing opinion, barely over two pages, that did not even acknowledge the aforementioned mitigating evidence presented on Diar’s behalf.

The only mitigating factors the trial court referred to were written in a two sentence paragraph that mentioned the youth of Diar and her lack of any prior criminal convictions. Dr. McPherson, the primary mitigation witness whose testimony on Diar’s physical and mental handicaps generated over fifty pages of trial transcripts (T.p. 2990-3042), is addressed nowhere

in the sentencing opinion. The complete absence of any finding in regard to Dr. McPherson's testimony would logically indicate that the trial court failed to weigh, or even acknowledge, the most important and powerful evidence presented at the sentencing phase.

The fact that this mitigating evidence was not addressed anywhere in the sentencing opinion undermines confidence that the trial court actually evaluated all of the evidence presented. It also demonstrates that the trial court abandoned its duty to carefully weigh the aggravating circumstance against the mitigating evidence in determining the appropriateness of the death penalty. This oversight is indicative of a flawed decision making process that ultimately undermines confidence in the decision itself.

Diar is aware of this Court's opinion in State v. Maurer which held that the trial court's failure to articulate its reasoning in the O.R.C. § 2929.03(F) sentencing opinion was not a sufficient cause to vacate the death sentence. 15 Ohio St.3d 239, 473 N.E.2d 768 (1984). However, Maurer was decided prior to the 1994 amendments to Section 2(B)(2)(c), Article IV of the Ohio Constitution that provide for the direct appeal of capital cases from common pleas courts to the Ohio Supreme Court. This Court, in deciding Maurer, already had before it a detailed and specific summary from the court of appeals that articulated its reasons for discounting the mitigating evidence presented by the defendant.

In addition, the Court in Maurer went on to make clear that the failure of a trial court to comply with O.R.C. § 2929.03(F) is not an insignificant omission. A trial court's failure to specifically articulate its weighing of aggravating circumstances against mitigating factors:

“disrupts the review procedures enacted by the General Assembly by depriving the defendant and subsequent reviewing courts of the trial court's perceptions as to the weight accorded all relevant circumstances. In a closer case, those perceptions could make a difference in the manner in which a defendant pursues his appeal and in which a reviewing court makes its determination.” 15 Ohio St.3d 239, 247 (1984).

Mitigating evidence was submitted on Diar's behalf during the penalty phase. Unfortunately, the trial court failed to even acknowledge this evidence in its sentencing opinion. By not following the mandatory statutory framework outlined in Title 29, the trial court created an unacceptable risk that the death sentence was imposed in an arbitrary manner.

**E. Conclusion**

The trial court's actions at the conclusion of the penalty phase displayed both an abdication of its mandatory duties and an ignorance of the law. The trial court in Diar's capital case failed to fulfill constitutionally indispensable and crucial responsibilities, thereby creating an unacceptable risk that the sentence of death was imposed in an arbitrary and capricious manner. The trial court's abandonment of these duties constitutes such severe violations of Diar's constitutional rights that independent reweighing cannot serve as an adequate remedy. Therefore, Diar's death sentence must be vacated.

### Proposition of Law No. III

The admission of prejudicial and irrelevant evidence during the sentencing phase of Diar's capital trial denied Diar her rights to due process and a reliable determination of her sentence as guaranteed by the U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 10 And 16.

During the sentencing phase of Diar's capital trial, the court admitted, over the objections of defense counsel, exhibits from the trial phase that did not relate to the aggravating circumstance. (T.p. 2990). The trial court's rulings were erroneous and deprived Diar of her rights to due process and a reliable sentencing determination. U.S. Const. amends. V, VI, VIII, XIV; Ohio Const. art. I, §§ 10, 16.

During the sentencing phase, the prosecution moved to admit Exhibits 2, 3, 4, 5, 14, 15, and 27.<sup>1</sup> (T.p. 2986-2990). In pertinent part, the following exchange occurred:

MR. NOLAN (Assistant Prosecutor): Your Honor, we seek to re-introduce, for purposes of this hearing, State's Exhibits 2, 3, and 4, which basically are schematics and/or computer-generated diagrams of the house

MR. PYLE (Defense Attorney): Object

COURT: To all of them?

MR. PYLE: Yeah.

COURT: Let me see them, please.

Exhibit 4, was that included in the package that was submitted – stipulated to, or what, because I don't recall having seen this?

MR. NOLAN: That is part of the evidence in the case in chief, Judge.

MR. PYLE: Your Honor, I don't see how those relate to the aggravating circumstance.

COURT: Well, I'm going to permit it.

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<sup>1</sup> State's Exhibit 27 is Jacob Diar's birth certificate and was not objected to. (T.p. 2988-2989).

...

MR. NOLAN: Your Honor, we would offer State's Exhibit 5 in its entirety, which Pertains to the report and photographs of the crime scene that relate to the nature and circumstance of the aggravating circumstance, and that would be the report of Ms. Bures and her company.

MR. PYLE: Objection, your Honor. It's just retrying the case. It has nothing to do with the specification.

MR. NOLAN: We're not retrying the case. We're dealing with the nature and circumstance surrounding the aggravating circumstance. That encompasses, obviously, the death of the child, the manner of that death, and the cover-up [sic.] or the attempt to cover up that death by way of the fire.

MR. PYLE: I mean, the only circumstance is age.

COURT: Again –

MR. PYLE: It's been proven.

COURT: Again, Mr. Pyle, **the prosecution has the right to introduce whatever evidence was in on the trial, as long as he did testimony on them.**

...

MR. NOLAN: We would further offer State's Exhibit Number 14, which is the autopsy protocol of Dr. Matus.

MR. PYLE: Objections, for previous – reasons previously stated, your Honor.

COURT: And again, admitted.

MR. NOLAN: We would offer State's Exhibits 15-A through V, which related to Photographs both at the home and the coroner's photographs of this particular victim ....

....

These are State's Exhibits that were offered for purposes of the coroner's determination.

COURT: All right. During that –

MR. NOLAN: -- and cause of death.

COURT: During that phase of it, all right. All right.... Again?

MR. PYLE: Objection for the same reasons.

COURT: Overruled. Shall be admitted.

MR. NOLAN: And finally, we would offer State's Exhibit 27, the birth certificate of Jacob Diar.

MR. PYLE: No objection.

COURT; Admitted.

(T.p. 2986-2989).

“[W]hen constitutionally inadmissible evidence has been admitted, a reversal is required where ‘there is a reasonable possibility that the evidence complained of might have contributed to the conviction.’” State v. Cowans, 10 Ohio St. 2d 96, 105, 227 N.E.2d 201, 207 (1967) (citing Fahy v. Connecticut, 375 U.S. 85 (1963); Chapman v. California, 386 U.S. 18 (1967)). This is true despite the overwhelming nature of any remaining admissible evidence. See id. As the inadmissible evidence was admitted during the mitigation phase, the proper review is whether it contributed to the jury’s imposition of a death sentence. Further, because this is a death penalty case, “... the Eighth Amendment ... requires a correspondingly greater degree of scrutiny of the capital sentencing determination.” Caldwell v. Mississippi, 472 U.S. 320, 329 (1985) (citing California v. Ramos, 463 U.S. 992, 998-99 (1983)) (internal quotations omitted).

Applying this heightened standard, the trial court erred in two ways.

First, it allowed irrelevant information to be put before the jury, that had nothing to do with the O.R.C. § 2929.04(A)(9) (under thirteen years of age) specification. The fire, the coroner’s report, Buress’ report, and the pictures of Diar’s residence and Jacob’s burned and

charred body prejudiced Diar’s right to a fair penalty phase, given that the coroner testified that Jacob was dead before the fire was set and the damage was done to his body. (T.p. 1702-1704).

Second, by allowing this evidence in the mitigation phase, the trial court violated this Court’s ruling in State v. Wogenstahl, 75 Ohio St. 3d 344, 662 N.E.2d 311 (1996); State v. DePew, 38 Ohio St. 3d 275, 528 N.E.2d 542 (1988); and State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984). In Depew, this Court held that O.R.C. § 2929.03(D)(1) permits the prosecutor in the penalty phase to rely on trial phase evidence that is relevant to the nature and circumstances of the aggravating circumstances. DePew, 38 Ohio St.3d at 281-282, 528 N.E.2d at 551. The prosecutor may also introduce evidence to rebut false statements made by the defendant or his witness. DePew, 38 Ohio St. 3d at 286, 528 N.E.2d at 555. The prosecutor may not, however, rely on the homicide itself as an aggravating factor in the penalty phase. See Jenkins, 15 Ohio St.3d at 196, 473 N.E.2d at 294. Further, it is improper for the prosecutor to “suggest that the nature and circumstances of the offense are aggravating [factors to be weighed by the jury].” Wogenstahl, 75 Ohio St. 3d at 355, 662 N.E.2d at 321.

There was one aggravating circumstances in this case: Rev. Code 2929.04(A)(9) (under thirteen years of age). Under DePew, the prosecutor could introduce in the penalty phase any culpability phase evidence that was relevant to that single aggravator. DePew, 38 Ohio St.3d at 281-282, 528 N.E.2d at 551. Here, the court permitted the State to reintroduce one hundred and thirty-seven exhibits that had nothing to do with the aggravator, and had nothing to do with Jacob’s death. See Table below. (see also, T.p. 1702-1704).

<b>EXHIBIT</b>	<b>DESCRIPTION</b>	<b>IDENTIFIED</b>
2. Diagram	First floor of Diar’s residence	T.p. 2986
3. Diagram	Three dimensional diagram of the first floor of Diar’s	T.p. 1361 -1364

	residence	
4. Picture	Of bed with Jacob's charred and severely burned body	T.p. 1369
5. Burress' Photos & Report:  * Originally marked 15-A through 15-KKKKK, and were remarked 5-A through 5-KKKKK (T.p. 2384).	A – cover page of Bures's report	T.p. 1816
	B – the letter with Burress' report	T.p. 1816
	C – conclusions of Bures's report	T.p. 1816
	D – picture of the front porch area	T.p. 1755
	E – another picture of the front porch area	T.p. 1755
	F – picture of area of house that showed sufficient venting	T.p. 1756
	G – picture of the rear area of the house; showing rear entrance door and location of electrical service entrance	T.p. 1757
	H – picture looking north in the backyard	T.p. 1758
	I – picture of an alley that runs north of the property	T.p. 1759
	J – picture of interior of garage	T.p. 1760
	K – first picture going into house; taken from the porch	T.p. 1760-1761
	L – picture of partially closed door, so can see this is exterior door of house leading into living room	T.p. 1761

M – picture taken in living room	T.p. 1761
N – picture of living room	T.p. 1762
O – picture of west wall of living room	T.p. 1762
P – picture of northwest corner of living room	T.p. 1762
Q – picture of northwest corner of living room	T.p. 1762
R – picture from living room looking at archway leading into dining room	T.p. 1764
S – picture of northeast corner of living room	T.p. 1764
T – picture of east wall of living room	T.p. 1764
U – picture of southeast corner of living room	T.p. 1765
V – picture of living room that shows front door	T.p. 1765
W – dining room	T.p. 1765
X – typing that does not contain a photograph	T.p. 1766
Y – picture of the flame impingement on dining room wall	T.p. 1766-1767
Z – picture of northwest corner of dining room	T.p. 1767
AA – picture of north wall of dining room	T.p. 1767
BB – east wall of dining room	T.p. 1768

CC – picture looking directly east in the dining room	T.p. 1768
DD – picture of southeast corner of dining room	T.p. 1769
EE – picture of the door that leads into the bedroom on the first floor	T.p. 1769-1770
FF – picture looking into the first floor bedroom	T.p. 1770-1771
GG – picture east wall of first floor bedroom	T.p. 1771
HH – picture of first floor bedroom south wall area	T.p. 1771
II – picture showing remains of mattress and the springs	T.p. 1772
JJ – picture of southwest corner of first floor bedroom	T.p. 1772-1773
KK – picture west wall of first floor bedroom	T.p. 1773
LL – picture of northwest corner of first floor bedroom	T.p. 1773
MM – picture of north side of first floor bedroom	T.p. 1774
NN – picture of northeast corner of first floor bedroom	T.p. 1774
OO – picture hallway	T.p. 1774
PP – picture of stairs going to basement	T.p. 1775
QQ – picture of first floor	T.p. 1775

	bathroom	
RR	– picture of hallway outside first floor bathroom	T.p. 1775
SS	– picture of refrigerator on south wall of the kitchen	T.p. 1776
TT	– picture of west side of kitchen	T.p. 1776
UU	– text, no picture	T.p. 1777
VV	– picture of kitchen showing sink and door to the back porch area	T.p. 1777
WW	– picture of rear porch area	T.p. 1777
XX	– picture of exterior door of rear porch	T.p. 1777
YY	– picture of storage area just off of kitchen	T.p. 1777
ZZ	– basement	T.p. 1778
AAA	– picture of electrical service panel in the basement	T.p. 1778-1779
BBB	– picture of hot water tank in basement	T.p. 1779
CCC	– picture of Carrier furnace in basement	T.p. 1779
DDD	– picture of hot water tank	T.p. 1780
EEE	– picture of the water and gas meters	T.p. 1780
FFF	– picture showing no fire	T.p. 1780-1781

	damage in basement	
	GGG – picture of wall in hallway on first floor showing that there is no fire detector	T.p. 1781
	HHH – picture of wall in hallway showing the mollies and the screws that held the smoke detector	T.p. 1781
	III – close-up picture of smoke detector underneath debris on floor in hallway	T.p. 1783
	JJJ – picture of stairs going up to the second floor	T.p. 1783
	KKK – picture of stairs going up to the second floor	T.p. 1783
	LLL – picture of second floor	T.p. 1784
	MMM – picture of the plaster and lath	T.p. 1785
	NNN – picture of the plaster and lath	T.p. 1785
	OOO – picture of the plaster and lath	T.p. 1786
	PPP – picture of second floor bedroom	T.p. 1786
	QQQ – picture on first floor showing burn patterns	T.p. 1787
	RRR – picture of archway between the living and dining room	T.p. 1787
	SSS – picture of archway between the living and dining room	T.p. 1787

	<p>TTT – picture showing sever charring on dining room side</p> <p>UUU – picture of the desk in the northeast corner of the living room</p> <p>VVV – close-up picture showing the vast difference in damage to the arch on living and dining room sides</p> <p>WWW – picture of a pile of clothing in the southwest area of the dining room</p> <p>XXX – picture of burn pattern on the floor of the dining room</p> <p>YYY – picture of dining room showing demarcation</p> <p>ZZZ – picture of area around dining room register</p> <p>AAAA – picture of path from the living room to the dining room</p> <p>BBBB – picture just outside master bedroom</p> <p>CCCC – close-up picture showing demarcation between living room and bedroom</p> <p>DDDD – picture of the exterior of the bedroom door</p>	<p>T.p. 1788</p> <p>T.p. 1788</p> <p>T.p. 1788</p> <p>T.p. 1788</p> <p>T.p. 1789</p> <p>T.p. 1790-1791</p> <p>T.p. 1791</p> <p>T.p. 1792-1793</p> <p>T.p. 1793</p> <p>T.p. 1793</p> <p>T.p. 1794</p>
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EEEE – picture of dining room table	T.p. 1794
FFFF – picture of the bottom of the dining room table	T.p. 1795
GGGG – picture of the dining room table legs	T.p. 1795
HHHH – close-up picture of one of the table legs	T.p. 1796
IIII – picture showing severe charring in the dining room	T.p. 1796
JJJJ – picture of door hinge to first floor bedroom	T.p. 1797
KKKK – picture of bedroom showing different char patterns	T.p. 1797
LLLL – picture of first floor bedroom	T.p. 1797 - 1798
MMMM – picture of first floor Bedroom	T.p. 1798-1799
NNNN – picture of north wall in first floor bedroom	T.p. 1799
OOOO – overhead picture; ceiling	T.p. 1800
PPPP – picture of the light Fixture	T.p. 1800
QQQQ – picture of the bed	T.p. 1800
RRRR – picture of the wooden remains of the bed	T.p. 1800
SSSS – picture of bed frame	T.p. 1801-1802

TTTT – picture of what the floor looked like after it was swept	T.p. 1801
UUUU – picture of the demarcation on the floor	T.p. 1802
VVVV – is text	T.p. 1802
WWWW – picture underneath the bed	T.p. 1802-1803
XXXX – picture shows difference between something protected from the fire and something not protected	T.p. 1803
YYYY – picture of whole burned in the floor	T.p. 1803
ZZZZ – picture of floor in southwest corner	T.p. 1803
AAAAA – picture of damage to wall, baseboard, and the floor	T.p. 1804
BBBBB – picture of north wall in bedroom	T.p. 1804
CCCCC – picture of doorway going into the dining room	T.p. 1804
DDDDD – picture of bed and frame	T.p. 1804-1805
EEEEE – picture of missing leg of bed frame	T.p. 1805
FFFFF – picture of leg that still remains of the	T.p. 1805-1806

	<p>bed frame</p> <p>GGGGG – picture of east wall of bedroom</p> <p>HHHHH – picture of dresser in bedroom</p> <p>IIII – picture taken of the floor</p> <p>JJJJ – picture taken of the floor</p> <p>KKKKK – picture taken of the floor</p>	<p>T.p. 1806</p> <p>T.p. 1806</p> <p>T.p. 1807</p> <p>T.p. 1807</p> <p>T.p. 1807</p>
<b>14. Coroner's Verdict</b>	Of Jacob Diar; determined caused of death was homicidal violence of an undetermined origin	T.p. 1681
<b>15. Autopsy Photos</b>	<p>A – picture of Jacob Diar, when he first entered the bedroom where his body was found</p> <p>B – picture taken closer to side of bed so can see Jacob's body</p> <p>C – picture shows position of body on the bed</p> <p>D – picture of mattress pulled from the ruins, with section cut out - the body is still there; can see elbow hanging over side of bed, and body is face down</p> <p>E – picture shows body after it was lifted from the bed - shows the amount of charring of the tissue - can see some of the brain material exuded out and</p>	<p>T.p. 1691</p> <p>T.p. 1691</p> <p>T.p. 1691-1692</p> <p>T.p. 1692</p> <p>T.p. 1692-1693</p>

	<p>into the bedding area and the material beneath the body</p> <p>F – close-up view showing the total thickness burns down to the layers over the muscle, with the severe charring of the skin</p> <p>G – picture of the mattress system after Jacob’s body removed - can see where body pulled loose, the searing of the tissue and oozing of bodily fluid</p> <p>H – picture from a different angle; so can see some of the epidural and subscalpular hemorrhaging that came from the intensity of the fire</p> <p>I – closer view; can see clothing Jacob was wearing</p> <p>J – picture shows the hemorrhagic area that exuded from the brain; the epidural and subscalpular hemorrhage that came from the cooking of the skull</p> <p>K – close-up showing area where left cheek of Jacob residing</p> <p>M – picture shows dark spot of charred tissue</p> <p>O – depicts spared areas of Jacob’s body that were not exposed to flammable</p>	<p>T.p. 1693</p> <p>T.p. 1693</p> <p>T.p. 1694</p> <p>T.p. 1694-1695</p> <p>T.p. 1695</p> <p>T.p. 1696</p> <p>T.p. 1697</p> <p>T.p. 1699</p>
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	material	
	P – another photograph depicting the degree of charring	T.p. 1699
	Q – photograph of the skull of Jacob showing a large degree of damage done to the cranium - can see the total destruction of the brain and skull	T.p. 1699-1700
	S – shows what up against with respect to the charred edges of the skull. - depicts the only remaining portion of the skull; some of the scalp that had survived; and the coagulated blood that exuded mostly from the skull	T.p. 1701
	T – shows Jacob’s face	T.p. 1701
	U – depicts an incision along the nose; showing that there was total protection from charring, so there was no inhalation of flames	T.p. 1703
	V – photograph of Jacob’s upper airway, larynx, trachea; going down into the lungs	T.p. 1703-1704

The trial court erred when it allowed the State’s to re-introduce trial evidence that was irrelevant to punishment and the aggravating factor. The error of the trial court demonstrates its ignorance; and deprived Diar of her right to a fair sentencing hearing.

**A. State Cannot Prove Evidence Did Not Affect The Jury's Decision To Impose Death.**

While the burden is on the State to demonstrate that this evidence did not affect the jury's decision to impose death, Brecht v. Abrahamson, 507 U.S. 619, 622 (1993) (citing Chapman v. California, 386 U.S. 18 (1967)), prejudice on this record is apparent. Diar presented a compelling case at mitigation, including the trauma she suffered as a child, the long lasting side effects of experiencing the trauma at such a young age, and the love and support of her family. See Proposition of Law No. IX.

Given the compelling mitigation case Diar presented, the State cannot demonstrate that this evidence did not affect the jury's decision to impose death. The prosecution's presentation of evidence showing the horrific post-mortem injuries Jacob's body suffered, improperly weighed into the balance of the aggravating circumstance and mitigating factors. This evidence was prejudicial and the State cannot meet its burden in this case.

**B. Conclusion.**

The trial court erroneously admitted one-hundred and thirty seven exhibits that had nothing to do with the aggravating circumstance. Because the State cannot prove that this evidence did not have an impact on the jury's decision to impose death, this Court must vacate Diar's death sentence and remand this case for new sentencing proceedings.

### Proposition of Law No. IV

A capital defendant is denied her substantive and procedural due process rights to a fair trial when a prosecutor commits acts of misconduct during the trial and the sentencing phases of her capital trial. She is also denied her right to reliable sentencing. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 9, 16, 20.

#### **A. Introduction.**

During the trial and sentencing phases of Appellant Diar's capital trial, the prosecutor committed acts of misconduct that deprived Diar of a fair trial and a reliable sentence. The prosecutor's misconduct was extensive, deliberate, and prejudicial to Appellant, in violation of Diar's rights guaranteed under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, as well as Article I, §§ 9, 16, and 20 of the Ohio Constitution.

#### **B. Voir Dire**

During voir dire, the prosecutors misstated the law. The prosecutors informed prospective jurors that:

MR. CILLO: ... [I]f you find that the mitigating factors proven beyond a reasonable doubt, they also need to be proven beyond a reasonable doubt ... outweigh the aggravating circumstances, then you would consider the other potential penalties ....

(T.p. 560-561).

The prosecutor's statements were improper. The aggravating circumstance(s) must outweigh the mitigating factors. O.R.C. § 2929.03(D)(1), (D)(2) and (D)(3). This places the burden of proof on the State, not Diar. State v. Stumpf, 32 Ohio St. 3d 95, 102, 512 N.E.2d 598, 606 (1987). See also State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984).

The Prosecutors also informed prospective jurors that several members of the jury would have to find that the aggravating circumstances did not outweigh the mitigating factors:

MR. NOLAN (Assistant Prosecutor): ... [I]f you and the other juror determine that

[the] aggravating circumstances does not outweigh the mitigating evidence, you would have to consider the other three life sentences  
....

(T.p. 653).

...

And conversely, should you and the other jurors, or some of the other jurors, if all find that the defendant has produced some evidence, or evidence has been produced wherein the aggravating circumstance does not outweigh the mitigating evidence, you could consider the other life sentences.

(T.p. 887). This was improper, since “a single juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do[es] not outweigh the mitigating factors.” State v. Hartman, 93 Ohio St. 3d 274, 292, 754 N.E.2d 1150, 1171, 2001-Ohio-1580. See also State v. Brooks, 75 Ohio St. 3d 148, 661 N.E.2d 1030, 1996-Ohio-134; Joseph v. Coyle, 469 F.3d 441 (6th Cir. 2006).

## **C. Trial Phase**

### **1. Opening statement**

During his opening statement to the jury, the prosecutor argued to the jury that Appellant learned how to start fires at burn camp. It is prejudicial to argue that at the age of four Appellant was training herself to someday set her son on fire. He argued, “She...became, after the age of 4, when she was burned, she became a person who paid a great deal of attention—who went to burn camps, for example—a person who obtained and had, on August 27th, 2003, a great deal of knowledge about fires, both good and bad. Having been the victim of a fire, she knew all about fires.” (T.p. 1264). He continued in this vein, saying of Appellant: “Gasoline was used as an accelerant by A, a person who is familiar with fires, and B, has some specific knowledge about fires. Nicole Diar.” (T.p. 1276). In reality, the fire that burned Appellant at age four was started

when her brother accidentally set her pajamas on fire. It is highly improper for the prosecutor to suggest behavior by the Appellant which has no basis in fact. Washington v. Hofbauer, 228 F.3d 689, 707 (6th Cir. 2000) (finding misconduct in part where prosecutor's statement was not based on evidence). "Misrepresenting facts in evidence can amount to substantial error because doing so 'may profoundly impress a jury and may have significant impact on the jury's deliberations.'" Washington, 228 F.3d at 700, citing Donnelly v. DeChristoforo, 416 U.S. 637, 646 (1974). Similarly, "asserting facts that were never admitted into evidence may mislead a jury in a prejudicial way." Washington, 228 F.3d at 700, citing Berger v. United States, 295 U.S. 78, 84 (1935). This is a particular danger "when a prosecutor misrepresents evidence because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty." Id. at 88

In talking about Appellant's appearance after the fire, the prosecutor invoked images of 9/11 when he said, "Think about 9/11. Think about the World Trade Center. Think about the people you saw getting out of there, covered with dirt and debris because they had been in a fire, while Nicole Diar's body and clothes are pristine, and they didn't smell of gas, either, even though she told the police, I was on the couch." (T.p. 1282). It is improper for the prosecutor to use arguments which inflame the passions or prejudices of the jurors. United States v. Young, 470 U.S. 1, 8 (1985).

## **2. Use of leading questions**

Most egregiously, the prosecutor repeatedly used improper leading questions to place his theories of the case before the jury, and to interject his own inflammatory opinions about Appellant. When a witness failed to supply the information the prosecutor wanted, he supplied it himself by the use of leading questions. For example, anticipating that a witness might testify

that Appellant was upset about her son's death, the prosecutor sought to discredit any emotion Diar may have displayed, in order that the testimony might fit with his theory of a cold, unfeeling, calculating murderer. Similarly, the prosecutor sought to discredit any other scenarios for the death of Jacob Diar except the theory that the prosecutor wanted the jury to believe.

During the testimony of the coroner, the prosecutor by the use of leading questions, vouched for unnamed "experts" who apparently agreed with the coroner's conclusion that Jacob died by "homicidal violence".

Q [Prosecutor]. Did you also continue to consult with other coroners and other pathologists throughout the state regarding this case?

A [Dr. Matus]. Yes I did.

Q. About how many individuals were you consulting with?

A. Well, besides myself and my Chief Deputy Coroner, at least five. Well, actually six individuals.

Q. Okay. And based upon the literature and your consultations with those individuals, *some of which were very highly skilled in fire and fire-related deaths--*

A. Yes

Q. --were you able to rule out a hematoma to the back of the head?

A. Yes...

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Q. *And, subsequent to your consultations with various other coroners and pathologists, I believe you said six, did you continue with your opinion that this was a homicidal death—*

A. Yes. Absolutely.

Q. --of undetermined origin?

A. Absolutely.

(T.p. 1687-88). (emphasis added.)

Early on in the State's case, the prosecutor signaled his disregard for the requirements of due process and the admonishments of the trial court. On redirect examination of Ralph Dolence, the prosecutor asked "There were areas of fire at the edge of the living room as it went into the dining room and went into the bedroom?" Defense counsel objected. The prosecutor continued, "Do you recall that?" Defense counsel again objected, saying "Leading." The prosecutor continued, "So therefore, there were at least a fire..." The trial court sustained the objection. (T.p. 1841). This pattern of persisting with improper questions even after objections were sustained continued, and in fact escalated, throughout the trial.

One theme advanced by the prosecutor through the use of leading questions was Appellant's faulty parenting skills and supposed lack of emotion after Jacob's death and funeral. Often it was the prosecutor testifying instead of the witnesses. For example, in questioning Destiny Faulkner, a babysitter for Jacob, about the use of codeine to quiet Jacob, the prosecutor asked "Did you think it was wrong to give somebody medicine that didn't seem to need it?" (T.p. 1931). In questioning Joyce Harkless about Appellant's behavior after Jacob's funeral, the prosecutor asked, "She [Appellant] didn't appear to be upset or sad; is that correct?" (T.p. 1983).

In questioning Detective Dave Garcia about an interview he conducted with Appellant, the prosecutor supplied the answers to his own questions:

Q. Now, during the course of this, approximately, half-hour interview, she appears to be somewhat emotional; is that correct?"

A. Yes.

Q. Did you note whether or not she was sobbing, crying, tearing?

A. Well, there were sounds being made as if she was crying, and at that time I tried not to be too judgmental because I figured she was in grief at that point. So I really wasn't paying much attention to that other than hearing what I heard.

Q. Did you get her any tissue, anything like that? Did you note that she was wiping her eyes of tears?

A. No, sir.

(T.p. 2068).

In questioning Garcia about the interview with Appellant, in order to discredit other theories of how the offenses occurred, the prosecutor asked:

Q. That's where Sergeant Rivera comes out with the stuff about the hematoma and all the rest of that stuff; is that correct?

A. Yes, that's correct.

Q. But again, that theory was subsequently discounted by Dr. Matus, and it is of no further import—was of no further import to your investigation; is that correct?

A. That is correct.

Q. All right. Now, another technique that Sergeant Rivera was using during the course of that interview with Nicole Diar on the 3rd of September, the long three plus hour interview, another one of those techniques was putting something before the defendant that would make it appear to her to ease her into becoming more forthcoming; is that correct?"

A. Yes, that's correct.

Q. And this is certainty [sic], certainly not a typical—or it is a typical police technique when it comes to interviewing a potential suspect in any given case; is that correct?

A. Yes, that is correct.

Q. So you tried to ease her into, or at least Sergeant Rivera, by bringing up the theory of hematoma or by bringing up the theory of some intruder; is that correct?

A. That's correct.

Q. And again, that was simply police technique, correct?

A. Yes, that is correct.

Q. And that doesn't mean that you gave any credence to either the hematoma theory and/or the intruder theory; is that correct?

A. That's correct.

Q. All right. Now, during the course of that long interview on September the 3rd, you noticed oftentimes that the defendant would appear to be emotional, did you not, during the course of that interview?

A. Yes.

Q. Now, during the course of that several-hour interview with Nicole Diar, did you ever see any real tears?

A. No.

Q. And this was within three days or four days of the funeral of her son; is that correct?

A. That's correct.

(T.p. 2088-90).

The prosecutor put words into the witness's mouth when he continued:

Q. ...Now, you eventually learned during the course of subsequent interviews that she indicated that she was in and out of the house on more than one occasion during the course of the fire; is that correct?

A. Yes.

Q. And that she was in and out of the house and in the house for a period of approximately three minutes during the time that she was going in and out, you learned that in your subsequent conversations, did you not?

A. Yes.

Q. All right. You noted that with respect to the contents of State's Exhibit Number 26, either the skirt nor the beige top are covered, coated completely in soot from the fire, you noted that, did you not?

A. Yes.

Q. And, of course, this gave you pause for reflection with respect to what she actually was doing during the morning of the 27th of August, did it not?

A. That's correct.

T.p. 2096.

The prosecutor also repeatedly asked the witness leading questions as to the house keys that had reportedly been lost or stolen, culminating in the following:

Q. So, first of all, you're relying upon what she [Appellant] says—

A. Correct.

Q. --which came to you in three different versions, and then further she, from her own statements to you—

A. That is correct.

Q. --indicated that Jonathan didn't have the keys?

A. Correct.

Q. So this is just a phoney [sic] issue, correct?

A. Yes.

(T.p. 2144-46).

The prosecutor continued questioning the witness with leading questions about a prior fire that occurred in Appellant's garage. (T.p. 2146). As to the present offense, the prosecutor used leading questions to promote his theory that Appellant moved her car to protect it from the fire she was planning to set.

Q. ...Now Nicole just happened to take her car out of the garage the day of or the night of the incident leading to the fire, correct—

A. Yes.

Q. --according to what she said at least?

A. Yes.

Q. And she, according to what she said, simply hid the car someplace else; is that correct?

A. Yes.

Q. So even if you give any credence whatsoever to her having lost the keys on the 26th, she had kept the car in the garage anyway before the evening of or the morning of the fire, correct?

A. Correct.

At this point, the prosecutor asked a question that was objected to by defense counsel: “And the person, Nicole Diar, who started that fire, wouldn’t know how far...the fire might...” The court sustained the objection. (T.p. 2147). The prosecutor rephrased the question, but continued to lead the witness: “The person who started the fire wouldn’t know, number one, how long it would take the fire department to get there; would that be a fair statement?” Answer: “Yes.” (T.p. 2147). He continued:

Q. And therefore, wouldn’t know how far that fire might spread; would that be a fair statement?

A. Yes.

Q. And wouldn’t know that that fire might leapfrog into the garage and destroy her prize possession of the car, correct?

Again defense counsel objected, and the objection was sustained. (T.p. 2148).

Undaunted, the prosecutor continued with the very same line of questioning:

Q. At any rate, there’s no predictability to what a fire might do until it’s put out virtually immediately, correct?

A. Yes.

Q. Could have gone into the garage, correct?

A. It could have.

Q. And if her car had been in there, her prize possession, it would have been destroyed, correct?

A. Yes.

Q. So very conveniently, she just happened to hide it someplace else the night of before this particular fire, correct?

A. Correct.

Q. Based at least upon what she told you?

A. Correct.

(T.p. 2148).

The prosecutor continued to lead the witness as to various prosecutorial theories of the case. For instance, as to how Appellant may have obtained gas to start the fire: “To the best of your recollection, that car runs on gas, does it not?” Answer: “That is correct.” “So there would have been a source of gas for the owner of that car; is that correct?” Answer: “Correct.” (T.p. 2149).

As the prosecutor continued questioning the witness, the prosecutor was in fact testifying; the witness was merely assenting to whatever idea the prosecutor proposed, for example that there could not have been a break-in. Defense counsel finally again objected, saying, “A lot of leading questions, Judge. The court said, “Leading,” and the prosecutor then continued in the same vein undeterred and unchecked. (T.p. 2150). On further redirect, the prosecutor returned to his theories of how Appellant may have obtained gas to start the fire, “testifying” that the witness did not check every gas station in the continental United States to determine whether Appellant got any gas on or about the 26th or 27th of August, or even in Lorain, because “that’s an impossible task, isn’t it?” The prosecutor then asked “You don’t have to go to a gas station to get gas, you get it out of your own car, can’t you?” Answer: “Yes.” (T.p. 2160). In fact, the prosecutor had no evidence that Appellant had obtained gasoline prior to the offense.

In questioning Carol Abfall, a beverage store employee, about Appellant's manner while going through the store drive-through, the prosecutor inserted improper remarks about Appellant: "She didn't say, 'For God sakes, I just lost my son?'" A defense objection was sustained. (T.p. 2169). The prosecutor nevertheless tried again, pressing the witness, "Did she?" Defense counsel's objection was again sustained. (T.p. 2170). The prosecutor again asked the witness, "Does she ever say, 'For God sakes, I just lost my son?'" Again defense counsel objected. The prosecutor continued to lead the witness concerning Appellant's behavior. (T.p. 2170-71).

While questioning Alicia Huff, a woman whose son attended day care with Jacob, the prosecutor asked, "And you agree with me there's a difference in being a mother in buying someone a lot of toys and spending a lot of time and being emotionally attached to the child?" Defense counsel objected, the court said "Leading?," and then, "Okay," and then the prosecutor asked the very same question again. The witness replied, "Yeah." (T.p. 2195). The prosecutor also elicited other information through the use of leading questions. (T.p. 2201, 2205). On redirect, the prosecutor engaged in leading questions about the witness's thoughts about Appellant; defense counsel's objection was sustained. (T.p. 2221). The prosecutor again continued with the very same question asked before the objection. He then asked a series of leading questions about whether or not Appellant would have had gasoline on her clothes, and whether Appellant gave money to boyfriends of unseemly character. (T.p. 2222-3). Defense counsel's objection was sustained; the prosecutor was told to rephrase the question but continued in the same manner as before. At one point even the witness could not agree with the prosecutor's assertions, answering, "I don't know." (T.p. 2223). Defense counsel attempted to object to leading questions "based upon hearsay upon hearsay." The court allowed the prosecutor to continue. (T.p. 2224-5).

When the prosecutor began asking questions about Appellant keeping a clean house “like a good mother would keep,” the court sustained an objection. The prosecutor then continued, “...did you not go to Nicole’s house because you think the sanitary conditions were poor?” Defense counsel again objected. The court admonished the prosecutor to ask the question differently. (T.p. 2225-6). Momentarily, the prosecutor asked a direct question, then continued to lead the witness as to Appellant’s failure to be a “good mother.” (T.p. 2226-7). When the prosecutor asked, “...do you consider a good mother somebody that has baby-sitters give codeine to their child that belongs to another person?,” the court sustained an objection. (T.p. 2227). The prosecutor further asked the witness leading questions as to how she became suspicious of Appellant. (T.p. 2228-9).

When the prosecutor asked the witness about Nicole’s decision to go out soon after the death of her son he added obvious sarcasm, “It wasn’t—to your knowledge, was it at gunpoint or a threat if she didn’t go?” The court sustained an objection, but the prosecutor merely rephrased it as, “Did anybody tell you she was forced physically to go out?” The defense objection was overruled. (T.p. 2243).

During the redirect of witness Sunshine Cantrell, the prosecutor asked a series of leading questions as to how Ms. Cantrell would behave if her child had just been burned in a fire. The prosecutor asked several questions before a defense objection was sustained. (T.p. 2258).

Evidence Rule 611(C) provides that leading questions should not be used on direct examination except as necessary to develop the testimony of a witness. It is within the trial court’s discretion to determine the limits of leading questions on direct examination. State v. Lewis, 4 Ohio App. 3d 275, 278, 448 N.E.2d 487 (1982). In Appellant’s case there was no necessity for the prosecutor to ask leading questions, as in for instance, a case where the witness

is a child and may need leading questions to develop his or her testimony. Here the trial court sustained many of the defense's objections, clearly signaling that the court believed the prosecutor was engaging in improper conduct, yet the prosecutor disregarded the admonishments of the court and continued in the prejudicial conduct.

In essence, the prosecutor, by his use of leading questions, was injecting his personal beliefs about Appellant into the proceedings, and asking the witnesses to agree with him. He also was in some instances putting evidence before the jury which had no basis in fact, and prompting witnesses to agree to evidence in the words the prosecutor wanted to hear, namely his own.

The role of the prosecutor is to ensure "not that it shall win a case, but that justice shall be done....It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger, 295 U.S. at 88. This misconduct was pronounced and persistent, and must be viewed in context of the entire proceeding. The court sustained objections to some of the questions, but "the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial." The mild actions of the trial court were not sufficient to remove the prejudice. Id., at 85. Here, the prosecutor continued with the improper questioning even after the trial court repeatedly sustained objections by defense counsel.

### **3. Closing argument in the trial phase.**

In this case, the prosecutor was desperate to convince the jury of charges that were not supported by sufficient evidence. The prosecutor argued facts not in evidence when he argued that witness Teresa Barthel, who saw Appellant and Jacob at the hospital when he was brought in with stomach pains, had thought Jacob "was basically dying" in the hospital. (T.p. 2770).

Actually, the witness did not say this. (T.p. 1964). The prosecutor also argued to the jury that Appellant “most likely caused Jacob Diar’s death. He was either smothered or drowned in that tub.” (T.p. 2793). He argued that there was prior calculation and design because Appellant “had an opportunity while she was smothering him to change her mind. It takes the human body a while to run out of oxygen before it expires.” (T.p. 2796). The prosecutor thereby argued facts not in evidence, as the cause of death could not be determined, and the prosecutor was merely speculating. No evidence was presented as to either drowning or smothering. The prosecutor also argued facts not in evidence when he said that witness Alicia Huff had testified that she believed Appellant had committed the offense. (T.p. 2861). In fact, Ms. Huff did not say this in her testimony. See Washington v. Hofbauer, 228 F.3d at 700-707.

The prosecutor argued that Appellant had more money for her defense than the State of Ohio had to prosecute the case. (T.p. 2844). He denigrated defense counsel by suggesting that the defense obtained its arguments about the case from movies, “a cry for to [sic] you to try to make up some imaginary possible doubt to find things his way. It’s an attempt to divert your attention from the actual evidence and to move it to the theory. And we all know what makes better movies is to exaggerate things to the point of being ridiculous.” (T.p. 2844). He stated that the defense was asking the jury to “teach the government a lesson. Let’s teach the government not to point its finger at people.” (T.p. 2861). State v. Hawkins, 66 Ohio St. 3d 339, 612 N.E.2d 1227 (1963) (improper for prosecutor to characterize defense testimony as “incredible” or “ridiculous.”); State v. McNeill, 83 Ohio St. 3d 438, 700 N.E.2d 596, 1998-Ohio-293. The prosecution may not make “unfounded and inflammatory attacks on the opposing advocate.” United States v. Young, 470 U.S. 1, 9-10 (1985); State v. Liberatore, 69 Ohio St. 2d 583, 433 N.E.2d 561, 566-67 (1982).

#### **D. Penalty Phase misconduct**

In opening statements in the penalty phase, the prosecutor said, "In all probability, by way of the evidence in this case, some method of suffocation was used." (T.p. 2970). The prosecutor thereby argued facts not in evidence, as the cause of death could not be determined, and the prosecutor again was merely speculating. He invoked a horrific death for a child with absolutely no evidence to support his statement. Further, the murder itself is not an aggravating circumstance. He improperly told the jurors to consider the aggravated murder counts in sentencing. (T.p. 2966-67). He also converted the facts of the fire into a nonstatutory aggravating circumstance. (T.p. 2970). The fire took place after Jacob was already dead, and was not part of the statutory aggravating circumstance in this case, to wit, that the Appellant caused the death of a person under the age of thirteen. Defense counsel's objection was overruled. The prosecutor also improperly included evidence in the penalty phase which the prosecutor knew was not related to the aggravating circumstance, but rather to the manner of death and the subsequent fire. (T.p. 2987-89). (See Proposition of Law III). Again all defense objections were overruled. The prosecutor invoked images of a terrible fire to tip the scales toward death.

The prosecutor also interjected victim impact evidence and nonstatutory aggravators when he said "Jacob liked to take baths, he liked to be clean, he liked to be clinging to his mother, and his mother, by way of the evidence in this case, it was demonstrated did not perform as a true mother should." (T.p. 2968).

During closing argument in the penalty phase, the prosecutor again argued the fire as a nonstatutory aggravating circumstance. (T.p. 3050, 3068). He argued that the jury should consider and weigh against the mitigating factors the two counts of aggravated murder. (T.p.

3050). He referred to the pictures of Jacob's body. This was particularly prejudicial because the pictures showed the effects of the fire on Jacob's body after his death. (See Proposition of Law VIII). The prosecutor said, "you know what happened here." (T.p. 3052). O.R.C. § 2929.04(A)(1)-(9) sets out the aggravating circumstances that may be weighed against a defendant's mitigating factors at the penalty phase of a capital trial. These are the only selection factors that may be placed on "death's side of the scale." See Stringer v. Black, 503 U.S. 222, 232 (1992). See also State v. Wogenstahl, 75 Ohio St. 3d 344, 355, 662 N.E.2d 311, 321 (1996). Moreover, constitutional error results when invalid aggravators are placed into the capital sentencing calculus. See Stringer, 503 U.S. at 235-36; Sochor v. Florida, 504 U.S. 527, 539 (1992); State v. Davis, 38 Ohio St. 3d 361, 369-70, 528 N.E.2d 925, 933-34 (1988). Further, the murder itself is not an aggravating circumstance. State v. Gumm, 73 Ohio St. 3d 413, 653 N.E.2d 253, 264 (1995); State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264, 302 (1984). The prosecutor also argued a non-statutory aggravating circumstance when he argued "she took her own flesh and blood's life." (T.p. 3068).

The prosecutor argued that in Dr. McPherson's testimony and the mitigating factors the jury heard, there was "not...one scintilla of an iota of a hint of remorse." Defense counsel's objection was overruled. (T.p. 3053). It is improper to turn the nonexistence of a mitigating factor, such as remorse, into an aggravating circumstance. State v. Tyler, 50 Ohio St. 3d 24, 41, 553 N.E.2d 576, 596 (1990). He improperly argued that Appellant's personality disorder did not "excuse" her conduct. (T.p. 3053). Mitigating factors do not "excuse" conduct but rather lessen the moral culpability of the defendant or diminish the appropriateness of death as the penalty. Eddings v. Oklahoma, 455 U.S. 104 (1982); State v. Lawrence, 44 Ohio St. 3d 24, 541 N.E.2d 451 (1989); State v. Holloway, 38 Ohio St. 3d 239, 527 N.E.2d 831 (1988). He argued that the

jury should impose death so that Appellant would not be released in the future. (T.p. 3066-67). State v. Evans, 63 Ohio St. 3d 231, 586 N.E.2d 1042 (1992) (improper to mention possibility of escape, commutation and pardon.). He told the jurors that they were not there for “mercy”. (T.p. 3066). The prosecutor also told the jurors that Appellant killed Jacob to have money to support her own lifestyle. This was an improper nonstatutory aggravating factor. (T.p. 3067). It was also contrary to the evidence, as Appellant had been generous to Jacob with gifts and toys.

The prosecutor also misled the jury as to the statutory weighing process. Prosecutor Nolan told the jury:

Well, you’ve got to figure out what weight to be [sic] given to the age factor. You’ve got to figure out what weight to be given the fact that [Diar] hasn’t committed a crime as an adult or a juvenile. Does that mitigate? Does that give pause? Does that make it seem to you that you should recommend the death penalty in this case.

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And finally, the all-purpose mitigation, that which you have heard about from day one in this case, to be [sic.] begin with the State’s own opening statement, we have granted, we have given you, there is no question that Nicole Diar was injured in her youth. There is no question that she was burned. There is no question that she was scarred for life, physically. That is not an issue

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You have to determine whether or not those three things in mitigation are valid for you, for your purposes[,] for your deliberations, for your determination of whether or not to recommend the death penalty or one of the other sentences \*\*\*.

(T.p. 3051-3052).

The prosecution’s rendition of the weighing process is misleading for a number of reasons. First, telling the jury that they must simply decide whether or not evidence is mitigating is not a correct statement of the law. The Ohio General Assembly has determined that the

circumstances enumerated in O.R.C. § 2929.04(B) have mitigating value. Moreover, a sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. Saffle v. Parks, 494 U.S. 484, 489 (1990). Thus, it is improper to tell a jury that they decide what is mitigating.

Second, telling jurors that if they find evidence is mitigating then they decide how much weight to give to it is also inaccurate. The General Assembly in enacting O.R.C. § 2929.04(C) required that the factors enumerated in subsection (B) are to be given some weight. A sentencer is free to determine the weight to given relevant mitigating evidence, but they may not exclude such evidence from their consideration by giving it no weight. Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982). The enumerated factors must be weighed against the aggravating circumstances.

In this case, it is impossible to determine whether the jurors found some of the statutory mitigating circumstances to exist, but decided, in light of the prosecution's uncorrected comments, to give them no weight. See Bates v. Bell, 402 F.3d 635 (6th Cir. 2005). (Prosecutorial misconduct in the sentencing hearing can operate to preclude the jury's proper consideration of mitigation). Of course, the State may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence. Buchanan v. Angelone, 522 U.S. 269, 276 (1998). But what happened in Diar's trial was that the State's argument precluded the jury from giving effect to recognized statutory mitigating factors.

#### **E. Conclusion**

The prosecutor has a unique role at a criminal trial. The prosecutor must ensure guilt is punished, but also that justice is done. State v. Lott, 51 Ohio St. 3d 160, 165, 555 N.E.2d 293, 300 (1990) (citing Berger v. United States, 295 U.S. 78, 88 (1935)). Thus, "he may strike hard

blows, [but] he is not at liberty to strike foul ones.” Id. It is incumbent upon the prosecutor to eschew foul blows that destroy a defendant’s right to a fair trial.

In analyzing prosecutorial misconduct under the Due Process Clause, the “touchstone” is “the fairness of the trial.” Lott, 51 Ohio St. 3d at 166, 555 N.E.2d at 301 (citing Smith v. Phillips, 455 U.S. 209, 219 (1982)). Further, claims of prosecutorial misconduct are considered for their cumulative effect on the defendant’s trial. 28 U.S.C. § 2254(d)(1). See Darden v. Wainwright, 477 U.S. 168, 181 (1986). See also Berger, 295 U.S. at 89 (“we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential.”); United States v. Francis, 170 F.3d 546, 556 (6th Cir. 1999) (holding that when cumulated prosecutorial misconduct warranted new trial). This Court has recognized the necessity of considering the cumulative effect of prosecutorial misconduct. State v. Fears, 86 Ohio St. 3d 329, 715 N.E.2d 136, 158 (1999) (Moyer, C.J., dissenting) (citing State v. Keenan, 66 Ohio St. 3d 402, 613 N.E.2d 203, 209-10 (1993); State v. Liberatore, 69 Ohio St. 2d 583, 433 N.E.2d 561, 566-67 (1982)). Each individual act of misconduct, or type of misconduct, is not separated out for consideration. Under such circumstances, it would be nearly impossible to succeed on a claim of misconduct. Rather, the alleged misconduct in its entirety should be reviewed to determine whether it “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” See Darden, 477 U.S. at 181 (citing Donnelly, 416 U.S. 637) (internal quotations omitted); See also Francis, 170 F.3d at 556.

Under the proper analysis, the totality of these circumstances, the prosecutor misconduct at Appellant’s trial rendered those proceedings unfair and denied him due process. Diar’s trial

was plagued with repeated acts of misconduct bringing to the jury's attention irrelevant and inflammatory information that prejudiced its decisions on both guilt and sentence.

The prosecutors' misconduct during the trial phase and in closing argument deprived Appellant of a fair trial. Further, the misconduct at the trial phase of Appellant's case would have had a carry over effect to Appellant's penalty phase. State v. Thompson, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 420 (1987). In State v. Keenan, 66 Ohio St. 3d 409, this Court held:

To be sure, any capital trial generates strong emotions. . . . And so we have consistently held the prosecution entitled to some latitude and freedom of expression. . . . Realism compels us to recognize that criminal trials cannot be squeezed dry of all feeling.

But it does not follow that prosecutors may deliberately saturate trials with emotion. We have previously announced that a conviction based solely on the inflammation of fears and passions, rather than proof of guilt, requires reversal.

(Citations and internal quotations omitted.) The prosecutor interjected improper emotional considerations into Appellant's trial. In addition, jurors were misled as to the facts and law to be applied in this case. This misconduct violated rights guaranteed to Appellant Diar by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, as well as Article I, §§ 9, 16 and 20 of the Ohio Constitution.

## Proposition of Law No. V

The introduction and admission of prejudicial and improper character and other acts evidence and the failure of the trial court to limit the use of the other acts evidence denied Diar her rights to a fair trial, due process and a reliable determination of her guilt and sentence as guaranteed by U.S. Const. amends. V, VI, VIII and XIV; Ohio Const. art. I, §§ 10 and 16.

### **A. Introduction**

During the course of Diar's trial, the State of Ohio introduced a wealth of evidence relating to her bad character and bad acts. Beginning with the State's opening statement and ending with the State's closing argument, Diar's trial contained inflammatory evidence that she was a bad mother who used baby-sitters excessively and reacted to her son's death in an inappropriate manner by going to a bar on the day of her son's funeral. The admission of this testimony was erroneous and prejudicial to Diar. Given the lack of evidence concerning Diar's guilt, this character evidence was clearly prejudicial and likely outcome determinative. Even more troubling is the fact that the trial court failed to instruct the jury on the proper purpose for which the evidence was admitted. These attacks injected confusion and overwhelming prejudice to the charge of aggravated murder. Thus, the inflammatory character evidence rendered the trial fundamentally unfair.

### **B. Law on admissibility of other acts and bad character evidence**

It is a well established rule that in a criminal trial, evidence of previous or subsequent criminal acts, wholly independent of the offense for which the defendant is on trial, is inadmissible. State v. Wilkinson, 64 Ohio St. 2d 308, 314, 415 N.E.2d 261, 267 (1980). Evidence of other acts is not admissible simply because such proof demonstrates a trait, disposition, or propensity toward the commission of a certain type of crime. State v. Lytle, 48 Ohio St. 2d 391, 401-402, 358 N.E.2d 623 (1976). Since observance of this axiom is essential to

a fundamentally fair trial, this Court has long held that, as a general rule, evidence of acts independent of the crime for which the accused is on trial are not admissible to show that the defendant acted in conformity therewith. State v. Mann, 19 Ohio St. 3d 34, 36, 482 N.E.2d 592, 595 (1985); State v. Curry, 43 Ohio St. 2d 66-69, 330 N.E.2d 720, 723 (1975); State v. Burson, 38 Ohio St. 2d 157, 311 N.E.2d 526 (1974); State v. Hector, 19 Ohio St. 2d 167, 249 N.E.2d 912 (1969).

The rule prohibiting the admission of other acts evidence to show conduct is set forth in Ohio R. Evid. 404(A) which provides that “evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion.” There are exceptions to Rule 404(A) which provide that evidence of other crimes, wrongs or acts may be admissible for other limited purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Ohio R. Evid. 404(B). Ohio Revised Code § 2945.59 (Anderson 1996) codifies this rule. Although the Revised Code does not specifically list identity as a proper purpose, the Ohio Supreme Court has held that identity is “included within the concept of scheme, plan, or system.” State v. Shedrick, 61 Ohio St. 3d 331, 337, 574 N.E.2d 1065, 1069 (1991).

Therefore, to be admissible under Evidence Rule 404(B) and O.R.C. § 2945.59, the proponent of the other acts evidence must show a proper purpose. Id. Nevertheless, because Rule 404(B) codifies an exception to the common law with respect to evidence of other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict. State v. Broom, 40 Ohio St. 3d 277, 282, 533 N.E.2d 682, 690 (1988). Therefore, evidentiary rules concerning character evidence help to assure that a

defendant “is tried for what he did, not for who he is.” United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977).

**C. Other acts and bad character evidence introduced at trial**

Based on discovery materials obtained prior to trial, the defense was aware that the State intended to offer testimony concerning Diar’s character and other bad acts. On September 23, 2005, a pre-trial proceeding was held that assessed the merits of the defense’s Motion in Limine that was to be filed under seal. At the proceeding, counsel for Diar argued that the testimony in question would be perceived by the jury in a manner that is prohibited under Ohio R. Evid. 404(A). The State countered that this evidence demonstrated motive, thus qualifying as an Ohio R. Evid. 404(B) exception. The trial court responded with an entry giving the State permission to offer testimony in regards to Diar’s use of babysitters, her visits to bars after her son’s death, and other testimony concerning how Diar reacted to her son’s death.

During opening arguments, the foundation was laid for how the jury should view Diar. According to the State’s theory, Diar was an “absentee mother” who farmed Jacob out to babysitters. (T.p. 1266-68). The jury was told early on that it was her “habit to dump Jacob on other people.” (T.p. 1268). Regrettably, these attacks remained a major theme of the trial as seven different witnesses offered testimony in regards to Diar’s parental skills.

Leroma Penn, Diar’s next door neighbor, testified that four year old Jacob would often walk over to her house unattended while his mother remained inside. According to Penn, “most of the time he came over by his self.” (T.p. 1481). Penn also testified that Becky, Diar’s sister, was “always” keeping Jacob. (T.p. 1506). Inflammatory evidence was also offered by Penn when she testified about broken glass in the front yard of the home Diar rented. Penn, concerned

about Jacob cutting his feet, testified that she asked Diar to clean up the glass but “she said she wasn’t going to get it up.” (T.p. 1538).

The State also offered repetitive evidence from four witnesses who testified about their experiences baby-sitting Jacob. This evidence continued with the State’s theme of attacking Diar’s bad character as a mother. The prejudicial impact of this parental skills testimony was further compounded by the fact that the trial court overruled the defense’s motion to sever the charge against Diar concerning the allegation that she gave her son Tylenol and codeine. (See Proposition of Law XI).

Luis Agosto, a State witness who baby-sat Jacob, testified that Nicole Diar and her sister instructed him to give Jacob medicine because “he tends to get a little hyperactive or hyper.” (T.p. 1874, 1876). According to Agosto, Jacob threw up the medicine after swallowing a teaspoon of it. (T.p. 1875, 1876, 1878, 1879). Agosto also testified that Diar did not leave a phone number where she could have been reached at in the event Jacob was sick. (T.p. 1879). The State concluded Agosto’s testimony by eliciting, over defense’s objection, information that Diar paid him cigarettes for the time he spent baby-sitting. (T.p. 1876-1877).

Rachel Wise, another witness for the State who baby-sat Jacob, testified that Jacob “was a good kid around Becky, not so much around Nicky.” (T.p. 1885). Wise also testified that Diar did not leave her with any emergency numbers to call in the event something happened. (T.p. 1887). The State’s direct examination of Wise also revealed that when she baby-sat for Jacob at night, Diar would not arrive home until 3:00 or 4:00 in the morning. (T.p. 1886). Wise was also present when Luis Agosto gave Jacob a teaspoon of medicine and testified to seeing him throw up afterwards. (T.p. 1888).

Destiny Faulkner was another witness for the State who baby-sat Jacob. Faulkner testified to baby-sitting Jacob more than four times a week and was able to watch him during the day because Diar would call her off from school as her own child. (T.p. 1922, 1932). When asked to describe the relationship between Diar and her son, Faulkner said that “he seemed like a bother to her.” (T.p. 1925). Faulkner also testified that Diar would participate in online chat-rooms and treated her son “like he was her little brother.” (T.p. 1932-33). Faulker also testified that she too was instructed by Diar to give Jacob medicine because “it made him tired.” (T.p. 1928). Diar allegedly told Faulkner the medicine was codeine. (T.p. 1929).

State Witness Christopher Shreves testified that he was approached by Diar about baby-sitting her son. (T.p. 1993). Shreves, under direct examination, described to the jury the incident where Jacob was given medicine that caused him to throw up. (T.p. 2001). This was the third witness called by the State who testified to seeing Jacob vomit after being given medicine. Shreves testified that he spoke with Diar about her son vomiting and she told him that “there’s no big deal.” (T.p. 2005).

The State even managed to elicit damaging and improper character evidence relating to Diar’s parental skills from the witnesses called on her own behalf. Under cross-examination, defense witness Nicksa Ortiz was asked if “a good mother is somebody that also has sanitary conditions around the apartment for their child; isn’t that right?” (T.p. 2499). After answering in the affirmative, the character attacks continued. The State asked Ortiz if she told the police that Diar “didn’t clean up after anything, she just left things laying everywhere.” (T.p. 2500). The State also attacked the fact that Jacob ate a lot of fast food. (T.p. 2500).

Five other witnesses called by the State offered prejudicial testimony in regards to Diar’s lifestyle following the death of her son. Samantha Garcia testified that she saw Diar at a Bar,

Jack and Diane's, on the day of Jacob's funeral. (T.p. 1973). Garcia described Diar as a bar patron, dressed in tight pants, who was dancing, singing, and "having a good old time." (T.p. 1974, 1975).

Joyce Harkless was another witness called by the State who observed Diar at Jack and Diane's on the day of her son's funeral. Harkless testified that she "saw Nicole up on the stage singing, karaokeing the 'YMCA.'" (T.p. 1983). According to Harkless, "she was also doing the electric slide" and drinking alcohol. (T.p. 1983).

Following the testimony of Harkless, the defense renewed their objection to the trial court's decision to allow testimony regarding Diar's actions at the bar following her son's funeral. (T.p. 1988). The State continued to argue that this was an "area of great relevance" which allegedly showed Diar's lack of remorse. (T.p. 1989). The trial court overruled the objection but noted it was preserved for the record. (T.p. 1988).

With the trial court's blessing, the State proceeded to call two more witnesses who testified to seeing Diar dancing, singing, and drinking at Jack and Diane's. Falisha Bisceglia testified that she observed Diar line dancing and singing karaoke at Jack and Diane's on the day of Jacob's funeral. (T.p. 2015-2016). Sunshine Cantrell, a bartender at Jack and Diane's the day of the funeral, testified that she served Diar approximately five drinks and also saw her line dancing and singing karaoke. (T.p. 2249, 2251).

The State called three other witnesses whose testimony added nothing relevant to the charges listed in the indictment. On the day of Jacob's funeral, Dustin Otero was bowling with his friends. Otero testified that he saw Diar bowling and drinking with a group of people shortly after the funeral. According to Otero, "they were bowling, drinking, looked like they were having a good old time." (T.p. 2053). Carol Abfall testified for the State and provided more

prejudicial information. Abfall worked in a drive-thru and testified that two days after the fire, a vehicle driven by Diar's brother pulled into the store. Diar was in the back seat of the vehicle, and allegedly told Abfall, "I want the liquor. Don't forget the liquor." (T.p. 2164).

One of the last witnesses called by the State was Alicia Huff, a former friend of Diar's. The questions asked and answers sought of this witness reveal the State's desperate attempt to paint Diar in the worst imaginable light as their case in chief came to a close. The evidence elicited from this witness, admitted by the trial court over the defense's objections, again dealt with facts unrelated to any of the charges Diar was indicted for. Huff was aware that Diar, "went out a lot and she would leave her—leave Jacob with baby-sitters." (T.p. 2193). Testimony from Huff also revealed that it took approximately six months after the death of Jacob for his gravesite to get a headstone. (T.p. 2204). Huff also agreed with the State's assertion that Diar was "completely irresponsible with her money." (T.p. 2223). The State also focused on the sanitary conditions of Nicole's house, arguing over defense objections that "this goes to the care of the child now, Judge, and good mother." (T.p. 2225). Huff agreed that the sanitary conditions of Diar's home were, "not very clean." (T.p. 2226). Over the defense's objections, the trial court even allowed the State to question Huff about problems Diar allegedly had with her landlord. (T.p. 2229, 2230).

The State's closing argument reiterated all of this testimony. Diar was a mother who, the State alleged, "didn't worry about the supervision" of her son. (T.p. 2766). The jury was once again reminded that on the same day of her son's funeral, Diar "changed into tight fitting clothes, she line danced and she sang karaoke." (T.p. 2786).

Not a single limiting instruction was given by the trial court in regards to the aforementioned testimony. Due to the failure of the trial court to provide any type of limiting

instruction, the jury was free to draw its own conclusions regarding how to utilize this highly prejudicial evidence when it came time to deliberate.

**D. Application of law to evidence presented**

Excessive and repetitive evidence concerning Diar's parenting style certainly falls within the definition of other acts evidence as provided in Rule 404. Based on Rule 404(A), the evidence should have been excluded. This evidence assured that Diar was tried for who she was, not for what the State alleged she did. The State's argument that this evidence demonstrated a motive, thus qualifying as a Rule 404(B) exception, is misplaced. Diar displayed poor judgment in who she hired as baby-sitters, the instructions given to them, and how they were paid. For the State to connect these poor decisions to a motive to commit murder is a stretch that Rules 404(A) and (B) are designed to protect against.

This Court has admitted other acts evidence where it is so inextricably related to the crime charged and intertwined to such an extent that it was necessary to give a complete picture of what occurred. See State v. Wilkinson, 64 Ohio St. 2d 308, 415 N.E.2d 261 (1980), State v. Curry, 43 Ohio St. 2d 66, 330 N.E. 2d 720 (1975). The trial court's decision to deny Diar's Motion to Sever further complicated her ability to defend against the charge of aggravated murder. (See Proposition of Law X). Even if Diar were to concede that she used excessive baby-sitters and instructed them to give her son Codeine, this evidence was unrelated to the homicide of Jacob. The Coroner who performed the autopsy on Jacob, testified that there were "no toxic drugs present" in his system. (T.p. 1684). This effectively eliminates poisoning, or any other type of drug induced death and cannot be deemed "inextricably related" to the charge of aggravated murder. Admitting the cumulative evidence from the baby-sitters, in spite of the

Coroner's testimony, was error and prejudicial to the defense. The same can be said for the testimony concerning Diar paying her babysitters with cigarettes.

The testimony offered in regards to Diar's time spent at Jack and Diane's, following her son's funeral, also falls within Rule 404(A)'s scope. This highly inflammatory evidence should have been excluded. The drinking, dancing, and singing evidence could not have provided any answers to the legitimate questions the jury may have had in regards to whether or not a crime occurred. Thus, the evidence was offered for the sole purpose of painting a disparaging picture of the defendant for the jury to carry into its deliberations on the issue of guilt or innocence.

The State argued that Diar's actions at the bar were an "area of great relevance" and showed a lack of remorse. (T.p. 1989). Again, this argument is misplaced. The testimony concerning Diar's activities at Jack and Diane's bar was independent and remote from the events which led up to and occurred on the morning of the fire. The references to Diar's activities at a bar cannot be considered to be inextricably related to the crime charged. Nor can drinking, dancing, and singing be considered to "form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment." State v. Curry, 43 Ohio St. 2d 66, 330 N.E. 2d 720 (1975).

Other irrelevant and prejudicial evidence presented by the State falls within this same analysis. The cumulative character evidence concerning the unsanitary conditions in Diar's home, her use of the internet, financial irresponsibility, and the issue of Jacob's gravesite not receiving a headstone for six months provide no reasonable explanation to the jury as to why a mother would murder her son and burn down the house. No rational explanation exists that could draw a connection between an under-skilled parent and a murderer.

The State argued such evidence went to the “care of the child.” (T.p. 2225). Again, Diar’s parenting style may have been sub-standard, but that in no way qualifies her as a murderer. For the State to admit this wealth of evidence concerning Diar’s shortcomings both as an individual and parent, it had to be necessary for the State’s case and offer some explanation as to why a mother would come to murder her son. This evidence was completely independent and remote from the crime which occurred and should have been excluded.

**E. No Limiting Instruction Was Given To The Jury**

This Court has held that where evidence of other acts is admitted, it is the duty of the trial court at the time such evidence is offered to instruct the jury regarding the purpose for which it is admitted. Baxter v. State, 91 Ohio St. 167, 110 N.E. 456, syl. at 3 (1914). The jury should be instructed that such evidence must not be considered by them as any proof whatsoever that the accused did any act alleged in the indictment. State v. Flonnory, 31 Ohio St. 2d 124, 129, 285 N.E.2d 726, 730-731 (1972). “To be effective, a limiting instruction on ‘other acts’ testimony should specifically say that this evidence is not to be used as substantive evidence that the defendant committed the crime charged.” State v. Lewis, 66 Ohio App. 3d 37, 43, 583 N.E.2d 404, 408 (1990) (citing State v. Pigott, 1 Ohio App. 2d 22, 197 N.E.2d 911 (1964)).

Assuming arguendo that this Court finds the other acts evidence did qualify as a 404(B) exception, the trial court was still required to properly instruct the jury that the evidence could not be utilized to demonstrate Diar’s guilt, and could only go to demonstrate one of the proper purposes under 404(B). In the present case, the trial court failed to do so. The trial court’s failure to instruct the jury properly invited the jury to take the State’s advice and draw its own conclusions as to how to utilize this evidence.

#### **F. The Error Was Not Harmless Error**

The State cannot demonstrate the admission of the prejudicial testimony was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 26 (1967). The admittance of the other acts testimony was not harmless in the present case. Due to the prejudicial nature of the character and other acts evidence in this case, an argument that there is no reasonable probability that the evidence affected Diar's conviction fails. State v. Lytle, 48 Ohio St. 2d 391, 358 N.E.2d 623 (1973).

#### **G. Conclusion**

Other acts evidence is never properly admitted when its sole purpose is to establish that the defendant committed the act alleged of her in the indictment. State v. Thompson, 66 Ohio St. 2d 496, 497-98, 422 N.E.2d 855, 857 (1981). In the present case, the sole purpose of the other acts evidence introduced in Diar's case was to prove that she was the type of person who could have committed the act alleged of her in the indictment. Moreover, the trial court's failure to advise the jury as to the proper use of the prejudicial other acts evidence was improper. It was the trial court's duty to ensure that the jury did not consider the other acts evidence as proof that Diar committed the aggravated murder of her son. The trial court abandoned its duty to determine the threshold legal determination of the proper purpose of the other acts evidence to the jury.

The improper admission of other acts evidence in the present case destroyed the presumption of innocence that should have been accorded to Diar and denied her the right to a fair trial in violation of the Due Process Clause of the Fourteenth Amendment. Without any type of limiting instruction, the improper character evidence also created a prejudicial "carry over" effect to Appellant's penalty phase deliberations. State v. Thompson, 33 Ohio St. 3d 1, 15, 514

N.E.2d 407, 420 (1987). Diar's convictions should be reversed, and this matter remanded for a new trial free from such highly prejudicial evidence.

### Proposition of Law No. VI

Appellant Diar's conviction and death sentence based on insufficient evidence of aggravated murder is a violation of due process and her right to be free from cruel and unusual punishment. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9 and 16.

#### **A. Law**

The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). In reviewing a record for sufficiency of the evidence, "the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." State v. Jenks, 61 Ohio St. 3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following Jackson v. Virginia, 443 U.S. 307 (1979).

In discussing sufficiency of the evidence, this Court has noted that "... 'sufficiency' is a term of art meaning that legal standard which is applied to determine whether...the evidence is legally sufficient to support the jury verdict as a matter of law." State v. Thompkins, 78 Ohio St. 3d 380, 386-7, 678 N.E.2d 541, 546 (1997), citing Black's Law Dictionary (6 Ed. 1990) 1433. Ohio R. Crim. P. 29(A) provides that a motion for judgment of acquittal can be granted by the trial court if the evidence is insufficient to sustain a conviction. Thompkins, 78 Ohio St. 3d at 386-7, 678 N.E.2d at 546. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. Id., citing State v. Robinson, 162 Ohio St. 486, 124 N.E.2d 148 (1955). A conviction based on legally insufficient evidence constitutes a denial of due process. Tibbs v. Florida, 457 U.S. 31, 45 (1982), citing Jackson v. Virginia, 443 U.S. 307 (1979). A mere modicum of evidence is not sufficient. "Any evidence that is relevant—that has any tendency to make the existence of an element of a crime

slightly more probable than it would be without the evidence, cf. Fed. R. Evid. 401—could be deemed a ‘mere modicum.’ But it could not seriously be argued that such a ‘modicum’ of evidence could by itself rationally support a conviction beyond a reasonable doubt.” Jackson, 443 U.S. at 320.

Thus, “[a] challenge to the sufficiency of evidence supporting a conviction requires a court to determine whether the state has met its burden of production at trial. On review for sufficiency, courts are to assess not whether the state’s evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.” State v. Thompkins, 78 Ohio St. 3d 380,390 , 678 N.E.2d 541, 549 (1997) (Cook, J. concurring).

## **B. Analysis**

### **1. The Indictment**

The indictment against Nicole Diar was filed on April 30, 2004. It included eleven counts, including counts for felonious assault, murder, and three counts of aggravated murder with death penalty specifications. (See Indictment, filed April 30, 2004).

The indictment was amended on September 26, 2005. One of the aggravated murder counts was dismissed; specification one to count six was dismissed; specification one to the new count seven was dismissed; count nine became count eight, count ten became count nine, and count eleven became count ten. (Trial Docket 9/26/05). The charges thus became, Count 1, Corrupting Another With Drugs; Count 2, Felonious Assault; Count 3, Murder; Count 4, Aggravated Arson; Count 5, Aggravated Arson; Count 6, Aggravated Murder with Capital Specifications; Count 7, Aggravated Murder with Capital Specifications; Count 8, Tampering with Evidence; Count 9, Felonious Assault; Count 10, Corrupting Another with Drugs.

The counts which addressed the death of Jacob Diar were Counts 2, 3, 6 and 7. Count 2 charged that Nicole Diar, on or about August 27, 2003, did, knowingly cause serious physical harm to Jacob Diar, in violation of § 2903.11(A)(1) of the Ohio Revised Code. Count 3 charged that Nicole Diar, did, knowingly cause the death of Jacob Diar while committing an offense of violence that is a felony of the first or second degree, to wit: felonious assault and/or aggravated arson, in violation of § 2903.02(B) of the Ohio Revised Code. Count 6 charged that Nicole Diar did, purposely and with prior calculation and design, cause the death of Jacob Diar, in violation of § 2903.01(A) of the Ohio Revised Code; the specification attached to Count 6 was that the offender purposely caused the death of another who was under thirteen years of age and the offender was the principal offender. Count 7 charged that Nicole Diar, did, purposely cause the death of Jacob Diar who was under the age of thirteen years at the time of the commission of the offense, in violation of § 2903.01(C) of the Ohio Revised Code; the specification attached to Count 7 was that the offender purposely caused the death of another who was under thirteen years of age and the offender was the principal offender. The State was required to prove all essential elements of each count beyond a reasonable doubt.

## **2. Testimony at Trial**

Testimony at trial was unable to establish an actual cause of death for Jacob Diar. Dr. Paul Matus, Lorain County Coroner, testified that he viewed the victim at the scene and conducted an autopsy of the victim the next day. (T.p. 1680). He determined that the cause of death was “homicidal violence of an undetermined origin.” However, this conclusion rested on questionable foundations and was not supported by physical evidence. Dr. Matus testified that there was too much destruction of the body to come to a specific cause. (T.p. 1682). He stated that “we try to use logic, deductive reasoning, and we look at the elements and circumstances

surrounding the individual's death and try to put that death and the situation into context.” (T.p. 1682).

Dr. Matus testified that he reviewed past medical records of Jacob, including past stomach problems, and concluded that they in no way contributed to his death. (T.p. 1683). He testified that he did a very extensive, complete autopsy from tip to toe, including the brain, looking for wounds such as knife blades, metallic objects, and projectiles which would cause bruising or hemorrhage due to trauma. (T.p. 1683). Any hemorrhage in the head was due to the intensity of the fire, caused after death. (T.p. 1694). On cross examination he testified that there was no suspicion that the child died from an injury to his head. (T.p. 1714). Dr. Matus also looked at toxicology; no toxic drugs were present. (T.p. 1684). No drugs of any kind were found in Jacob's system, either over the counter or prescription drugs. (T.p. 1715). Matus looked at the internal organs; there was nothing found to cause death. (T.p. 1690).

Matus testified that the eyes were consumed; they therefore could not be examined for petechia, or little hemorrhages. (T.p. 1698). The prosecutor elicited this information by way of an improper leading question, thereby inserting his theories into the testimony by asking, “And you would look for petechia, little pinpricks of blood, sometime from smothering or drowning?” (T.p. 1698). The prosecutor would return to these themes again in his arguments to the jury. In reality, no evidence was offered to show that Jacob was either smothered or drowned by Nicole Diar.

Although Dr. Matus testified that he looked at the placement of the body, the position of the body, and the way the body was dressed, and concluded that they were not indicative of any accidental or naturally caused death, in actuality the body told him nothing about the cause of death, because his observations about the body had to do with the effect of the fire on the body,

and he testified that Jacob was already dead when the fire reached him. (T.p. 1702-04) (no soot or debris in mouth, nasal passages, throat or lungs, no foam in nostrils, no evidence of inhalation of smoke or flames). Matus testified that the body was in an unusual position, that the manner of dress was peculiar and alarming, in other words that it was a warm day in August but Jacob was wearing long pants, T-shirt, and a hooded sweatshirt pulled down over his face. (T.p. 1685). The inference intended was that the body was dressed this way after death to burn more efficiently, which supposedly would lead to the inference that the victim was killed purposely and purposely and with prior calculation and design, and with specific intent, but it is improper to pile inference upon inference without actual evidence to support the conclusions. Thus, both aggravated murder counts must fail. Most of Dr. Matus's testimony described the effects of the fire on the body after death, testimony which was not probative as to cause of death, but was highly prejudicial. (See Proposition of Law VIII.)

The prosecutor then, by the use of leading questions, vouched for unnamed "experts" who apparently agreed with Dr. Matus's vague conclusions.

Q [Prosecutor]. Did you also continue to consult with other coroners and other pathologists throughout the state regarding this case?

A [Dr. Matus]. Yes I did.

Q. About how many individuals were you consulting with?

A. Well, besides myself and my Chief Deputy Coroner, at least five. Well, actually six individuals.

Q. Okay. And based upon the literature and your consultations with those individuals, *some of which were very highly skilled in fire and fire-related deaths--*

A. Yes

Q. --were you able to rule out a hematoma to the back of the head?

A. Yes...

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Q. *And, subsequent to your consultations with various other coroners and pathologists, I believe you said six, did you continue with your opinion that this was a homicidal death—*

A. Yes. Absolutely.

Q. --of undetermined origin?

A. Absolutely.

(T.p. 1687-88). (emphasis added.)

The coroner's testimony was solely designed to suggest to the jury that Jacob was deliberately dressed in heavy clothing before the fire was set, but it in no way provides any evidence as to the actual cause of death. The conclusion of "homicidal violence of an undetermined origin" is too vague to support a conviction of aggravated murder and sentence of death, particularly in light of the accompanying prosecutorial misconduct and other improper evidence. (See Propositions of Law IV, V, and VIII).

For the remainder of Appellant's trial, the prosecutor cobbled together questionable "evidence" with suggestions that Appellant was a bad mother and that she failed to behave "appropriately" after her son's funeral. (See Propositions of Law V). But the State offered no evidence that Appellant had ever said that she would like to kill Jacob, and no statement from Appellant that she had indeed killed him.

Much of the State's evidence was inconsistent. For example, in attempting to show that Appellant failed to show appropriate distress after the fire, the State offered testimony that Appellant was calm, and not crying or hysterical. (T.p. 1347, 1351, 1431). Paramedic Priscilla Bidlake testified that Appellant displayed no tears when she was told her son had died, but on

cross examination it was revealed that the witness had noted in her written report that Appellant “cried” and had tears in her eyes. (T.p. 1437). The written report of paramedic Jason Bishop noted that the “mother was very upset.” (T.p. 1463). As to Appellant’s alleged failure to correctly direct firemen to Jacob’s location in the house, this evidence too was inconsistent. Fireman Frank Griffith, who spoke to Appellant at the scene, testified that she said she last saw Jacob downstairs in the back; she then said he was upstairs. (T.p. 1307). John May testified that Appellant said that “someone is inside to the right under a chair.” (T.p. 1347). On cross, May was questioned about the fact that his written report said that Appellant said the child might be on a chair in the living room. (T.p. 1350-51). Mark Nunez, a fireman who saw Appellant at the scene, testified that she said “my baby’s inside.” (T.p. 1402). Without more, this testimony does not prove purpose, specific intent, or prior calculation and design, as at most it relates only to Appellant’s actions after the fire began. None of this evidence is sufficient to support a conviction for aggravated murder and a sentence of death. The prosecutor’s uncertainty about the evidence in this case is demonstrated by the fact that the indictment charged Nicole Diar with felonious assault, murder, and two counts of aggravated murder all for the same victim, a victim for whom no cause of death could be identified.

That the prosecutor could not even state with certainty how Jacob Diar was killed is demonstrated by his arguments to the jury. In closing argument to the jury in the trial phase, the prosecutor argued that “she [Appellant] most likely caused Jacob Diar’s death. He was either smothered or drowned in that tub.” (T.p. 2793). The prosecutor also argued prior calculation and design when he said to the jury, “she had an opportunity while she was smothering or drowning him to change her mind. It takes the human body a while to run out of oxygen before it expires.” (T.p. 2796). No evidence was presented at trial that Appellant smothered or

drowned Jacob. During opening statements in the penalty phase, the prosecutor said, “[i]n all probability, by way of the evidence in this case, some method of suffocation was used.” (T.p. 2970). “Most likely” and “in all probability” are not proof beyond a reasonable doubt. The prosecutor merely sought to sway the jury with improper speculation and suggestion.

At the close of the State’s case, defense counsel moved for judgment of acquittal under Rule 29. (T.p. 2412). The Rule 29 motion was denied by the court. (T.p. 2432). Counsel renewed the motion at the end of the defense case. It was again denied. (T.p.. 2760, 2762).

### **C. Conclusion**

A capital case requires more than a “throw it up against the wall and see what sticks” approach to conviction and sentencing. It requires more than a “mere modicum” of evidence. As the Jackson court noted, “[i]n Winship, the Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction ‘except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.’” Jackson v. Virginia, 443 U.S. at 315, citing In re Winship, 397 U.S. at 364. The requirement of proof beyond a reasonable doubt “ ‘plays a vital role in the American scheme of criminal procedure,’ because it operates to give ‘concrete substance’ to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding.” Jackson, 443 U.S. at 315, citing Winship, 397 U.S. at 363. “[T]he standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself.” Jackson, 443 U.S. at 315, citing Winship, 397 U.S. at 372 (Harlan, J., concurring). The court reiterated that “[t]he Winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. A

‘reasonable doubt,’ at a minimum, is one based upon ‘reason.’” Jackson, 443 U.S. at 316-7. In Nicole Diar’s case it cannot be said that her guilt of aggravated murder was proved beyond a reasonable doubt. Her convictions and sentence must be reversed.

## Proposition of Law No. VII

Diar's right to effective assistance of counsel was violated when counsel's performance failed to meet the prevailing standards of practice, thus prejudicing Diar. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 10.

Trial counsel's performance failed to meet the prevailing standards of practice. As a result, Diar's rights guaranteed by the Sixth and Fourteenth Amendments and Article I, §§ 10 and 16 of the Ohio Constitution were violated.

### **A. Standard Of Review For Ineffective Assistance Of Counsel Claims.**

The Sixth Amendment right to counsel applies to the states through the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). The test for whether the right to counsel has been violated is found in Strickland v. Washington, 466 U.S. 668 (1984). The reviewing court must determine if counsel's performance is deficient. Id. at 687. If counsel's performance is deficient, the reviewing court must determine if the accused was thereby prejudiced. Id. To establish prejudice the accused need not establish outcome-determinative error. Id. Instead, the accused is prejudiced when the reviewing court loses confidence in the fairness of the trial. Id.

Strategic choices by appointed counsel are virtually unassailable. Id. at 690. Strickland makes clear, however, that a reasonable investigation of both the facts and the applicable law is required before counsel's choice may be deemed strategic. Id. at 691. Further, under Strickland, appointed counsel in a criminal case has a "duty to advocate the defendant's cause" as well as "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688.

Strickland also establishes that a reasonable investigation of both law and facts is required before a choice by counsel may be deemed strategic. Id. at 691. "[S]trategic choices

made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation. A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances.” Wiggins v. Smith, 539 U.S. 510, 533 (2003) (citations and internal quotation marks omitted).

When assessing the performance prong in a capital case, counsel’s performance is review under the American Bar Association’s Guidelines for the Appointment of Counsel in Death Penalty Cases. See Wiggins, 539 U.S. at 524. “The ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence ....” Id. (citation and internal quotation marks omitted with emphasis in original).

If counsel’s performance is deficient, this Court must determine whether Diar suffered prejudice resulting from counsel’s error. Strickland, 466 U.S. at 687. Prejudice results when this Court’s confidence in the result of Diar’s trial is undermined by counsel’s error. Id. at 694. Diar has no requirement to demonstrate that counsel’s error was outcome determinative under the Strickland prejudice prong. Id. at 693.

To summarize, Diar’s trial attorney’s performance should be viewed in light of the ABA Guidelines regarding the prevailing professional norms for death penalty counsel. Diar has been prejudiced by her attorneys’ error if this Court’s confidence in the result of the trial has been undermined. In addition to finding prejudice from individual deficiencies, the cumulative impact of counsel’s errors and omissions must be assessed as well. See State v. DeMarco, 31 Ohio St. 3d 191, 509 N.E.2d 1256 (1987); Harris By & Through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). The performance of trial counsel throughout Diar’s capital trial was deficient and prejudicial.

Diar asserts that her counsel performed deficiently, and to her prejudice, during all phases of her capital trial. Counsel's actions, and failures to act, were so far below the standard of care that counsel "gave up." (T.p. 3042).

**B. Ineffective Assistance Of Counsel During Pre-Trial**

Diar did not receive effective assistance of counsel during the pretrial phase of her capital proceedings. Lead defense counsel essentially abandoned his motion for change of venue when he opposed the State's motion for a gag order and then failed to reassert the defense's motion after voir dire showed extensive venire exposure to pretrial publicity. (Pretrial, June 2, 2004, pp. 13-18)

Defense counsel filed a motion for a change of venue on May 26, 2004. The trial court denied the motion, finding that it was premature. (Pretrial, June 2, 2004, p. 5) Defense counsel opposed the State's motion for a gag order, which would have limited public comment on the case. (Pretrial, June 2, 2004, pp. 13-18) Defense counsel's position on the gag order undercut his previous motion for change of venue, where he argued that extensive pretrial publicity would impede a fair trial. Where counsel should have used a thorough voir dire to convince the court to grant a change of venue, he instead argued against his own motion by opposing the state's gag order motion. This action only served to further flood the pool of potential jurors with the very information that he sought to curtail through his change of venue motion.

During voir dire a number of prospective jurors who expressed knowledge of the facts of the case. (T.p.. 60, 85, 98, 102, 131, 316, 405, 481, 697, 725, 796, 887, 970, 1086, 1095). In all, twenty-one members of the panel admitted to having seen articles about the case in the

local newspapers. (T.p.. 60, 85, 98, 102, 131, 316, 405, 481, 697, 725, 796, 887, 970, 1086, 1095.)

In Rideau v. Louisiana, 373 U.S. 723 (1963), the United States Supreme Court held that in certain cases adverse publicity can be so pervasive and so prejudicial that jury prejudice is presumed. A defendant's right to a fair trial by an impartial jury is one of our most fundamental rights. In Patterson v. Colorado, 205 U.S. 454, 462 (1907), the Court observed that "the theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence ...."

Of the twenty-one venire persons who admitted to having been exposed to pretrial publicity, six members were seated on Diar's jury. (T.p..131, 223, 316, 388, 480, 887). Despite their claims that could put that information aside, the very nature of the articles were so inflammatory as to support a presumption of prejudice.

In fact, several venire members admitted that, based on the newspaper articles, they had already formed an opinion that Diar was guilty. (T.p. 60, 93, 114, 474). Prospective juror Jenkins gave extensive details garnered from newspaper articles to support her conclusion that Diar was guilty: "I think what was stated in the newspaper was that there was no evidence on her clothing of any signs of being near the fire, and also, there was some mention of there being some agent used ... " and, "Well I can't erase what I've read and what I've heard, and I can't erase the fact that, yes, I made a judgment and an opinion, whatever you want to say ...." (T.p. 93-107). Where several disqualified jurors admitted that they could not ignore the impact of the pretrial publicity, it is unlikely that other jurors who were not as candid could set aside their prejudices. Where at least six of the jurors who convicted Diar and sentenced her to death

admitted to having read such articles, Diar's Sixth and Fourteenth Amendment rights to a fair trial and due process were violated.

The United States Constitution's Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. Strickland, 466 U.S. 668. Diar's attorney was ineffective when he undercut his change of venue motion and failed to renew it.

**C. Ineffective Assistance Of Counsel During Voir Dire.**

"Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981). It is also true that the "obligation to impanel an impartial jury lies in the first instance with the trial judge." Id. at 189. At Diar's capital trial, however, the trial court played a limited role in the voir dire questioning of prospective jurors. Instead, the trial court allowed counsel for the prosecution and defense to subject the venire members to questions. Additionally, the potential jurors completed a juror questionnaire, which counsel used in probing the jurors' beliefs on a variety of subjects.

Diar's right to receive effective assistance extends throughout her entire capital trial, including voir dire. Johnson v. Armontrout, 961 F.2d 748, 754-56 (8th Cir. 1992). The Constitution does not dictate catechism for voir dire, but only that the defendant be afforded a fair and impartial jury. Even so, part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. Morgan v. Illinois, 504 U.S. 719, 729 (1992); Dennis v. United States, 339 U.S. 162, 171-172 (1950); State v. Jackson, 107 Ohio St. 3d 53, 64, 836 N.E.2d 1173 (2005); State v. Wilson, 74 Ohio St. 3d 381, 386, 659 N.E.2d 292 (1996).

Voir dire plays a critical function in assuring the criminal defendant that [her] constitutional right to an impartial jury will be honored.

Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence cannot be fulfilled.

Morgan, 504 U.S. 729-730; citing Roales-Lopez, 451 U.S. at 188.

As such, trial counsel must engage in voir dire questioning to expose those prospective jurors who cannot impartially follow the trial court's instructions and impartially evaluate the evidence, so that the trial court may fulfill its responsibility. This did not happen here - not because of the trial court's obstructions to questioning, but because of counsel's ineffectiveness.

**C.1 Counsel failed to challenge for cause Juror #14 - Mark Takacs and Prospective-Juror – Rose Yarber Hogan**

A capital defendant has a constitutional right to conduct an adequate voir dire to determine if prospective jurors can follow the law and consider mitigating evidence to impose a sentence less than death. Morgan, 504 U.S. 719. The voir dire conducted of the entire venire, but especially Juror Takacs and Prospective-Juror Hogan demonstrates that this venire could not follow the law and would automatically impose the death penalty after a finding of guilt.

Juror Takacs, who ultimately sat on Diar's jury, indicated that he was predisposed to impose a death sentence in a "really, really nasty or strong case ... [a crime that is] really violent [or] ugly where innocent life is taken for no reason." (T.p. 231). He further stated that the accused would have to "show she had a really good motive ...[,] some signs of remorse or [that they] felt bad" in order for him not to vote for death. (T.p. 229, 231). While Juror Takacs' response seems somewhat innocuous - it is not.

Juror Takacs response indicates that he expected Diar to take the stand and show "she had a really good motive ...[, show] remorse or that she felt bad," in order for him not to impose death. (T.p. 229, 231). Juror Takacs expectations that Diar must testify to demonstrate she had "a really good motive [or] that she felt bad" violates Diar's right to remain silent. (T.p. 229, 231).

See U.S. Const. amends. V and XIV. Further, requiring Diar to take the stand to admit remorse or demonstrate she had a really good reason, would be a waiver her ability to argue on appeal that her conviction is based on insufficient evidence. This is especially important here, given the fact that Diar denied killing Jacob.

Counsel should have also moved to have Juror Takacs removed for cause. Counsel's failure was prejudicial because it denied Diar her right to a fair trial by allowing a juror predisposed to death to sit on the jury.

Prospective-Juror Hogan indicated that she was predisposed to impose a death sentence. She stated

... if a mother intentionally killed her child, then [she] would seek the death penalty ... [and if the death were the result of] maybe an accidental overdose, or something like that, [and] they try to still cover up the fact they accidentally did that, [she] would still seek [] death [].

(T.p. 344). In other words, in a case where a mother killed her child she would start with death and go from there. (T.p. 344). While Prospective-Juror Hogan indicated that she could be fair, impartial, follow the instructions of the court, and could consider other sentences; she also indicated that death would be the only option unless it was proven that there was no premeditation. (T.p. 336, 339-341, 343). Prospective-Juror Hogan's answers demonstrated that she could not follow the law, and Diar's attorneys should have challenged her for cause.

Counsels' performance in voir dire was deficient, and prejudicial to Diar because counsel allowed a death no matter what juror to sit in judgment of Diar.

## **C.2 Counsel failed to correct members of the venire and Juror Takacs' misperception of what constitutes mitigation**

The imposition of a penalty of death must be "directly related to the personal culpability of the criminal defendant," and "reflect a reasoned *moral* response to the defendant's

background, character, and crime." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). Consequently, if a jury is preclude "from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the [is] a basis for a sentence less than death," than the death sentence is invalid. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

Here, counsel violated their duty when they failed to define mitigation to the prospective jurors during voir dire after hearing the venire's and Juror Takacs' response to what they thought mitigation was. For example:

- Juror #14, Mark Takacs, defined mitigation as having a really good motive to commit the crime and/or remorse (T.p. 229, 231);
- Prospective-Juror Rose Yarber Hogan, defined mitigation as a lack of premeditation (T.p. 344)
- Prospective-Juror Douglas Haessig, a recent law school graduate, stated that mitigation would be something done accidentally. (T.p. 629).
- Prospective-Juror Diane Bozik, stated that mitigation would be some sort of justification. (T.p. 744).

At no time did counsel address these glaring misperceptions; especially that mitigation is accidental or that it involves some sort of justification. (T.p. 229, 629, 744). Counsel also failed to address the fact that if the State failed to prove "premeditation" beyond a reasonable doubt that that would be a complete defense and that the jury would never even get to the mitigation phase. (T.p. 344). Further, counsel failed to question Juror Takacs about situations where the accused denies involvement, and whether the lack of "remorse" would negatively affect his ability to consider another sentence. (T.p. 229, 231).

Because of these misperceptions, counsel had a duty to inform the venire and Juror Takacs that mitigating factors are "[factors] not constituting [a] justification or excuse of the

offense in question, but which in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or punishment.” Coker v. Georgia, 433 U.S. 584, 590-591 (1977). The venire’s and Juror Takacs’ limited view of what constitutes mitigation prevented them from understanding and considering constitutionally relevant evidence. See Buchanan v. Angelone, 522 U.S. 269, 276 (1998).

### **C.3 Counsel had no understanding of what constitutes mitigation**

Diar’s trial attorney’s performance fell below the ABA Guidelines regarding the prevailing professional norms for death penalty counsel because counsel did not know what mitigation was during almost the entire first half of voir dire. See Wiggins, 539 U.S. 510.

Defense counsel’s “theory” of mitigation for the first forty members of the venire, most of whom ended up serving as jurors, was residual doubt. Counsel had no idea that residual doubt was not a mitigating factor in Ohio until the following dialogue took place:

MR. CILLO

(Assistant Prosecutor): ... While we’re at it, your Honor. The reason I’ve been forced to go through the questions this way is because there have been what I consider, misleading questions by the defense. Repeatedly, they ask if this was the death of a four year old is the only sentence that you can impose death, not giving them the flip side of the coin about the mitigating factors, so they have no knowledge, and then trying to ride those findings into removing people for cause without any information, which we’ve objected to repeatedly, your Honor.

MR. PYLE

(Defense Attorney): And could I explain that, your Honor? That’s because ... [t]hey can find just based on residual doubt.

MR. CILLO: No, there’s no residual doubt in Ohio. It’s been clearly established. I could give you a brief on that.

MR. PYLE: The statute, it’s any reasonable. Any.

MR. CILLO: There is no residual doubt standard.

(T.p. 558-559). See State v. McGuire, 80 Ohio St. 3d 390, 403, 686 N.E.2d 1112, 1123, 1997-Ohio-335 (Residual or lingering doubt as to the defendant's guilt or innocence is not a factor relevant to the imposition of the death sentence because it has nothing to do with the nature and circumstances of the offense or the history, character, and background of the offender). See also Joseph v. Coyle, 469 F.3d 441 (6th Cir. 2006) (Defense attorneys must investigate and understand the law).

After being informed that residual doubt was not a mitigation factor, counsel then tried to cover up their error by implying the State had explained to the venire what mitigation was. However, that was not true:

MR. BRADLEY (Defense Attorney): Most of the time when we've done that is because it's been explained by the prosecutor.

THE COURT: Not really, not really.

(T.p. 559).

Counsel failure to understand mitigation and to question the jurors about mitigating factors, left the jury without any clear concept of mitigation and it left jurors on the panel who would vote for death no matter what. See, Joseph, 469 F.3d 441. (See also C.1, C.2 and C.4, fully incorporated herein).

#### **C.4 Counsel failure to object to the prosecutors misstatement of the law**

During voir dire, prosecutors misstated the law. Prosecutors informed prospective jurors that:

MR. CILLO: ... [I]f you find that the mitigating factors proven beyond a reasonable doubt, they also need to be proven beyond a reasonable doubt ... outweigh the aggravating circumstances, then you would consider the other potential penalties ....

(T.p. 560-561).

Counsel failed to object to the impermissible burden shifting. (T.p. 560-561). Counsels' failure to object demonstrate they did not understand who carries the burden during the mitigation phase of a capital trial. The aggravating circumstance(s) must outweigh the mitigating factors. O.R.C. § 2929.03(D)(1), (D)(2) and (D)(3). This places the burden of proof on the State, not Diar. State v. Stumpf, 32 Ohio St. 3d 95, 102, 512 N.E.2d 598, 606 (1987). See also State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984).

Prosecutors also informed prospective jurors that several members of the jury would have to find that the aggravating circumstances did not outweigh the mitigating factors:

MR. NOLAN (Assistant Prosecutor): ...[I]f you and the other juror determine that [the] aggravating circumstances does not outweigh the mitigating evidence, you would have to consider the other three life sentences  
....

(T.p. 653).

...

And conversely, should you and the other jurors, or some of the other jurors, if all find that the defendant has produced some evidence, or evidence has been produced wherein the aggravating circumstance does not outweigh the mitigating evidence, you could consider the other life sentences.

(T.p. 887). Counsel should have objected since “a single juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do[es] not outweigh the mitigating factors.” State v. Hartman, 93 Ohio St. 3d 274, 292, 754 N.E.2d 1150, 1171, 2001-Ohio-1580. See also State v. Brooks, 75 Ohio St. 3d 148, 661 N.E.2d 1030, 1996-Ohio-134; Joseph, 469 F.3d 441.

Counsels failure to object and correct such a glaring misstatement of law deprived Diar of her constitutional right to a fair trial. See U.S. Const. amend. VI and XIV; O.R.C. § 2929.03; Cooks v. United States, 461 F.2d 530, 532 (5th Cir. 1972) (counsel is required to know the

current state of the law); see also Joseph, 469 F.3d 441; Kennedy v. Maggio, 725 F.2d 269, 272 (5th Cir. 1984) (counsel ineffective where advised defendant he could receive death for crime charged in contradiction of United States and State law); Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994).

**D. Ineffective Assistance Of Counsel During Trial Phase**

**D.1. Counsel failed to object to numerous instances of prosecutorial misconduct**

Counsel failed to object to the numerous instances of prosecutorial misconduct outlined in Proposition of Law IV, fully incorporated herein. The failure to object to these instances of misconduct deprived Diar of her constitutional right to a fair trial. See U.S. Const. amend. VI and XIV.

**D.2. Counsel failed to object the admission of graphic photographs into evidence at the trial because the photographs are cumulative, repetitive and prejudicial to Diar’s right to Due Process.**

At trial, the prosecution submitted numerous crime scene photographs, as well as the testimony of several fire experts. The trial court should not have admitted the one hundred and fifty-seven crime scene photographs (Exs. 8-A through 8-TT, and 15-D through 15-KKKKK). They probative value of these photographs was weak at best. Moreover, they were cumulative of the testimony given by Lee C. Behune, Genevieve Bures, and Ralph Dolence. (T.p.1595-1619; 1749-1807). Further, several of the photographs were repetitive of other photographs as the chart below demonstrates. These depictions were graphic, shocking, and created an unacceptable risk of prejudice to Diar. Their admission into evidence at trial violated Diar’s right to a fair trial. U.S. Const. amend. VI and XIV; Ohio Const. art. I, § 16.

The following is a chart of the crime scene photographs shown to the jury and admitted:

<b>PHOTOGRAPH</b>	<b>EXHIBIT 8 Series</b>	<b>EXHIBIT 15 Series</b>
Front side of house	A	D, E

Westside of house	B, QQ	F
Rear of the house	C, RR	G
Living room	D	N, O, P, Q, VVV
Living room: from the front door	E	L, M
Living room floor & couch	F, BB, CC, EE	
Dining room	G, FF	W, Z, AA, BB, CC, WWW, EEEE, FFFF, GGGG, HHHH
Dining room and living room: floor area	H, AA, LL, OO, PP	Y, DD, QQQ, RRR, SSS, TTT, XXX, YYY
First floor bedroom: shows victim's body	I, Y	
First floor bedroom: bed	J, Y	NNNN, DDDDD, EEEEE, FFFFF
First floor bedroom: bed, wall, numerous objects, and floor	K, HH, NN	FF, GG, BBBB, GGGG, HHHH
Dining room: showing kitchen door open	L	
Kitchen	M	
Kitchen: cabinets, stove, countertops	N	TT
Hallway: stairs going to basement	O	PP, ZZ, AAAA
First floor bathroom	P	
Front of House: living room, south wall, and the couch	Q	
Kitchen: door to back of house	R	VV, WW, XX, YY
Kitchen: floor, refrigerator, and plastic table	S	SS
Dining room: burn patterns	T, AA	AA, DD, EE
Bathroom: bathtub three-quarters full of water	U	QQ
Stairs: going to second floor	V	JJJ, KKK
Stairs: midway up stairs to second floor	W	KKK
Second floor: top of stairs looking towards second bedroom	X	LLL
Dining room: near register by north wall	Z	
First floor bedroom: mattress on west side of room & debris under bed, including dead puppy	II, JJ	HH, II, JJ, KK, LLLL, MMMM, QQQQ, RRRR, SSSS

First floor bedroom: floor after cleaning	MM	TTTT, UUUU, YYYY, ZZZZ
Basement: floor, furnace, hot water tank, miscellaneous debris, washer and dryer	SS, TT	AAA, BBB, CCC, DDD, EEE, FFF

(T.p.1595-1619; 1749-1807).

Defense counsel failed to object to any of the photographs listed above and all of them were admitted into evidence. (T.p. 2393).

Under the Rules of Evidence the opponent of the evidence carries the burden to demonstrate that the probative value of the photographic evidence “is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.” Ohio R. Evid. 403(A). Additionally, photographs may be excluded under the Rules of Evidence if the opponent of the photograph persuades the Court that the “probative value [of the photograph] is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.” Ohio R. Evid. 403(B).

In capital cases, however, the burden shifts to the proponent of the evidence to demonstrate that the probative value of “each photograph” outweighs the “danger of prejudice” to the defendant. State v. Morales, 32 Ohio St. 3d 252, 258, 513 N.E.2d 267, 274 (1987). In addition to that burden, the proponent of the photograph must also establish that the photographs are neither repetitive nor cumulative. Id. at 259, 513 N.E.2d at 274. See also State v. DePew, 38 Ohio St. 3d 275, 281, 528 N.E.2d 542, 551 (1988); State v. Maurer, 15 Ohio St. 3d 239, 473 N.E.2d 768, syl. para. 7 (1984).

As the standard in Maurer and Morales is designed to protect the capital defendant from the “*danger* of prejudice,” the defendant need not establish actual prejudice. See Morales, 32 Ohio St. 3d at 258, 513 N.E.2d at 274 (emphasis added). Thus, the Maurer and Morales standard

is in concert with capital jurisprudence from the Supreme Court of the United States that strives to make the trial phase in a capital case as reliable as possible. See Beck v. Alabama, 447 U.S. 625, 630 (1980) (requiring instruction on lesser offense at trial phase of capital case when supported by evidence).

It was unnecessary for the prosecution to use Exhibits 8-A through 8-TT, and 15-D through 15-KKKKK to demonstrate that the fire at Diar's residence was the result of arson. The testimony on this issue was uncomplicated. The jurors did not need to see horrific photographs, some of which showed Jacob's severely fire damaged body, in order to understand that the fire consumed portions of the house and burned Jacob's body.

According to the State's experts the fire at Diar's home was purposefully set, and that whoever started the fire used gasoline as an accelerant. (T.p. 1587-1590, 1609-1611, 1616-1617, 1635-1637, 1671, 1789-1790, 1817, 1819, 1831, 1833, 1837). The experts also testified about the extensive fire and smoke damage and where the fire started. (T.p. 1309, 1311, 1314-1315, 1357-1358, 1361, 1366, 1383-1388, 1399, 1410, 1412).

Verbal descriptions were sufficient for the jurors to understand that the fire was purposefully set and that the fire damage was extensive. The experts explained what they observed and the cause of the fire in a manner that the jury could understand with little or no difficulty. (See generally T.p. 1587-1590, 1609-1611, 1616-1617, 1635-1637, 1671, 1789-1790, 1817, 1819, 1831, 1833, 1837). Moreover, the extensive damage done to the house and where the fire was started was corroborated by other witness testimony. (T.p. 1309, 1311, 1314-1315, 1357-1358, 1361, 1366, 1383-1388, 1399, 1410, 1412). The photographic evidence had weak probative value because, on this record, the severity of the fire and that it was the result of arson was easily proven through testimony.

The photographs were also unnecessary because defense counsel did not dispute that the fire could be the result of arson. Rather, the central issue at trial was whether Diar committed the arson.

Exhibits 8-A through 8-TT, and 15-D through 15-KKKKK were simply unnecessary to prove the damage to the house or the fact that the fire was the result of an arson. The points illustrated by the photographs were made easily with testimony from the State's experts. The jury did not need photographs to understand that the fire at Diar's residence was the result of an arson. Thus, the probative value of Exhibits 8-A through 8-TT, and 15-D through 15-KKKKK cannot outweigh the danger of prejudice to Diar. See Morales, 32 Ohio St. 3d at 259, 513 N.E.2d at 274.

**D.2.1 The crime scene photographs were inadmissible because many were repetitive of other photographs.**

A review of the chart above of the photographs admitted and shown to the jury demonstrates that they are repetitive. The only difference, if any, among the photographs in the chart above are that they were shot from slightly different angles or were close-ups.

The question here is whether the photographs that were actually put before the jury were repetitive, not whether the prosecution limited the number of photographs presented. See Morales, 32 Ohio St. 3d at 259, 513 N.E.2d at 274. Moreover, it would make for poor policy in a capital case to allow the prosecution to admit repetitive or cumulative gruesome photographs simply because the prosecution had reduced the total number of photographs that it could have offered. This would give the prosecution an incentive to fill up rolls of film with gory pictures so that it could then claim that it had drastically reduced its gruesome photographic evidence for the jury. If this Court were to accept the argument made by the prosecution at trial, it would give the prosecution an incentive to circumvent the fairness strictures of Maurer and Morales by

overdoing the collection of the photographic evidence. Here, the photographs were repetitive. This is so regardless of whether the prosecution could have offered more of them as evidence.

**D.2.2 The photographs created an unacceptable danger of prejudice to Nicole Diar. Their admission into evidence during trial phase was not harmless error.**

The jury must have felt “horror and outrage” when they viewed the photographs at the trial phase. See State v. Thompson, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 420 (1987). The crime scene photographs and the pictures of Jacob’s burned and charred body at the scene appealed to the jurors’ emotions. See Id. at 15, 514 N.E.2d at 420-421. They created an unacceptable risk that the jurors would convict Diar out of their feelings of anger and revulsion. Moreover, unlike DePew in which the photographs were kept to an “absolute minimum of two for each victim,” DePew, 38 Ohio St. 3d at 282, 528 N.E.2d at 551, here the prosecution relied on one hundred and fifty-seven photographs of the crime scene. As explained in sections above, the photographs had weak probative value, and they were cumulative and repetitive.

Unlike Thompson, this trial error is not harmless beyond a reasonable doubt. See Thompson, 33 Ohio St. 2d at 15, 514 N.E.2d at 420. The prosecution’s case was entirely circumstantial. Here, the evidence was not so overwhelming as to make the prosecution’s use of the photographs harmless. See Chapman v. California, 386 U.S. 18, 26 (1967).

**D.2.4. Remedy and conclusion.**

Exhibits 8-A through 8-TT, and 15-D through 15-KKKKK. were irrelevant, unnecessary, cumulative, repetitive, and they created a danger of prejudice to Diar. Their admission at the trial phases violated Diar’s right to due process. U.S. Const. amend. XIV; Ohio Const. art. I, § 16. Diar is therefore entitled to a new trial.

**D.3. Counsel failed to object to every instance where the State sought to introduce bad character and bad acts evidence.**

During the course of Diar's trial, the State of Ohio introduced a wealth of evidence relating to her bad character and bad acts. Beginning with the State's opening statement and ending with the State's closing argument, Diar's trial contained inflammatory evidence that she was a bad mother who used baby-sitters excessively and reacted to her son's death in an inappropriate manner by going to a bar on the day of her son's funeral. Counsel failed to object to much of this evidence and its admission was erroneous and prejudicial to Diar.

Given the lack of evidence concerning Diar's guilt, this character evidence was clearly prejudicial and likely outcome determinative. These attacks injected confusion and overwhelming prejudice to the charge of aggravated murder. Thus, the inflammatory character evidence rendered the trial fundamentally unfair and counsel's failure to object to every instance constitutes ineffective assistance of counsel. See Proposition of Law V, fully incorporated herein.

**D.4. Counsel failed to adequately cross-examine Leroma Penn**

Trial counsel failed to introduce evidence and cross-examine Leroma Penn regarding Diar's stolen money orders Penn had cashed. Counsel should have investigated and presented information that Diar's \$100 and \$500 money orders were stolen, and the recovered money orders were signed by Penn. This information may have impeached Penn, and it would have prevented the State from casting doubt on Diar's statements to her landlord, Charles Hassler. (See T.p. 1863-64, 2772.)

Defense counsel knew before trial that the State was going to call Leroma Penn to testify, yet they failed to seek information about her theft of the checks until October 7, 2006, when they finally subpoenaed Integrated Systems. (Hrg. on Motion for New Trial, Oct. 27, 2005, p. 29).

However, this was ten days after Diar's trial began. (Hrg. on Motion for New Trial, Oct. 27, 2005, p. 29)

Because counsel waited so long to obtain this critical information, which casts doubt on Leroma's credibility, counsel had to file a Motion for a New Trial – which he did on October 24, 2005. In this motion, Bradley argued that these stolen money orders were newly discovered evidence and could have been used to confront Leroma Penn. (Id. at 11, 23) His justification for waiting to bring up the money orders was that he did not receive proper documentation and authentication of Diar's stolen money orders until October 26, 2005. (Id. at 13) But Bradley did not even subpoena Integrated Systems until October 7, 2005. (Id. at 29)

Bradley's explanation for failing to use the money orders during the State's case-in-chief is that he did not yet have confirmation that Diar issued a stop payment on the money orders. (Id. at 34-35) He knew the State would ask for verification. Bradley argued that without it, the State would have done to him what it did to Diar's father on the witness stand. (Id. at 38)

The Sixth Amendment guarantees to the criminal defendant the right to the effective assistance of counsel. Strickland, 466 U.S. 668. Counsel violated this duty when he waited to obtain key information that would challenge the credibility of Leroma Penn.

#### **E. Ineffective Assistance Of Counsel During the Mitigation Phase**

The sentencing phase is likely to be “the stage of the proceeding where counsel can do his or her client the most good.” Glenn v. Tate, 71 F.3d 1204, 1207 (6th Cir. 1995) (quoting Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989)). In order to have a reliable sentencing determination the sentencer must focus on the individual characteristics of the defendant and circumstances of the crime. Lockett v. Ohio, 438 U.S. 586 (1978). It is defense counsel's obligation to humanize and personalize their client: to have the jurors see not merely a murderer,

but a person in who we see the “diverse frailties of humankind.” Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

In determining prevailing professional norms, the United States Supreme Court looks to the ABA Guidelines for the standards of conduct for defense counsel in capital cases. Rompilla v. Beard, 545 U.S. 374, 374-377 (2005); Wiggins, 539 U.S. at 524; Hamblin v. Mitchell, 354 F.3d 482, 486 (6th Cir. 2003).

In deciding which witnesses and evidence to prepare concerning penalty, counsel’s considerations should include considering witnesses “who would present positive aspects of the client’s life, or would otherwise support a sentence less than death,” and demonstrative evidence such as photos \*\*\* and documents that would humanize the client or portray [her] positively.

1989 ABA Guidelines 10.11 F. 1 & 5. See Marshall v. Hendricks, 307 F.3d 36, 103 (3rd Cir. 2002) (“The purpose of investigation [for the penalty phase] is to find witnesses to help humanize the defendant, given that a jury has found him guilty of a capital offense.”); see also Mayes v. Gibson, 210 F.3d 1284, 1288 (10th Cir. 2000) (mitigation evidence “affords an opportunity to humanize and explain – to individualize a defendant outside the constraints of the normal rules of evidence”). Further, counsel should present to the sentencing entity all reasonable available mitigation, including the defendant’s “complete social history” unless there are strong strategic reasons not to do so. 1989 ABA Guidelines 11.8.6.

Defense counsel’s behavior was not “reasonable considering all the circumstances.” Strickland, 466 U.S. at 688. As demonstrated below, defense counsel were ineffective in their mitigation investigation

#### **E.1. Failure To Adequately Prepare For The Mitigation Phase.**

Beyond the testimony of forensic and clinical psychologist Dr. McPherson, defense counsel offered only the testimony Diar’s mother in mitigation. Certainly, there were others who

could have testified, for example, a medical doctor who could interpret and discuss Diar's medical history, her surgeries, and the pain associated with being burned and undergoing the numerous surgeries to repair the burn damage. (T.p. 2999-3000) Counsel must conduct a thorough investigation into their client's background. Williams v. Taylor, 529 U.S. 362, 397 (2000) (internal citation omitted); Austin v. Bell, 126 F.3d 843, 848 (6th Cir. 1997). Diar had the right to present and to have the jury consider all of the mitigating evidence available in his case. Strickland, 466 U.S. at 706 (Brennan, J., concurring in part and dissenting in part) (citing to Eddings v. Oklahoma, 455 U.S. 104 (1982)). However, this right means very little when trial counsel fails to look for and present mitigating evidence. Strickland, 466 U.S. at 706 (citing Comment, 83 Colum.L.Rev. 1544, 1549 (1983)); See e.g. Burger v. Zant, 718 F.2d 979 (11th Cir. 1983). Trial counsel did not take the necessary time or expense to prepare a case sufficient to convince the jury that the aggravating circumstance did not outweigh the mitigating factors, their ineffectiveness effectively sealing Diar's fate.

This is easily illustrated by information defense counsel conveyed to the trial court. Obviously not prepared for Diar's mitigation hearing on November 1, trial counsel informed the court that they were not even sure if Diar had a criminal record and or any juvenile adjudications. (T.p. 2912-2914, 2941-2944, 2953-2954, 2959). The paucity of mitigation presented by counsel also supports Diar's claim. For example, counsel was only able to get Diar's mother to identify some pictures of Diar before and after she was burned, and to testify that she loved Diar and would like the juror to "spare her life." (T.p. 3044-3045). Counsel elicited no other testimony from Diar's mother. (T.p. 3043-3045).

Dr. McPherson's testimony was a disaster for three reasons. First, Dr. McPherson failed to adequately define and explain Diar's maladaptive behavior and how that behavior shaped

Diar. (T.p. 3007-3008). Dr. McPherson also never explained the nexus between the maladaptive behavior and Diar's severe physical disfigurement. (T.p. 3007-3008).

Second, Dr. McPherson also failed to give adequate attention to Diar's severe childhood burn injury. Without adequate testimony on the subject, the jurors could not give this important mitigating factor the weight it deserved.

Finally, co-counsel John Pyle asked the psychologist to address the medical issues. (T.p. 3000) The court sustained the prosecutor's objection that Dr. McPherson was not qualified to testify to medical matters. (T.p. 3000, 3002) This left counsel without much substance to elicit from Dr. McPherson's testimony. In the end, Pyle expressed his frustration: "I give up." (T.p. 3042) With his client's life on the line, defense counsel simply gave up. As the prosecutor noted, the mitigating evidence defense counsel presented "by way of testimony" was "absolutely, positively weak." (T.p. 3066)

There is no right to the effective assistance of experts guaranteed by the Constitution. It is counsel who owes to the criminal defendant the duty of effective assistance. Clabourne v. Lewis, 64 F.3d 1373, 1385 (9th Cir. 1995) (duty to prepare experts on counsel). Dr. McPherson's failures "were largely caused by failures of [Diar's] counsel." Richey v. Mitchell, 395 F.3d 660, 683 (6th Cir. 2005) (citation omitted), *rev'd and remanded on other grounds*, Bradshaw v. Richey, 546 U.S. 74 (2005). Counsel's failure to "supervise, or engage [Dr. McPherson] left [Diar] with little more than a warm body with a prefix attached to his name." Id. at 685 (citations and internal quotations omitted). Dr. McPherson failed to address some of the most compelling and significant events in Diar's life. This was deficient performance. Id. See also Bean v. Calderon, 163 F.3d 1073, 1078 (9th Cir. 1998) (finding counsel "failed to furnish other necessary information to the experts who testified during the penalty phase, and failed to prepare

these experts adequately for their testimony.”); Bloom v. Calderon, 132 F.3d 1267, 1278 (9th Cir. 1997) (finding “[a]s a result of trial counsel’s woefully deficient performance, however, Dr. Kling was not provided with sufficient information and, as a result, his testimony not only failed to help the defense, it significantly hindered it.”). By failing to adequately supervise and direct Dr. McPherson, counsel rendered deficient performance, which prejudiced Diar, because Dr. McPherson was central to the defense’s mitigation case.

Failure to present mitigating evidence is not alone proof of ineffective assistance of counsel or a deprivation of the defendant’s fair trial right. State v. Johnson, 24 Ohio St. 3d 87, 91, 494 N.E.2d 1061, 1065 (1986). However, it is incumbent on trial counsel to offer mitigating evidence when the penalty their client faces is so severe and the reality of the situation is that their client’s life is at stake. Pickens v. Lockhart, 714 F.2d 1455, 1468 (8th Cir. 1983); Williams, 529 U.S. at 397 (counsel ineffective for failure to present mitigation evidence).

Diar’s counsel presented “some” mitigation, but failed to explore the wealth of available mitigation. Providing the jury with information about the client’s background, education, mental and emotional stability, family relations, and the like are all relevant in mitigation. Pickens, 714 F.2d at 1466. It was counsel’s job to find, prepare, and present this information to the jury, but they failed in this task. See Williams, 529 U.S. at 397; Austin, 126 F.3d at 848.

This Court’s review cannot cure counsels’ failure to present mitigating evidence to the jury. Had the trial court prohibited the presentation of mitigation evidence, Diar would have been unconstitutionally prejudiced, regardless of the strength of the aggravating circumstance. Blake v. Kemp, 758 F.2d 523, 535 (11th Cir. 1985). While the source of error is different, counsel’s ineffectiveness resulted in the same prejudice.

Further, the weight of the aggravating circumstance does not vitiate Diar's constitutional claim; mercy has been shown by trial courts and juries with "behavior at least as egregious," especially after presentation of adequate information about the defendant's personality and life. Strickland, 466 U.S. at 719 (Marshall, J., dissenting). Counsel was ineffective. Counsel deprived the jury of information crucial to the sentencing determination, resulting in an unfair sentencing proceeding and an unreliable sentence, rendering counsel's assistance ineffective.

**E.1.2. The record proves that defense counsel were inattentive in preparing a mitigation-phase defense, and instead presented an inaccurate, and incomplete picture of Diar's background to the jury.**

Diar's rights guaranteed by the United States Constitution's Sixth and Fourteenth Amendments were violated. Defense counsel's failure to present available, relevant, and compelling mitigating evidence to the jury prejudiced Diar.

At the mitigation hearing, defense counsel called only two witnesses: a psychologist, Dr. Sandra McPherson, and Diar's mother. The failure to adequately prepare Marilyn Diar to testify and to elicit from her mitigating evidence worthy of weight, as well as counsel's failure to present other family members who could testify about Diar's background, violated Diar's Sixth Amendment right to effective assistance of counsel. Furthermore, Dr. McPherson's testimony was deficient. (See, D.1).

Mrs. Diar's direct examination at the penalty phase amounts to two transcript pages. (T.p. 3043-45) Dr. McPherson's direct examination amounts to only twenty-one transcript pages (redirect was four pages) in a mitigation transcript that consists of 185 pages. (Trial Transcript, Vol. XIII)

Defense counsel failed to develop Diar's family background. The jurors were not given an understanding of the dynamics within the family or the family history of dysfunction. For

example, Marilyn Diar was not the caring, nurturing mother that the prosecutor tried to make her out to be. (T.p. 3045-3046).

The Sixth Circuit has found that “first-hand accounts from those who knew Petitioner best” provide a “significant benefit during the penalty phase.” Powell v. Collins, 332 F.3d 376, 400 (6th Cir. 2003). Dr. McPherson testified that she did not personally interview Diar’s family members. (T.p. 3035) Thus, the live testimony of Diar’s parents and siblings at the mitigation hearing was necessary for the jurors to gain insight into Diar as a human being and to weigh her family background in mitigation.

Although Mrs. Diar did testify at the penalty phase, her testimony lacked any substance. Her trial-phase testimony was short and lacked any sort of sympathy to Diar’s severe burn injury. (T.p. 2522-2525) Defense counsel needed to prepare Mrs. Diar to elicit the true devastation Diar suffered as a severely disfigured burn victim; and not the unbelievable response that Diar lived a “normal life for the most part.” (T.p. 2525). Defense counsel’s failure to prepare Mrs. Diar “further demonstrates that counsel conducted an inadequate investigation of mitigating evidence.” Mason v. Mitchell, 320 F.3d 604 (6th Cir. 2003).

The United States Constitution’s Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). This right is violated when counsel’s performance falls below an objective standard of reasonableness and the client is prejudiced by counsel’s breach of duty. Strickland, 466 U.S. at 690, 696. Only after a *full* investigation can counsel make an informed, tactical decision about which information would be helpful in the case. State v. Johnson, 24 Ohio St. 3d 87, 90 (1986).

Defense counsel’s penalty-phase performance failed to meet the standards articulated in Wiggins v. Smith, 539 U.S. 510 (2003), Williams v. Taylor, 529 U.S. 362 (2000), and Powell.

Defense counsel also failed Diar in just submitting to the jury some pictures and handing the jury voluminous medical records to review on their own, without anything more. (T.p. 3044). (Defense Exhibits A-D).

The only person who reviewed these records and pictures was defense expert Dr. McPherson who made no specific reference to the Diar's records in her penalty-phase testimony. (T.p. 2992-3041). Defense counsel did not use the records to develop a closing argument. (T.p. 3053-3065). In fact, the only the only thing counsel did was give the jury some pictures and hand them voluminous medical records to review on their own. (T.p. 3044). (Defense Exhibits A-D). Defense counsel's lack of use of the records vitiated the weight that could be placed on them. Merely admitting a stack of records into evidence without explaining the contents and focusing the jury's attention on important information does not amount to effective representation. Turpin v. Lipham, 510 S.E.2d 32, 42 (Ga. 1998). An attorney who fails to make use of relevant records during the penalty phase does not provide effective assistance. See Stephens v. Kemp, 846 F.2d 642, 653 (11th Cir. 1988).

Dr. McPherson spent just under seventeen hours reviewing the Diar's records. (T.p. 3010). It is unreasonable to expect that twelve jurors would take the time necessary to review, comprehend, and discuss all the records; especially given the fact that the jurors did not hear the medical details of the second and third degree burns Diar endured, due to counsel's failure to call a medical expert. (T.p. 3000, 3002).

As the prosecutor noted, the mitigating evidence defense counsel presented "by way of testimony" was "absolutely, positively weak." (T.p. 3066)

Defense counsel had the responsibility of conducting a complete investigation and presenting evidence of the mitigating factors in Diar's background. Instead, with their client's

life on the line, defense counsel simply gave up (T.p. 3042). They also had the responsibility of properly preparing their witnesses and securing appropriate—and timely—expert assistance. They failed on all counts.

**E.1.2.A. Failure to call an expert witness.**

At Diar’s capital trial, defense counsel failed to present specific mitigating evidence regarding the severe burns Diar suffered as a child. The jurors did not hear the medical details of the second and third degree burns Diar endured—they were simply shown pictures (T.p. 3044) and handed voluminous medical records to review on their own. (Defense Exhibits A-D).

The testimony of Diar’s mother, Marilyn Diar, was not sufficient to convey to the jurors a proper and accurate understanding of Diar’s burn trauma. In fact, Mrs. Diar testified that her daughter suffered “third degree burns over – I don’t know the exact percentage right now ....” (T.p. 2522-2523) She acknowledged that “[Nicole] got made fun of a lot,” but said that she and her husband “didn’t let her use it as a crutch.” (T.p. 2524) And she claimed that, for the most part, Diar lived a normal life. (T.p. 2524-2525) Nothing in Mrs. Diar’s testimony conveyed to the jurors the excruciating trauma that results from a thermal injury and the years of medical treatments and surgeries.

Counsel’s failure to call an expert witness was not the result of a reasonable, strategic decision. “Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation.” Wiggins v. Smith, 539 U.S. 510, 533 (2003) (internal citations omitted).

Trial counsel did not make a strategic decision to avoid presenting this type of medical testimony. They had attempted to introduce evidence of Diar’s physical trauma through the testimony of a psychologist, Dr. McPherson. (T.p. 2999-3000). Because Dr. McPherson “is not

a medical doctor,” the court would not permit her to render any medical opinions as to what Diar’s medical records revealed. (Id.)

The available mitigating evidence would have humanized Diar and provided the jurors with reasons to spare her life. See Woodson v. North Carolina, 428 U.S. 280, 304 (1976); Boyd v. North Carolina, 471 U.S. 1030, 1036 (1985) (Marshall, J., dissenting). The documentation alone was not sufficient. Diar needed an expert to testify regarding her burn injuries. See 2003 ABA Guideline 10.11.F.2. Counsel’s failure to call an expert, in light of their pathetic attempt to get the information from a psychologist, was unreasonable, and it prejudiced Diar.

**E.2. Failure to object to comments made by prosecutor during closing arguments.**

The prosecution engaged in a pattern of misconduct during final argument in the penalty phase. The prosecution misled the jury as to the statutory weighing process. Prosecutor Nolan told the jury:

Well, you’ve got to figure out what weight to be [sic.] given to the age factor. You’ve got to figure out what weight to be given the fact that [Diar] hasn’t committed a crime as an adult or a juvenile. Does that mitigate? Does that give pause? Does that make it seem to you that you should recommend the death penalty in this case.

\*\*\*

And finally, the all-purpose mitigation, that which you have heard about from day one in this case, to be [sic.] begin with the State’s own opening statement, we have granted, we have given you, there is no question that Nicole Diar was injured in her youth. There is no question that she was burned. There is no question that she was scarred for life, physically. That is not an issue

\*\*\*

You have to determine whether or not those three things in mitigation are valid for you, for your purposes[,] for your deliberations, for your determination of whether or not to recommend the death penalty or one of the other sentences \*\*\*.

(T.p. 3051-3052).

The prosecution's rendition of the weighing process is misleading for a number of reasons. First, telling the jury that they must simply decide whether or not evidence is mitigating is not a correct statement of the law. The Ohio General Assembly has determined that the circumstances enumerated in O.R.C. § 2929.04(B) have mitigating value. Moreover, a sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. Saffle v. Parks, 494 U.S. 484, 489 (1990). Thus, it is improper to tell a jury that they decide what is mitigating.

Second, telling the jury that if find evidence is mitigating then they decide how much weight to give to it is also inaccurate. The General Assembly in enacting O.R.C. § 2929.04(C) required that the factors enumerated in subsection (B) are to be given some weight. A sentencer is free to determine the weight to given relevant mitigating evidence, but they may not exclude such evidence from their consideration by giving it no weight. Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982). The enumerated factors must be weighed against the aggravating circumstances.

In this case, it is impossible to determine whether the jurors found some of the statutory mitigating circumstances to exist, but decided, in light of the prosecution's uncorrected comments, to give them no weight. See Bates v. Bell, 402 F.3d 635 (6th Cir. 2005). (Prosecutorial misconduct in the sentencing hearing can operate to preclude the jury's proper consideration of mitigation). Of course, the State may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence. Buchanan v. Angelone, 522 U.S. 269, 276 (1998). But what happened in Diar's trial was that State's argument precluded the jury from giving effect to recognized statutory mitigating factors.

The State's improper argument interfered with Diar's right to a fair trial and to be free from the deprivation of life without due process under the Fourteenth Amendment to the United States Constitution. As such, any confidence in the jury's recommendation is compromised by the fact that these comments went unchallenged and uncorrected. (T.p. 3051-3052).

**E.3. Failing to object to the trial court's imposition of the death sentence because it failed to comply with the mandatory language of O.R.C. § 2929.03.**

The trial court in Diar's capital case imposed a sentence of death in an arbitrary and capricious manner after completely ignoring the mitigating evidence that was presented during the penalty phase. The trial court had specific duties under O.R.C. § 2929.03 to conduct an independent weighing of the aggravating and mitigating circumstance(s) and to specifically state in the sentencing opinion why the aggravating circumstance Diar was found guilty of was sufficient to outweigh these mitigating factors. These mandatory duties were completely ignored by the trial court and counsel failed to object. The trial court's abandonment of these mandatory duties and counsels' failure to object constituted such severe violations of Diar's constitutional rights that independent reweighing cannot serve as an adequate remedy. Diar's sentence of death must be vacated. See Proposition of Law II, fully incorporated herein.

**F. Counsel failed to object to improper jury instructions**

Counsel's failure to object to the trial court's improper jury instructions deprived Diar of her right to a fair trial and a reliable sentence. See Propositions of Law I, XIII and XIV fully incorporated herein. Diar must therefore be granted a new trial and sentencing hearing.

### **Proposition of Law No. VIII**

A capital defendant is denied her right to a fair trial, due process, and a reliable determination of her guilt and sentence as guaranteed by the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 16 of the Ohio Constitution when gruesome and cumulative photographs and video are admitted into evidence and their prejudicial effect outweighs their probative value.

#### **A. Introduction**

During the trial phase, the jury was exposed to inflammatory crime scene and autopsy photographs. This occurred at both the trial and penalty phases of Diar's trial. Exposing the jury to cumulative and inflammatory visual evidence prejudiced Diar's right to a fair trial and sentencing determination as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United State's Constitution and Article I, §§ 2, 9, 10 and 16 of the Ohio Constitution.

#### **B. Facts**

At Diar's capital trial, the State introduced gruesome photographs depicting the charred and disfigured body of Jacob Diar. (See State's Exhibits 15A-V) Paul Matus, M.D., the Coroner of Lorain County, performed the autopsy. Matus determined the cause of death to be "homicidal violence of an undetermined origin." (T.p. 1681) While Matus was unable to provide the jury with a definitive cause of death, he testified that Jacob was deceased prior to the fire. During the testimony of Matus, the State sought and was granted permission from the trial court to publish the photographs to the jury. The trial court acknowledged the gruesome nature of the photographs and warned: "They're not the prettiest of pictures. Hopefully, hopefully, we'll be able to get through them without too much difficulty." (T.p. 1690).

The inflammatory and prejudicial photographs the State proceeded to introduce included Exhibits 15-A, 15-B, 15-C, 15-D, 15-E, 15-F, 15-G, 15-H, 15-I, 15-J, 15-K, 15-L, 15-M, 15-N, 15-O, 15-P, 15-Q, 15-R, 15-S, 15-T, 15-U, and 15-V. These exhibits depicted the following:

Exhibit 15-A, a crime scene photograph, displayed the charred body of Jacob Diar lying on the burnt out bed. The coroner commented, “So you can see that it was relatively difficult to see that there was indeed a person there, with all the debris falling around.” (T.p. 1691).

Exhibit 15-B, a crime scene photograph of the victim lying on the bed. There was so much destruction to the bed and body that the coroner had to point out individual body parts. “You can see the buttocks here. And another leg and foot here, another leg and foot here. The back area is here. This is the head.” (T.p. 1691).

Exhibit 15-C, a crime scene photograph, displayed the position of the body on the bed.

Exhibit 15-D, a crime scene photograph showing Jacob’s destroyed body amongst the debris.

Exhibit 15-E an autopsy photograph, showed the body after being lifted from the mattress, where jurors could see bones burned off and the skull burned away, exposing the brain. The coroner pointed out that “some of the brain material you can see has exuded out and into the bedding area and the material beneath the body.” (T.p. 1693).

Exhibit 15-F, a photograph, was a close up view of “severe charring of the skin full thickness down to the layers over the muscles.” (T.p. 1693).

Exhibit 15-G, a crime scene photograph, displayed the mattress after the body had been removed. The coroner noted that, “In this area, when the body was pulled loose, there was obviously some searing of the tissues and oozing of bodily fluids and cooking, so that there was some welding of some of these articles of clothing to the – to the body itself.” (T.p. 1693, 1694).

Exhibit 15-H, a crime scene photograph was offered to show the amount of debris in the room. However, Dr. Matus remained fixated on the macabre and commented “you can see some of that hemorrhage that we talked about, that epidural hemorrhage and that subscalpular hemorrhage that came from the intensity of the fire.” (T.p. 1694).

Exhibit 15-I, a crime scene photograph, showed a close view of the inside of the sweatshirt Jacob Diar was wearing.

Exhibit 15-J, a photograph showing the hooded sweatshirt and “the hemorrhagic area that exuded from the brain up there where I pointed; that’s the epidural and subscalpular hemorrhage that came from the cooking of the skull.” (T.p. 1695).

Exhibit 15-K, a crime scene photograph of the clothes that stuck to the bed. Dr. Matus stated that, “these clothes have not been moved whatsoever except for the T-shirt that clung and was cooked to the body here and it pulled away. (T.p. 1696).

Exhibit 15-L, another close up photograph of Jacob’s charred face.

Exhibit 15-M, another close up photograph of Jacob’s body. Dr. Matus pointed out the “charred tissue.” (T.p. 1696).

Exhibit 15-N, another graphic photograph showing the destruction of Jacob’s face.

Exhibit 15-O, a picture of Jacob Diar’s body, “trying to depict the spared areas.” (T.p. 1699).

Exhibit 15-P, a photograph of Jacob Diar’s face shown to “depict the degree of charring.” (T.p. 1699).

Exhibit 15-Q, was a photograph of the skull of Jacob Diar. The coroner stated in detail:

“So this whole area has been burned. A little bit of tissue, charred tissue here and there. The brain has been, you know, fairly destroyed by cooking. You see some of that hemorrhage that we talked about before here; it’s inherent to

the brain. But there's near total destruction – well, in that area, there was total destruction of the brain – of the skull itself.”

Exhibit 15-R, was another repetitive and gruesome photograph of the skull. Again, the coroner went into great detail discussing the damage to the skull and brain:

“The brain material is here. This is that clotted epidural blood that we talked about that was cooked out of the skull and remains there, adhering to the surface of the brain. There was another small piece of brain – I mean of skull right here down in this area that fell off the back of the skull.” (T.p. 1700).

Exhibit 15-S, a horrific photograph of Jacob Diar's skull. Again, Dr. Matus went overboard by stating, “this area here is some scalp material, some scalp that had survived showing this coagulated blood that some exudes from the skull – scalp, but mostly from the skull.” (T.p. 1701).

Exhibit 15-T, an autopsy photograph depicting the charred face of Jacob Diar.

Exhibit 15-U, an autopsy photograph that depicted an incision along Jacob's nose with the flipping back of soft tissues.

Exhibit 15-V, another gruesome autopsy photograph that showed Jacob Diar's larynx and trachea cut out of his body.

At the conclusion of the trial phase, the State sought to admit all trial phase exhibits into evidence. (T.p. 2385). Defense counsel objected to the coroner's photographs, noting their extremely gruesome nature. (T.p. 2385). The trial court reviewed the coroner's photographs and commented, “there are some duplications in here.” (T.p. 2387). Pursuant to this finding, exhibits 15-L, 15-N, and 15-R were not admitted into evidence. (T.p. 2389, 2390).

During the mitigation phase, the State sought to re-introduce all of the physical evidence that was presented at trial, including the inflammatory photographs. (T.p. 2983, 2988). Counsel

for Diar objected, arguing that these were irrelevant to the lone aggravating circumstance. (T.p. 2988). The trial court overruled counsel's objection, incorrectly stating:

“the prosecution has the right to introduce whatever evidence was in on the trial, as long as he did testimony on them. And if he would have introduced it all at one time, I would have more than likely granted it to him.” (T.p. 2987).

Following the jury's consideration of the photographs, the jury returned a death verdict. (T.p. 3085, 3086).

### **C. Law on gruesome photographic evidence**

The standard used to determine whether gruesome photographic evidence is inadmissible in a capital case is stricter than the standard used in non-capital cases under Ohio R. Evid, 403. State v. Morales, 32 Ohio St. 3d 252, 258, 513 N.E.2d 267, 274 (1987). Under the Rules of Evidence the opponent of the evidence carries the burden to demonstrate that the probative value of the photographic evidence “is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.” Ohio R. Evid. 403(A). Additionally, photographs may be excluded under the Rules of Evidence if the opponent of the photograph persuades the Court that the “probative value [of the photograph] is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.” Ohio R. Evid. 403(B).

In capital cases, however, the burden shifts to the proponent of the evidence to demonstrate that the probative value of “each photograph” outweighs the “danger of prejudice” to the defendant. Morales, 32 Ohio St. 3d at 258, 513 N.E.2d at 274. In addition to that burden, the proponent of the gruesome photograph must also establish that the photographs are neither repetitive or cumulative. Id. at 259, 513 N.E.2d at 274. See also State v. DePew, 38 Ohio St. 3d 275, 281, 528 N.E.2d 542, 551 (1988); State v. Maurer, 15 Ohio St. 3d 239, 473 N.E.2d 768, syl.

para. 7 (1984). A photograph is gruesome when it depicts the actual body parts of the victim. DePew, 38 Ohio St. 3d at 281, 528 N.E.2d at 550.

As the standard in Maurer and Morales is designed to protect the capital defendant from the “**danger** of prejudice,” the defendant need not establish actual prejudice. See Morales, 32 Ohio St. 3d at 258, 513 N.E.2d at 274. Thus, the Maurer and Morales standard is in concert with capital jurisprudence from the Supreme Court of the United States that strives to make the trial phase in a capital case as reliable as possible. See Beck v. Alabama, 447 U.S. 625, 630 (1980), (requiring instruction on lesser offense at trial phase of capital case when supported by the evidence.)

Nevertheless, the admission of the photographs may be harmless error at the trial phase when the evidence of guilt is overwhelming as to each element of the offense. See State v. Thompson, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 420 (1987). See also In re Winship, 397 U.S. 358 (1970). On direct appeal, constitutional error is harmless only if the prosecution proves it to be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 26 (1967). Even when the admission of gruesome photographs is harmless at trial, the use of the photographs by the prosecution at trial may have a prejudicial “carry over” effect on the jury’s penalty phase deliberations. See Thompson, 33 Ohio St. 3d at 15, 514 N.E.2d at 421. This is especially so when the photographs are linked to inflammatory arguments by the prosecution at the penalty phase. Id. at 15, 514 N.E.2d at 420-21. Last, the prosecution’s use of the “unduly prejudicial” evidence in a capital case violates the defendant’s right to due process. See Payne v. Tennessee, 501 U.S. 808, 825 (1991).

**D. Standard of review**

This issue is preserved during the penalty phase due to numerous defense objections (T.p. 2392, 2956-2958, 2968, 2969, 2970). To the extent that defense counsel for Diar did not sufficiently object to these photographs at the trial phase, see Proposition of Law VII. This Court reviews this type of claim to determine if the trial court abused its discretion by admitting the gruesome photographs. See Morales, 32 Ohio St. 3d at 257, 513 N.E.2d at 273.

**E. Trial Phase Argument**

**Manner, severity, and type of injury**

It was unnecessary for the State to use the photographs (Exhibits 15-A through 15-V) to demonstrate the manner, severity, and type of injuries Jacob Diar sustained in the fire. The testimony on this issue was uncomplicated. The jurors did not need to see horrific photographs to understand the injuries inflicted by the fire.

Testimony from Dr. Matus began without any photographic assistance and centered around the autopsy he performed on Jacob Diar. The autopsy was performed the day after the fire. Dr. Matus determined the cause of Jacob's death was "homicidal violence of an undetermined origin." (T.p. 1681). Although the exact cause of death was uncertain, Dr. Matus determined "something had been done to this individual because he was not alive at the time of the fire." (T.p. 1682). Dr. Matus provided the jury with the specific details and individual facts that led him to reach this conclusion.

Dr. Matus' testimony was uncomplicated. Verbal descriptions were sufficient for the jurors to understand that Jacob Diar was deceased prior to the fire. Dr. Matus explained his findings in words that the jury could understand with little or no difficulty. The photographic evidence had weak probative value because Dr. Matus had testified that Jacob Diar was not alive

at the time of the fire. While testifying to the significance of the photographs, Dr. Matus described in graphic detail the “cooking” and “charring” and other damage done to Jacob Diar’s body. Since Dr. Matus concluded that Jacob was deceased prior to the fire, the twenty-two photographs and accompanying testimony describing the destruction of Jacob’s lifeless body offered no probative value as to the manner in which Jacob actually died. The photographs were simply offered to inflame the jury.

This Court, in State v. Jackson, found error in a trial court’s admission of victim’s blood stained clothes. 107 Ohio St. 3d 53, 836 N.E.2d 1173 (2005) In Jackson, the victim was shot in the head, “but no evidence was introduced to show that she had sustained injuries to any other part of her body.” (Id. at 71, 1193). This Court found the clothes were unrelated to the actual cause of death and not relevant to any fact of consequence. The same can be said for the coroner’s photographs. The photographs of Jacob Diar’s charred body were unrelated to his actual cause of death and offered no facts of consequence to the jury. Thus, the probative value of Exhibits 15-A through 15-V did not outweigh the danger of unfair prejudice to Diar. See Morales, 32 Ohio St. 3d at 259, 513 N.E.2d at 274.

**F. The gruesome photographic evidence was inadmissible because the twenty-two photographs were cumulative of other evidence offered by the State and repetitive in the manner in which they were presented.**

The gruesome photographs of Jacob Diar (Exs. 15-A through 15-V) were also inadmissible because they were repetitive and cumulative of other photographs offered by the State. In addition to the twenty-two horrific photographs of Jacob Diar, the trial court admitted one hundred and fifty-seven crime scene photographs. (See Proposition of Law VIII). (Exs. 8-A through 8-TT, and 5-A through 5-KKKKK). Lee C. Behune, Genevieve Bures, and Ralph

Dolence provided cumulative testimony in concert with these photographs. (T.p. 1595-1619; 1749-1807).

The following is a chart of the crime scene photographs, in addition to Exhibits 15-A through 15-V, shown to the jury and admitted:

<b>PHOTOGRAPH</b>	<b>EXHIBIT 8</b>	<b>EXHIBIT 15</b>
Front side of house	A	D, E
Westside of house	B, QQ	F
Rear of the house	C, RR	G
Living room	D	N, O, P, Q, VVV
Living room: from the front door	E	L, M
Living room floor & couch	F, BB, CC, EE	
Dining room	G, FF	W, Z, AA, BB, CC, WWW, EEEE, FFFF, GGGG, HHHH
Dining room and living room: floor area	H, AA, LL, OO, PP	Y, DD, QQQ, RRR, SSS, TTT, XXX, YYY
First floor bedroom: shows victim's body	I, Y	
First floor bedroom: bed	J, Y	NNNN, DDDDD, EEEEE, FFFFF
First floor bedroom: bed, wall, numerous objects, and floor	K, HH, NN	FF, GG, BBBB, GGGG, HHHH
Dining room: showing kitchen door open	L	
Kitchen	M	
Kitchen: cabinets, stove, countertops	N	TT
Hallway: stairs going to basement	O	PP, ZZ, AAAA
First floor bathroom	P	
Front of House: living room, south wall, and the couch	Q	
Kitchen: door to back of house	R	VV, WW, XX, YY
Kitchen: floor, refrigerator, and plastic table	S	SS
Dining room: burn patterns	T, AA	AA, DD, EE
Bathroom: bathtub three-quarters full of water	U	QQ
Stairs: going to second floor	V	JJJ, KKK

Stairs: midway up stairs to second floor	W	KKK
Second floor: top of stairs looking towards second bedroom	X	LLL
Dining room: near register by north wall	Z	
First floor bedroom: mattress on west side of room & debris under bed, including dead puppy	II, JJ	HH, II, JJ, KK, LLLL, MMMM, QQQQ, RRRR, SSSS
First floor bedroom: floor after cleaning	MM	TTTT, UUUU, YYYYY, ZZZZ
Basement: floor, furnace, hot water tank, miscellaneous debris, washer and dryer	SS, TT	AAA, BBB, CCC, DDD, EEE, FFF

(T.p.1595-1619; 1749-1807).

The State used Exhibits 8-A through 8-TT and 5-A through 5-KKKKK to demonstrate that the fire at Diar's residence was the result of arson and that a victim was found inside. According to the State's experts, the fire was purposely set and gasoline was used as the accelerant. (T.p. 1587-1590, 1609-1611, 1616-1617, 1635-1637, 1671, 1789-1790, 1817, 1819, 1831, 1833, 1837). The extensive damage done to the house and the origins of the fire was corroborated by other witness testimony. (T.p. 1309, 1311, 1314-1315, 1357-1358, 1361, 1366, 1383-1388, 1399, 1410, 1410). Based on the testimony and one hundred and fifty-seven other cumulative photographs, it was easily proven that the fire was the result of arson, the home was severely damaged, and Jacob's body was found in a first floor bedroom. The jury did not need to see Exhibits 15-A through 15-V to understand this.

In addition to being cumulative and repetitive of other photographs offered by the State, these twenty-two gruesome photographs were also repetitive in the manner in which they were presented. Exhibits 15-A through 15-V were a constant barrage of shocking and graphic photographs. Prior to the photographs being published, Dr. Matus explained his findings with

the assistance of his coroner's verdict in words the jury could understand with little or no difficulty.

Exhibits 15A through 15-V were cumulative of other evidence offered by the State and repetitive in the manner in which they were presented. Thus, the probative value of Exhibits 15-A through 15-V did not outweigh the danger of prejudice to Diar. See Morales, 32 Ohio St. 3d at 259, 513 N.E.2d at 274.

**G. Penalty Phase Argument**

The jury had to weigh one aggravating circumstance at the penalty phase: that Diar purposely caused the death of another who was under thirteen years of age at the time of the offense. O.R.C. § 2929.04(A)(9). This Court has held that, on the issue of punishment, the State may rely on any trial phase evidence that is relevant to the nature and circumstances of the aggravating circumstances. DePew, 38 Ohio St. 3d at 283, 528 N.E.2d at 552 (citing O.R.C. § 2929.03(D)(1)). Here, the State could only rely on photographic evidence that was relevant to the underage victim aggravating circumstance.

During the penalty phase, the jury was allowed to consider Exhibit 27, the birth certificate of Jacob Diar. This was directly relevant to the A(9) specification. The same cannot be said for the photographs, 15-A through 15-V. These photographs bear no relevance to nature and circumstances of the aggravating circumstance. Each of the twenty-two photographs show crime scene and autopsy photographs of Jacob's charred body. Such evidence was unnecessary given that the jury knew his age, which was established at trial, and had access to his birth certificate during the penalty phase. (T.p. 2988, 2989).

Had the trial court used the proper test to determine the admissibility of these twenty-two photographs, the jury would not have seen them at sentencing. The trial court did not balance

the probative value against the prejudice, but instead incorrectly noted that the State had the right to “introduce whatever evidence was in on the trial, as long as he did testimony on them.” (T.p. 2987). Rather than supporting the aggravating circumstances, these photographs emphasized the horrific destruction of Jacob Diar’s body. Not one of these photographs had sufficient probative value to outweigh the “danger of prejudice” to Diar at the penalty phase. See Morales, 32 Ohio St. 3d at 259, 513 N.E.2d at 274.

Additionally, the trial court’s rationale for admitting the photographs suggests a flawed interpretation of the law. The trial court admitted the photographs at the penalty phase and said the State had the right to “introduce whatever evidence was in on the trial, as long as he did testimony on them.” (T.p. 2987). This erroneous statement is in direct contrast to this Court’s ruling in DePew, which stated trial phase evidence that is relevant to the nature and circumstances of the aggravating circumstances can be admitted at the penalty phase. 38 Ohio St. 3d at 283, 528 N.E.2d at 552 (citing O.R.C. § 2929.03(D)(1)). Moreover, the quantity and horrific nature of these photographs renders them “so unduly prejudicial as to render” Diar’s trial fundamentally unfair. Payne v. Tennessee, 501 U.S. 808, 825 (1991). Their admission violated Diar’s due process rights. See id.

**H. The photographs created an unacceptable danger of prejudice to Nicole Diar. Their admission into evidence during both phases of the trial was not harmless error.**

The jury must have felt “horror and outrage” when they viewed the photographs at the trial phase. See Thompson, 33 Ohio St. 2d 15, 514, N.E.2d at 420. These exhibits were inflammatory and they appealed to the juror’s emotions. See Thompson, 33 Ohio St. 2d 15, 514, N.E.2d at 420-421. They created an unacceptable risk that the jurors would convict Diar out of their feelings of anger and revulsion. Moreover, unlike DePew in which the photographs were kept to an “absolute minimum of two for each victim,” 38 Ohio St. 3d at 282, 528 N.E.2d at

551, here the State relied on twenty-two crime scene photographs, a crime scene video, computer generated floor plans, and the numerous photos presented during the testimony of the State's fire investigator. In light of this, Exhibits 15-A through 15-V had weak probative value, and they were cumulative and repetitive.

Unlike Thompson, this trial error is not harmless beyond a reasonable doubt. See 33 Ohio St. 3d at 15, 514 N.E.2d at 420. The State's case was entirely circumstantial. Here, the evidence was not so overwhelming as to make the prosecution's use of the photographs harmless. See Chapman, 386 U.S. at 26.

The admission of the gruesome photographs at the penalty phase was also error. The photographs were completely unrelated to the nature and circumstances of the aggravating circumstance. Moreover, as in Thompson, these photographs would cause the jurors to feel "horror and outrage." 33 Ohio St. 3d at 15, 514 N.E.2d at 420. This intimately graphic evidence was fundamentally unfair to the issue of punishment and must have inflamed the jury. The photographs would compel the jury to seek revenge with a gruesome penalty to match the gruesome images of Jacob Diar. See id. at 15, 514 N.E.2d at 421.

## **I. Conclusion**

The prejudicial impact of the jury's exposure to repetitive inflammatory photographs and the jury's continuous exposure to a charred and disfigured body deprived Nicole Diar of her right to a fair trial, due process, and a reliable determination of her guilt in a capital case as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 9, 10 and 16 of the Ohio Constitution. The trial's contamination by exposure to evidence not related to facts at issue further prejudiced Diar's right to a fair trial free from improper emotional impact. Moreover, the "carry-over" effect of the evidence violated the

Eighth and Fourteenth Amendment guarantees “that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion.” Gardner v. Florida, 430 U.S. 349, 358 (1977). See also State v. Thompson, 33 Ohio St. 1, 514 N.E.2d 407 (1987). For these reasons, Nicole Diar’s convictions should be overturned or, at a minimum, her death sentence vacated.

### **Proposition of Law No. IX**

The sentence of death imposed on Diar was unreliable and inappropriate. The death sentence in her case violates U.S. Const. amends. VIII and XIV; Ohio Const. art. I, §§ 9 and 16 and Ohio Rev. Code § 2929.05.

#### **A. Introduction**

Ohio Revised Code § 2929.05(A) requires this Court to determine the appropriateness of the death penalty in each capital case it reviews. The statute directs the appellate courts to “affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.” Id. The statute requires this Court to make an independent review of the record and decide for itself, without any deference given to the determinations below, whether it believes that this defendant should be sentenced to death. State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984); State v. Maurer, 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984). The record in this case merits the independent conclusion by this Court that the death sentence is not appropriate for Nicole Diar.

#### **B. Mitigation Evidence**

This Court has defined mitigation as “not a justification or excuse of the offense in question, but [that] which in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.” State v. Steffen, 31 Ohio St. 3d 111, 127, 509 N.E.2d 383 (1987). Ohio Revised Code § 2929.04(B) gives ten (10) categories into which mitigating evidence may fall: nature and circumstances of the offense; defendant’s character, history and background; and seven (7) specifically enumerated factors. Diar submitted mitigating evidence that was relevant to several of these enumerated factors. The record in the present case presents

evidence that the degree of Diar's moral culpability has been reduced to the point where it is unjust to execute her.

**C. History, character and background.**

First, this Court is required to review a capital defendant's "history, character and background" to determine if any mitigating factors can be discovered. Ohio Revised Code § 2929.04(B). These mitigating factors are extremely important. Evidence of the defendant's background and upbringing is relevant "because of the belief, long held by this society, that the defendant who commits criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J. concurring).

The evidence presented on Diar's behalf demonstrated that her character, history and background were mitigating. Diar was the victim of a horrific accident and the product of a disadvantaged background that left her suffering both physically and emotionally.

**D. A Tragic Accident compounded by a prolonged and painful rehabilitation**

At the age of four, Nicole Diar was involved in a catastrophic accident that left her disfigured and disabled. The accident occurred when Diar's younger brother accidentally set her night gown on fire. Diar's body was engulfed in flames. As a result of the fire, Diar was left with severe burns to her face, neck, chest, and upper extremities. Over twenty percent of her body was burned. Prior to the accident, Diar was a typical smiling four year old girl. After the accident, Diar's youth was marred by constant pain, suffering, disfigurement, and ongoing invasive medical treatment.

The treatment Diar underwent subsequent to the accident was prolonged and invasive. Diar had multiple surgeries for skin grafts up until the age of sixteen. She was also subjected to

bone grafts. There was an operation on her deformed ear and reconstructive surgery to the left thumb. Part of Diar's therapy included wearing neck, hand, and finger splints. Painful debridement operations were performed on Diar to treat her neck, chest, and hand. In 1987, Diar had bilateral tissue expanders inserted into her body.

Despite the treatment, Diar still suffered through agonizing deformities. Scar contractures were so severe around Diar's neck that they pulled down at the mouth, limiting her ability to even smile and appear happy. Defense Mitigation Exhibit G.

The trauma Diar suffered through was not limited to her physical injuries and subsequent treatments. In 1984, Diar was given a psychiatric evaluation by Dr. Norman R. Bernstein. Diar was eight years old at the time of the evaluation and had already been subjected to ten different hospitalizations and major surgical procedures. Dr. Bernstein's evaluation concluded that the physical pain Diar suffered through was having a strong impact on her mentally as well. In the report, Dr. Bernstein took note of the following comments from Diar's mother:

“...she now seems to fear possible injury in new situations. She was fearful of riding a bicycle because of apprehension or being injured. She showed fear of learning to swim, fear of roller skating, fear of going on the trampoline though once she began to do this, she did it without anxiety.” See Defense Mitigation Exhibit C.

Dr. Bernstein also elicited from Diar that children at school would touch her and then make believe they were spraying themselves to decontaminate. Friends of Diar were also interviewed and they commented on the cruel treatment she received at school. The friends “described how people do tease her and make fun of her and how people call her itchy and how she tries to deal with it by ignoring them.” Id.

In light of this, Dr. Bernstein noted the “catastrophic” nature of Diar's injuries, her ongoing struggles, and stated that:

“I believe that her life experience and the course of her existence will be significantly less happy, more troubled and leave her vulnerable for psychiatric illness; very largely depression. She already is experiencing a very intense struggle to maintain her self image as a worthwhile child in the face of increasing social rejection as a result of her physical deformities and post-burn handicaps.” See Defense Mitigation Exhibit C

Hospital records from 1994 show that as Diar approached adulthood, she was still haunted by the trauma she suffered through as a child. As a depressed eighteen year old, Diar admitted herself to St. Joseph’s Hospital & Health Center. Her chief complaint was depression. The records show a depressed and frightened Nicole Diar who:

“has had recurring nightmares of a fire that she was involved in 1979. She also has nightmares of her car running into a truck. She states that she has been unable to sleep, her nerves are shot, she has no energy and has a loss of appetite.” See Defense Mitigation Exhibits D & E.

A psychosocial assessment from this visit indicated that Diar was “frustrated because she feels her insurance company will not permit her to stay in the hospital to work on her issues.” Id. A medical doctor who diagnosed Diar with depression at this time, wrote in a report that; “It was quite evident that she was lacking self confidence, at times she needed direction and much supervision, she was discharged on 1-17-94 on the following medications, Tofranil 75mg.” Id. Over fourteen years after Diar’s living nightmare began, she was still literally crying out for help and guidance.

#### **E. Negligent and Inadequate Nurturance**

The suffering Diar experienced was magnified due to the fact that she was not given the adequate support that would have benefited her both physically and emotionally. At a time when she was experiencing severe trauma at a vulnerable age, there were serious support problems, as reflected in the record.

Hospital records indicate a constant theme of neglect. A 1980 entry from the physical therapy department of St. Joseph's Hospital noted that social services were "actively involved in this care as there has been a problem concerning the patient." See Defense Mitigation Exhibit A-378. The "problem" was missed treatments that were essential to Diar's recovery. Id. Another entry from St. Joseph's noted that Diar did not show up for scheduled treatment due to her mother's stomach ache. See Defense Mitigation Exhibit A-429. Diar's mother did not even bother to call and cancel the appointment. Id. Diar's therapy appointments were also cancelled due to car trouble. See Defense Mitigation Exhibit A-433. A 1982 memo from St. Joseph's states that Diar missed a therapy appointment and her "mother stated that she could not remember what day she was to bring her in." See Defense Mitigation Exhibit A-459.

Hospital records around the time of Diar's recovery plan also indicate there were similar problems away from the hospital. A March, 1980 evaluation of Diar noted her complaints concerning therapy at home. See Defense Mitigation Exhibit A-378. In the report, Diar was quoted as saying, "My mom doesn't do my exercises." Id. Another report indicated that Diar's mother was not laundering and alternating the garments that were essential to proper skin recovery. See Defense Mitigation Exhibit A-382. The substandard care was obvious to those at the hospital, who commented in a 1980 report the difficulties in "communicating with parents and getting them to involve themselves." See Defense Mitigation Exhibit A-382. Diar's mother had a different outlook on the progress of the rehabilitation and simply said her daughter was "whiney and immature" since the accident. See Defense Mitigation Exhibit C.

Dr. McPherson commented on this extensively in her Summary Report for Mitigation. After reviewing Diar's medical files, Dr. McPherson noted there was a:

"clearly documented presence of neglect and inadequate nurturance during a period when that absence of needed support would make the difference

not only emotionally but would also influence the course of physical response to treatment. Nicole's mother sometimes did not stay with her, leaving her at the rehabilitation program and not picking her up on time. Her mother had to be re-directed for getting involved with other children, neglecting to be with her own child, and causing some difficulties to the other patients. Nicole arrived for treatment unkempt, dirty, and without the garments that were prescribed which would limit the keloid production (and therefore would reduce the disfigurement potentials). In the meantime, the mother complained that healing was not progressing well enough." (See Defendant's Mitigation Exhibit G)

In addition to the lack of support for her physical ailments, Diar failed to receive any treatment for the abuse she encountered at school. Dr. Bernstein's 1984 evaluation of Diar made note of this. As part of the evaluation, Diar's third grade teacher was interviewed. The teacher, Mr. Gross, said that other students did not want to stand next to Diar in line. Other students called Diar "burnface, ugly, stupid." *Id.* Some students called her "picky," referring to the way Diar picked at her burn scars during class. *Id.* Mr. Gross said that Diar went to him and reported the teasing. Nothing in the record indicates he did anything to stop it.

Although Diar had received treatment for her physical scars, she was never given the benefit of professional assistance on how to deal with the verbal abuse encountered at school. Instead of learning beneficial coping mechanisms that could have helped heal her mental wounds, Diar was simply told by her father that people were cruel because "people do that when they are not happy with themselves." *See* Defendant's Mitigation Exhibit G.

**F. Trauma and neglect lead to a troubling psychological profile**

After evaluating Diar in 1984, Dr. Bernstein, a professor of psychiatry, believed she was "vulnerable for psychiatric illness." *See* Defendant's Mitigation Exhibit C. Due to the catastrophic injuries from the fire, the trauma that followed, and the lack of support provided during that critical period, Dr. Bernstein's impression came to fruition.

Dr. Sandra McPherson, a clinical and forensic psychologist, was retained to conduct a psychological evaluation of Diar. Dr. McPherson reviewed Diar's medical records, testified at the penalty phase, and also submitted a Summary Report for Mitigation. See Defense Mitigation Exhibit G. Personality testing of Diar suggested a "complex picture and one consistent with the past history of severe trauma and prolonged medical stress." Id. Another major aspect of Diar's life was the "clearly documented presence of neglect and inadequate nurturance." Id.

This tragic combination of trauma and neglect led to the development of psychological defense systems that greatly impacted Diar's "day to day living and decision making." Id. Over time, Diar developed an identity that Dr. McPherson found to include "massive potentials for self destructive functioning." Id. at 7. These defense systems carried to the extreme, as was the case with Diar, lead to a person who "exists in an alternative universe of his or her own making which can bear little resemblance to the actualities that need to be handled." Id. at 6. Dr. McPherson noted that Diar had "clearly split off from the emotional cognitive." Id.

These findings led Dr. McPherson to conclude that Diar is:

"...an individual who has difficulty accurately gauging her impact on others and she misperceives or inaccurately assesses the behavior of others. Under conditions of stress, she becomes impulsive and reactive and makes poor decisions. Personality configurations suggest depression and anxiety and underlying personality structure problems involving borderline aspects. She also appears to be an individual who can be influenced and possibly manipulated by others. Id. at p. 2.

Despite her best attempts to heal physically and emotionally, and live a pleasant life, Nicole Diar was unable to successfully overcome the hurdles placed before her at a very young age. Given the severity of the trauma Diar experienced, the neglect that ensued, and the maladaptive personality traits that developed in response to this, no one can blame her.

All of the above factors are mitigating of the sentence of death. The trauma Diar experienced throughout her youth is unimaginable. The fact that she did not receive support from her family is equally shocking.

**G. Lack of criminal history**

This Court should consider and give weight to Diar's lack of a criminal history. This evidence is mitigating under O.R.C. § 2929.04(B)(5) and is entitled to weight in this Court's consideration. State v. Palmer, 80 Ohio St. 3d 543, 687 N.E.2d 685 (1997).

Prior to this case, Diar had no other criminal convictions.

**H. Other evidence relevant to sentencing**

Finally, this Court should consider any other mitigation evidence that would be relevant to whether Diar should be sentenced to death. O.R.C. § 2929.04(B)(7). Dr. McPherson's Summary Report for Mitigation indicates that Diar would not be a danger to others in prison. According to Dr. McPherson, "It can be securely predicted that she is able to adapt and not cause harm to others in the prison system." (Defense Mitigation Exhibit G)

**I. Conclusion**

Our law requires "a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). The death of Jacob Diar was tragic. No one disputes that. What is disputed is how he died and who did it. In prosecuting Diar for this crime, not even the State could give a definitive answer as to how Jacob Diar died. The State offered its theory behind the death to the jury in closing remarks at the trial phase and the opening statement of the penalty phase. The theories were offered, but prefaced with "most likely" and "in all probability." (T.p. 2793, 2970).

That is not the standard this Court should subscribe to when reviewing a sentence of death.

Despite this, the State was still able to secure a conviction and death sentence.

Nevertheless, the mitigating factors in this case call for a sentence less than death.

### **Proposition of Law No. X**

The trial court erred when it failed to grant defense counsel's motion to sever the charges of corrupting another with drugs from the other counts in the indictment, in violation of appellant's rights under the United States and Ohio Constitutions. U.S. Const. amends. VI, VIII, IV; Ohio Const. art. I, §§ 9, 16, 20.

#### **A. The Indictment**

The indictment against Nicole Diar was filed on April 30, 2004. It included eleven counts, including counts for felonious assault, murder, and three counts of aggravated murder with death penalty specifications. (See Indictment, filed April 30, 2004).

The indictment was amended on September 26, 2005. One of the aggravated murder counts was dismissed; specification one to count six was dismissed; specification one to the new count seven was dismissed; count nine became count eight, count ten became count nine, and count eleven became count ten. (Trial Docket 9/26/05). The charges thus became, Count 1, Corrupting Another With Drugs; Count 2, Felonious Assault; Count 3, Murder; Count 4, Aggravated Arson; Count 5, Aggravated Arson; Count 6, Aggravated Murder with Capital Specifications; Count 7, Aggravated Murder with Capital Specifications; Count 8, Tampering with Evidence; Count 9, Felonious Assault; Count 10, Corrupting Another with Drugs.

Counts 1 and 10 charged Appellant with Corrupting Another With Drugs under O.R.C. § 2925.02(A)(4)(b) and (A)(4)(a) respectively. The counts which addressed the death of Jacob Diar were Counts 2, 3, 6 and 7. Count 2 charged that Nicole Diar, on or about August 27, 2003, did, knowingly cause serious physical harm to Jacob Diar, in violation of § 2903.11(A)(1) of the Ohio Revised Code. Count 3 charged that Nicole Diar, did, knowingly cause the death of Jacob Diar while committing an offense of violence that is a felony of the first or second degree, to wit: felonious assault and/or aggravated arson, in violation of § 2903.02(B) of the Ohio Revised

Code. Count 6 charged that Nicole Diar did, purposely and with prior calculation and design, cause the death of Jacob Diar, in violation of § 2903.01(A) of the Ohio Revised Code; the specification attached to Count 6 was that the offender purposely caused the death of another who was under thirteen years of age and the offender was the principal offender. Count 7 charged that Nicole Diar, did, purposely cause the death of Jacob Diar who was under the age of thirteen years at the time of the commission of the offense, in violation of § 2903.01(C) of the Ohio Revised Code; the specification attached to Count 7 was that the offender purposely caused the death of another who was under thirteen years of age and the offender was the principal offender.

On May 26, 2004, defense counsel filed a Motion for Relief From Prejudicial Joinder. (Trial docket, 5/26/04). The purpose of the motion was to sever the charges of corrupting another with drugs from the other counts charged in the indictment.

## **B. Law**

### **1. Improper Joinder Under O.R.C. § 2941.04**

Under Ohio R. Crim. P. 13, two cases may only be joined if they “could have been joined in a single indictment.” O.R.C. § 2941.04 regulates whether two charges may be included in the same indictment, and limits this occurrence to three instances: (1) when the charges are connected together in their commission; (2) when the charges are different statements of the same offense (3) or when the charges are two or more different offenses of the same class of crimes or offenses. See also Ohio R. Crim. P. 8(A).

The corrupting another with drugs charge was alleged to have been committed between May 20 to July 19, 2003. The death of Jacob Diar occurred on August 27, 2003. Therefore this case does not fall under the first factor as they were not connected together in their commission.

The drug charge is not a different statement of the offense of aggravated murder. Therefore, this case does not fall under the second factor.

Finally, the drug charge is not of the same class or offense as aggravated murder. While both are felonies, the similarities end there. Aggravated murder is a felony of the first degree punishable by death. O.R.C. §§ 2903.01, 2929.02. The corrupting another with drug charge is a felony of the second degree in this case. O.R.C. § 2925.02(A)(4)(a) and (b). Therefore, this case does not fall under the third factor, and cannot be joined under O.R.C. § 2941.04.

## **2. Improper Joinder Under Crim. R. 14**

Ohio R. Crim. P. 8 provides in part:

(A) Joinder of offenses. Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.

Ohio R. Crim. P. 14 provides in part:

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires.

A defendant claiming error arising from the trial court's refusal to separate trials of multiple charges under Crim. R. 14 has the burden of proving that his rights were prejudiced. State v. Torres, 66 Ohio St. 2d 340, 343, 421 N.E.2d 1288, 1290 (1981). He must demonstrate that the trial court abused its discretion in refusing to separate the charges for trial. Id., at 343, 1291, citing Opper v. United States, 348 U.S. 84, 95 (1954).

The benefit in the economy of a single trial must be considered against the disadvantages to the defendant. Drew v. United States, 331 F.2d 85, 88 (C.A.D.C. 1964) ("the justification for

a liberal rule on joinder of offenses appears to be the economy of a single trial”). Among the arguments against joinder due to prejudice to the defendant are “(1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.” Id. The court in Drew noted also that “a less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one.” Id.; see State v. Roberts, 62 Ohio St. 2d 170, 405 N.E.2d 247 (1980).

Relevant to Appellant’s case is the observation in Queen v. King by Justice Hawkins:

\*\*\*I pause here to express my decided opinion that it is a scandal that an accused person should be put to answer such an array of counts containing, as these do, several distinct charges. Though not illegal, it is hardly fair to put a man upon his trial on such an indictment, for it is almost impossible that he should not be grievously prejudiced as regards each one of the charges by the evidence which is being given up on the others.

Id., citing Queen v. King, 1 Q.B. 214, 216 (1897).

Joinder is not proper where the counts are not “for two or more acts or transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence.” Drew, 331 F.2d at 88, citing McElroy v. United States, 164 U.S. 76, 79-80 (1896).

The corrupting another with drugs and aggravated murder offenses in Appellant’s case were distinct offenses, “not provable by the same evidence and in no sense resulting from the same series of acts.” Id. The prejudice in Appellant’s case arose because the jurors were likely to use the evidence of corrupting another with drugs in their consideration of the aggravated

murder charge. Joinder should not be permitted “where the crimes charged are of such a nature that the jury might regard one as corroborative of the other, when , in fact, no corroboration exists.” Drew, 331 F.2d at 89, citing Kidwell v. United States, 38 App. D.C. 566, 570 (1912).

This is exactly the danger in Appellant’s case. The testimony about Appellant’s use of codeine to make Jacob fall asleep was highly prejudicial but unrelated to the charge of aggravated murder, as codeine was in no way connected to Jacob’s death. Testimony at trial was unable to establish an actual cause of death for Jacob Diar. Dr. Paul Matus, Lorain County Coroner, testified that he viewed the victim at the scene and conducted an autopsy of the victim the next day. (T.p. 1680). He determined that the cause of death was “homicidal violence of an undetermined origin.”

Dr. Matus testified that he reviewed past medical records of Jacob, including past stomach problems, and concluded that they in no way contributed to his death. (T.p. 1683). He testified that he did a very extensive, complete autopsy from tip to toe, including the brain. Dr. Matus also looked at toxicology; no toxic drugs were present. (T.p.1684). No drugs of any kind were found in Jacob’s system, either over the counter or prescription drugs. (T.p. 1715). Matus looked at the internal organs; there was nothing found to cause death. (T.p. 1690).<sup>2</sup>

The evidence as to the corrupting another with drugs charge was presented after the state presented testimony about the fire and the autopsy of Jacob. Several of Jacob’s babysitters testified that they were asked to give him Tylenol with codeine and that it made him sick. They were instructed to give it to him to make him sleepy and to calm him down. These events took place in the late spring, early summer of 2003. (T.p. 1868-2002). A pharmacist and Detective Greg Mehling testified about the existence of the prescription for Taylor Diar, the child of

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<sup>2</sup> The prosecutor’s theory in closing arguments was that Jacob was either smothered or drowned. No evidence was presented to support either of these scenarios.

Appellant's sister. (T.p. 2036). Testimony was also offered that Appellant brought Jacob to the emergency room for treatment of stomach pains. (T.p. 1961, 2046). There was no testimony that Appellant gave Jacob medicine in order to intentionally harm him. Testimony established that Jacob died on August 27, 2003.

In this case there was a danger that "the jury used the evidence of the one crime to convict of the other or cumulated the evidence to find guilt under both charges." Drew, 331 F.2d at 89. Because of the nature of the testimony, "...the possibility of the jury's becoming hostile or inferring guilt from belief as to criminal disposition is...substantial." Id., at 91.

It has long been a principle of law that evidence of a particular crime is inadmissible to prove a disposition to commit crime, whereby the jury may infer the defendant committed the crime charged. "...[T]he likelihood that juries will make such an improper inference is high, [therefore] courts presume prejudice and exclude evidence of other crimes unless that evidence can be admitted for some substantial, legitimate purpose. The same dangers appear to exist when two crimes are joined for trial, and the same principles of prophylaxis are applicable." Id., at 89-90.

Joinder in this case was also improper because the offenses did not arise out of a continuing transaction or same set of events. Id., at 90. Nor were they close together in time. See, State v. Hamblin, 37 Ohio St. 3d 153, 158, 524 N.E.2d 476, 481 (1988) (crimes of attempted murder and having a weapon while under disability and aggravated murder and aggravated robbery took place less than twenty minutes of one another; the evidence relating to the two crimes was inter-related).

If the jury may become confused, the court should order severance. Drew, 331 F.2d at 92. In Appellant's case the evidence and arguments of the prosecutor were so improperly

intertwined as to create an unfair danger of confusion in the minds of the jurors when they came to consider the charges of aggravated murder. The prosecutor further guaranteed that the evidence would not maintain the required simplicity by including testimony of “bad character” and other acts to the prejudice of Appellant. (See Proposition of Law V). The combination of the separate offenses had a cumulative effect on the jury. In fact, the evidence of aggravated murder in the present case was actually very weak; this made joinder prejudicial. Torres, 66 Ohio St. 2d 340 at 343, 421 N.E.2d 1288 at 1291, citing United States v. Ragghianti, 527 F.2d 586 (9th Cir. 1975) (See Proposition of Law VI)

The prejudicial effect of the joinder prejudiced Appellant in the penalty phase as well, as the trial court allowed the admission of evidence from the trial phase in the penalty phase. Capital punishment differs from lesser forms of punishment in kind because of its extreme finality. Lockett v. Ohio, 438 U.S. 586, 604 (1978). Resultantly, the Eighth Amendment requires a heightened degree of reliability in the application of the death penalty. Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976). See also Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring). Unconstitutional arbitrariness results when the sentencer has unguided or improperly guided discretion in the imposition of the death penalty. Furman v. Georgia, 408 U.S. 238 (1972). To avoid arbitrariness, “there is a required threshold below which the death penalty cannot be imposed .... [T]he State must establish rational criteria that narrow the decision maker’s judgment as to whether the circumstances of a particular defendant’s case meet the threshold.” McCleskey v. Kemp, 481 U.S. 279, 305 (1987) (citations omitted). Accordingly, the State is limited at the penalty phase to the aggravating circumstances in O.R.C. § 2929.04(A) under Ohio’s sentencing calculus. See State v. Wogenstahl, 75 Ohio St. 3d 344, 662 N.E.2d 311 (1996). These constitutional principles were breached in this case

because the jury's discretion was improperly guided. They were allowed to consider improper and prejudicial evidence in imposing the sentence of death.

The convictions and death sentence in Appellant's case must be reversed.

## Proposition of Law No. XI

A capital defendant's right to due process is violated when the State is permitted to convict upon a standard of proof below proof beyond a reasonable doubt. U.S. Const. amend. XIV; Ohio Const. art. I, § 16.

### 1. Introduction.

“There is always in litigation a margin of error” and “[i]t is critical that the moral force of the criminal law not to be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.” In re Winship, 397 U.S. 358, 364 (1970). To maintain confidence in our system of laws proof beyond a reasonable doubt must be held to be proof of guilt “with utmost certainty.” Id. Thus, a capital defendant's conviction and death sentence must be reversed where the instruction on reasonable doubt could have led jurors to find guilt “based on a degree of proof below that required by the Due Process Clause.” Cage v. Louisiana, 498 U.S. 39, 41 (1990). The instruction given by the trial court allowed the jurors to find Nicole Diar guilty on “a degree of proof below that required by the Due Process Clause.” Diar's convictions and death sentence must be reversed. See id.

### 2. Facts.

During the trial phase, the trial court instructed the jury on “reasonable doubt” as follows:

Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are **firmly convinced of the truth of the charge**. Reasonable doubt is a doubt based upon reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to **human affairs or depending on moral evidence**, is open to some possible or imaginary doubt. Proof beyond a reasonable is proof of such character that an ordinary person would be **willing to rely and act upon it in the most important of his or her own affairs**.

(T.p. 2865) (emphasis added).

During the sentencing phase, the trial court instructed the jury on “reasonable doubt” as follows:

Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are **firmly convinced** that the aggravating circumstances of which the defendant was found guilty outweighs the mitigating factors. Reasonable doubt is a doubt based upon reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to **human affairs or depending upon moral evidence** is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be **willing to rely upon it and act upon it in the most important of his or her own affairs.**

(T.p. 3070) (emphasis added).

The trial court’s charge, taken as whole, did not adequately convey to jurors the stringent “beyond a reasonable doubt” standard. Diar points this Court to three specific flaws within the trial court’s instructions. First, the “willing to act” language of O.R.C. § 2901.05 did not guide the jury because it is too lenient. Second, the statutory definition of reasonable doubt is flawed because the “firmly convinced” language represents only a clear and convincing standard. Third, the Court’s use of “moral evidence” was improper.

The trial court’s erroneous instructions resulted in the jury convicting Diar on a standard below that required by the Due Process Clause of the Fourteenth Amendment. This is a fundamental, structural error that requires reversal of Diar’s convictions. See Sullivan v. Louisiana, 508 U.S. 275 (1993).

### **3. Willing to act.**

The trial court’s definition of reasonable doubt, which included instructing the jury that reasonable doubt was “proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs,” allowed the jurors to find guilt on proof below that required by the Due Process Clause. This Court has held that Ohio’s statutory

reasonable doubt definition is not an unconstitutional dilution of the State's burden of proof. State v. Nabozny, 54 Ohio St. 2d 195, 202-03, 375 N.E.2d 784, 791 (1978). However, the Supreme Court of the United States, several federal circuit courts, and lower Ohio courts have condemned the language in the statute that defines reasonable doubt in this way.

The Supreme Court of the United States expressed strong disapproval of the "willing to act" language when defining proof beyond a reasonable doubt in Holland v. United States, 348 U.S. 121, 140 (1954). The federal courts express a similar disapproval of this language. "There is a substantial difference between a juror's verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him." Scurry v. United States, 347 F.2d 468, 470 (D.C. Cir. 1965).

The Scurry court recognized that human experience shows that a prudent person, called upon to act in his more important business or family affairs, would gravely weigh the risks and considerations tending in both directions. After weighing these considerations, however, a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Id. As a result of this disapproval, several of the federal circuit courts have adopted a preference for defining proof beyond a reasonable doubt in terms of a prudent person who would hesitate to act when confronted with such evidence. See e.g., Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990); United States v. Colon, 835 F.2d 27 (2nd Cir. 1987); United States v. Pinkney, 551 F.2d 1241 (D.C. Cir. 1976); United States v. Conley, 523 F.2d 650 (8th Cir. 1975).

Ohio courts have also expressed disapproval of the "willing to act" language of O.R.C. § 2901.05(D). The Franklin County Court of Appeals concluded that the final sentence of O.R.C. § 2901.05(D) should be eliminated or modified by adding the word "unhesitating" to the last sentence before the phrase "in the most important of his own affairs." State v. Frost, No. 77AP-

728, slip op. at 8 (Franklin Ct. App. May 2, 1978). Ordinary people who serve as jurors are frequently required to make important decisions based upon proof of a lesser nature by choosing the most preferable action. In fact, the “willing to act” language is the traditional test for the clear and convincing evidence standard of proof. State v. Crenshaw, 51 Ohio App. 2d 63, 65, 366 N.E.2d 84, 85 (1977). “A standard based upon the most important affairs of the average juror ... reflects adversely upon the accused.” Id.

**4. Firmly convinced.**

The “firmly convinced” language also did not define the reasonable doubt standard, but rather, defined the clear and convincing standard. This Court has defined clear and convincing evidence as that “which will provide in the mind of the trier of facts a firm belief or conviction to the facts sought to be established.” Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118, syl. (1954). That definition is similar to O.R.C. § 2901.05(D), where reasonable doubt is present only if jurors “cannot say they are firmly convinced of the truth of the charge.” Resultantly, the jurors were given a definition of reasonable doubt that failed to satisfy the Due Process Clause.

**5. Moral Evidence.**

The court’s definition of reasonable doubt was further flawed because it informed the jury that “[r]easonable doubt is not mere possible doubt because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt.” (Vol. 7, T.p. 1453; June 20, 2002, T.p. 120) The phrase “moral evidence” improperly shifted the focus of this jury to the subjective morality of Nicole Diar and from the required legal quantum of proof, Victor v. Nebraska, 511 U.S. 1 (1994), notwithstanding.

It is possible for a challenge to a jury instruction that includes the phrase “moral evidence” to survive that challenge, however, it is the context of the phrase that determines this.

In Victor, the Court rejected a due process challenge to a jury instruction that included the phrase “moral evidence.” Id. at 13. But see id. at 21 (Kennedy J., concurring). The Court found no error because the phrase “moral evidence” was proper when placed in the context of the jury instruction on reasonable doubt that was given:

[T]he instruction itself gives a definition of the phrase. The jury was told that **“everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt”** - in other words, that absolute certainty is unattainable in matters relating to human affairs. **Moral evidence, in this sentence, can only mean empirical evidence offered to prove such matters** - the proof introduced at trial.

Id. at 13 (emphasis added).

Unlike Victor, the instruction in this case did not guide the jury by placing the phrase “moral evidence” within any proper context. In Victor, the instruction properly guided the jury on the phrase “moral evidence” because it was conjunctively paired with the phrase “matters relating to human affairs.” Id. Here, “moral evidence” was disjunctively stated as an alternative to the phrase “relating to human affairs.” (Vol. 7, T.p. 1453; June 20, 2002, T.p. 120) The trial court did not direct this jury to consider “moral evidence” as evidence “related to human affairs.” Instead, the trial court instructed this jury to consider either evidence related to human affairs “or moral evidence.” Compare T.p. Volume 7, T.p. 1453 and June 20, 2002, T.p. 120 with Victor, 511 U.S. at 13. Accordingly, the reasonable doubt instruction permitted the jury to convict Diar based on considerations of subjective morality, rather than evidentiary proof required by Due Process Clause. Victor, 511 U.S. at 21 (Kennedy J., concurring) (“[the] use of ‘moral evidence’ ... seems quite indefensible ... the words will do nothing but baffle”).

## **6. Conclusion.**

Juries in Ohio are convicting criminal defendants on a clear and convincing evidence standard. The “willing to act” language found in O.R.C. § 2901.05(D) represents a standard of

proof below that required by the Due Process Clause. The “firmly convinced” language in the first sentence of O.R.C. § 2901.05(D) defines the presence of reasonable doubt in terms nearly identical to the accepted definition of clear and convincing evidence. Courts that have disapproved the “willing to act” language have generally allowed it to be used only when the instruction, taken in its entirety, conveyed the true meaning of “reasonable doubt” as required by the Due Process Clause. See Holland, 384 U.S. at 140.

This is not, however, the case in Ohio. O.R.C. § 2901.05(D) defines reasonable doubt in terms far too similar to the definition of “clear and convincing” evidence. The “willing to act” language in the last sentence of O.R.C. § 2901.05(D) is defective because reasonable doubt is also defined in a clear and convincing standard from the outset in the phrase “firmly convinced.” O.R.C. § 2901.05(D), as applied to this case, defines reasonable doubt by an insufficient standard. Furthermore, the reference to “moral evidence” improperly shifts the jury’s focus to Diar’s subjective moral culpability. Accordingly, the instructions in this trial allowed the jury to find guilt “based on a degree of proof below that required by the Due Process Clause.” Cage, 498 U.S. at 41. Diar’s convictions and sentence must be reversed.<sup>3</sup>

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<sup>3</sup> Similar claims have been denied on the merits by this Court, e.g. State v. Van Gundy, 64 Ohio St. 3d 230, 594 N.E.2d 604 (1992) and this Court may summarily reject this claim on the merits if it disagrees with Appellant’s view of Federal law. State v. Poindexter, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988).

## Proposition of Law No. XII

Appellant's constitutional rights were violated when the trial court gave the jury verdict forms that did not mandate a finding of guilt beyond a reasonable doubt. U.S. Const. amends. VI, VIII, XIV, Ohio Const. art. I, §§ 9, 16, 20.

In Appellant Diar's case, the trial court gave the jury verdict forms that did not mandate the jury to find Appellant guilty beyond a reasonable doubt. T.p. 2896. The verdict forms simply required the jury to find Diar guilty. This permitted the jury to find Diar guilty on a burden less than reasonable doubt. These verdict forms were materially inaccurate. They misled the jury as to its essential role as fact finder of guilt beyond a reasonable doubt. It is the trial court's responsibility to properly instruct the jury as to its duty to determine guilt beyond a reasonable doubt. See e.g., Kelly v. South Carolina, 534 U.S. 246, 256 (2002).

This error was particularly prejudicial in Appellant's case, due to the insufficient evidence of aggravated murder. See Proposition of Law VI. Appellant's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were thereby violated.

Counsel's failure to object to this error constituted ineffective assistance. Counsel's duty to advocate and to use professional skill under Strickland includes the duty to object to errors and to otherwise preserve errors for federal review. Strickland v. Washington, 466 U.S. 668 (1984). See e.g., Gravely v. Mills, 87 F.3d 779, 785 (6th Cir. 1996); Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994).

### Proposition of Law No. XIII

A jury instruction that shifts the burden of proof to the accused is unconstitutional. U.S. Const. amend. XIV; Ohio Const. art. I, §16.

The trial court instruction on the jury's duty at the trial phase shifted the burden of proof to Diar in violation of In re Winship, 397 U.S. 358, 364 (1970). The trial court instructed that it was the jury's duty to decide whether Diar was "guilty or innocent" of the charges. (T.p. 2887-88). This was error. At a criminal trial the State carries the entire burden of proof. An acquittal is not a finding of innocence. Rather, an acquittal means that the State failed to meet its burden of proof on each essential element of the charge. In re Winship, 397 U.S. at 364. There is a "reasonable likelihood" that the trial court's instruction on "innocence" conflated the jurors' understanding of this bedrock principle. See Estelle v. McGuire, 502 U.S. 62, 72 (1991). The jurors were misled by this instruction to deliberate on whether Diar put forward evidence to show her "innocence." The trial court's instruction shifted the burden of proof to Diar in violation of her right to due process.

**Proposition of Law No. XIV**

Appellant Diar's right to due process under the Fourteenth Amendment to the United States Constitution was violated because the jury instructions reduced the State of Ohio's burden to prove beyond a reasonable doubt that Diar purposely caused Jacob Diar's death. U.S. Const. Amend. XIV, Ohio Const. Article 1, §§ 9 and 16.

The amended indictment against Nicole Diar contained ten counts: Count 1, Corrupting Another With Drugs; Count 2, Felonious Assault; Count 3, Murder; Count 4, Aggravated Arson; Count 5, Aggravated Arson; Count 6, Aggravated Murder with Capital Specifications; Count 7, Aggravated Murder with Capital Specifications; Count 8, Tampering with Evidence; Count 9, Felonious Assault; Count 10, Corrupting Another with Drugs.

The aggravated murder counts were contained in counts 6 and 7. Count 6 charged that Nicole Diar did, purposely and with prior calculation and design, cause the death of Jacob Diar, in violation of § 2903.01(A) of the Ohio Revised Code; the specification attached to Count 6 was that the offender purposely caused the death of another who was under thirteen years of age and the offender was the principal offender. Count 7 charged that Nicole Diar, did, purposely cause the death of Jacob Diar who was under the age of thirteen years at the time of the commission of the offense, in violation of § 2903.01(C) of the Ohio Revised Code; the specification attached to Count 7 was that the offender purposely caused the death of another who was under thirteen years of age and the offender was the principal offender.

Diar was charged with aggravated murder under O.R.C. § 2903.01 (A) and (C). To convict, her jury had to find by proof beyond a reasonable doubt that Diar purposely caused Jacob Diar's death. Moreover, when Diar was indicted and tried for aggravated murder, the Ohio Revised Code included as an element of aggravated murder the offender's specific intent to kill the victim.

In this case, the trial court's instructions on purpose relieved the State of Ohio of its burden of proof on the mens rea element of O.R.C. § 2903.01 (A) and (C). On the aggravated murder count, the jury was instructed to find a purposeful killing "regardless" of what Diar intended if Diar engaged in prohibited conduct. The jury was also instructed that Diar purposely caused Jacob's death even if Diar did not foresee a specific injury to any specific person.

At the close of the trial phase, the trial court instructed the jury, in pertinent part, as follows:

In Count 6 of the indictment the defendant, Nicole Diar, is charged with aggravated murder with a specification. Before you can find the defendant guilty of aggravated murder with a specification as charged in Count 6, you must find by proof beyond a reasonable doubt, the State of Ohio has proved all of the essential elements of Count 6, which are:

1. On or about August 27th, 2003;
2. The defendant, Nicole Diar;
3. Did **purposely** and with prior calculation and design, **cause the death** of Jacob Diar;
4. And venue: That it occurred in Lorain County, Ohio

**Purpose to cause the death of another person is an essential element of the crime of aggravated murder.**

The person acts purposely when it is his or her specific intention to cause a certain result.

It must be established in this case that at the time in question there was present in the mind of the defendant a specific intention to cause the death of another person.

**When the essence of the offense is a prohibition against conduct of a certain nature, a person act [sic] purposely if his or her specific intention was to engage in conduct of that nature, regardless of what the person may have intended to accomplish by such conduct.**

Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally. **Purpose and intent mean the same thing.** The purpose with which a person does an act is known only to himself, unless he or she expresses it to others or indicates it by his or her conduct.

The **purpose** with which a person does an act or brings about a result is **determined from** the manner in which it is done, **the means or weapon used**, and all the facts and circumstances in evidence.

Proof of motive is not required. The presence or absence sense [sic] of motive is one of the circumstances bearing upon purpose.

No person may be convicted of aggravated murder unless he or she specifically intended to cause the death of another.

(T.p. 2876-78). The instruction was repeated for Count 7. (T.p. 2880). (emphasis added). The instruction contains a constitutional error on the essential element of purpose.

The Due Process Clause of the Fourteenth Amendment guarantees the criminally accused that the State must prove each essential element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). When Diar was tried, specific intent to kill was an essential element of an Ohio capital offense. See State v. Mapes, 19 Ohio St. 3d 108, 114, 484 N.E.2d 140, 146 (1985), , . See also O.R.C. § 2903.01(A) and (C) (defendant must purposely cause victim's death.) Under Ohio law, "[t]he existence of an accused's purpose to kill must be found by the jury under proper instructions from the trial court and can never be determined by the Court as a matter of law." State v. Scott, 61 Ohio St. 2d 155, 400 N.E.2d 375, syl. para. 4 (1980).

Because the state had to prove the mens rea element of aggravated murder beyond a reasonable doubt, the burden of proof regarding Diar's purpose or intent to kill could not be shifted to her. See Wilbur v. Mulaney, 421 U.S. 684, 698-701 (1975). A jury instruction which relieves the State of its burden of proof regarding the mens rea element of the offense is

unconstitutional. Id. Burden-shifting instructions on the mens rea element of the offense are unconstitutional whether the presumption of the mens rea is conclusive or rebuttable. Francis v. Franklin, 471 U.S. 307, 313, 317-18 (1985); Sandstrom v. Montana, 442 U.S. 510, 517-18, 524 (1979).

Those bedrock constitutional principles were infringed by the trial court’s instructions to Diar’s jury. First, the trial court’s definition of purpose was improper. Ohio law defines “purpose” as follows:

A person acts purposely when it is his specific intention to cause a certain result, **or when the gist of the offense is a prohibition against conduct** of a certain nature, **regardless of what the offender intends to accomplish** thereby, **if it is his specific intention to engage in conduct of that nature.**

O.R.C. § 2901.22(A) (emphasis added.) The definition of “purpose” is written in the alternative: A person acts purposely **either** when he specifically intends to cause a certain result **or** when the “gist of the offense” is prohibited “conduct” of a certain nature.<sup>4</sup> Id. Both definitions should not be given in a capital case as the comment to the Ohio jury instructions makes clear:

COMMENT: Section 3 [conduct definition] will be given in rare cases where conduct is prohibited, e.g., Corruption of a minor, R.C. Section 2907.04. **The trial bench has been giving both Section 2 and Section 3 instructions in “result” situations (aggravated murder) and it is both incorrect and confusing.**

Comment, OJI 409.01 (emphasis added.) Further, the Supreme Court of Ohio has condemned the use of this conduct definition of purpose in capital cases. See State v. Wilson, 74 Ohio St. 3d 381, 392, 659 N.E.2d 292, 305 (Ohio 1996) (citing State v. Carter, 72 Ohio St. 3d 545, 551-52, 651 N.E.2d 965, 973-74 (1995), ).

The trial court should not have given the conduct definition of purpose in this capital case. See id. Its effect was to relieve the State of its burden to prove the mens rea element of

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<sup>4</sup> The court in Diar’s case used the language “essence of the offense.”

aggravated murder. The proper result definition of purpose was completely undermined by the improper conduct definition. See Francis, 471 U.S. at 322 (instruction unconstitutional when correct language contradicts correct language and discrepancy is unexplained). The conduct definition stated that Diar acted purposely if she engaged in prohibited conduct “**regardless of what [she] may have intended to accomplish.**” (emphasis added.) This conduct definition told the jurors that it was unnecessary for them to find the specific purpose to kill in order for them to find Diar guilty of the mens rea element. The state was thereby relieved of its burden to prove Diar’s purpose or her specific intent to kill in violation of the Due Process Clause. See Francis, 471 U.S. at 313; Sandstrom v. Montana, 442 U.S. at 520-23. See also O.R.C. §§ 2903.01(B); 2903.01(D).

A reasonable juror would have understood the instruction on purpose to mean that Nicole Diar was guilty of the mens rea element of aggravated murder if she purposefully engaged in some form of unlawful conduct, i.e. corrupting another with drugs, felonious assault, and arson. A reasonable juror, taking these instructions as a whole, would not have understood that Diar could have been guilty of the mens rea element of aggravated murder only if she fatally injured Jacob Diar with a purpose to cause the specific result of Jacob’s death. See id. The instruction created an impermissible conduct definition of the essential element of purpose under O.R.C. § 2901.22(A). This conduct definition relieved the state of its burden of proof as to this essential element.

The jury was bound to understand Diar’s intent in accordance with the conduct definition of purpose. “Purpose” was defined for the jury and it was incorrectly defined by the conduct definition in O.R.C. § 2901.22(A). Conversely, “intent” was not defined for the jury. Moreover, the trial court never told the jury to give words like “intent” their common and ordinary meaning

in the absence of a specific definition from the court. See id. Rather, the jury was instructed that “[p]urpose and intent mean the same thing.”

Based on these instructions, the jury had to ignore its common and ordinary understanding to the word “intent.” This is so because the jury was instructed that purpose and intent were synonymous, and because purpose was defined but intent was not. Further, it must be presumed that Diar’s jury followed the instructions of the trial court as they were given. See Zafino v. United States, 506 U.S. 534, 540 (1993); State v. Henderson, 39 Ohio St. 3d 24, 528 N.E.2d 1237, 1246 (Ohio 1988) (citing Parker v. Randolph, 442 U.S. 62 (1979)).

Thus, the erroneous definition of purpose was necessarily incorporated into the jury’s understanding of the word “intent”. The jury was told that a “person **acts purposely . . . regardless of what the person may have intended** to accomplish [if he commits a prohibited act].” In this context, the jury was instructed that intent meant purpose, and by the definition of purpose, intent was irrelevant once Diar engaged in prohibited conduct.

When the instructions are taken as a whole, a reasonable juror would have believed that Nicole Diar could be guilty of aggravated murder if she purposely engaged in any illegal conduct that somehow led to Jacob Diar’s death.

Diar’s jury should have been given unambiguous guidance that a guilty verdict of aggravated murder necessitated a finding, beyond a reasonable doubt, that Diar specifically intended to cause the certain result of Jacob’s death. O.R.C. § 2901.22(A); OJI 409.01 (comment). Diar was prejudiced by the improper instruction on purpose.

### **Proposition of Law No. XV**

Ohio's death penalty law is unconstitutional. Ohio Rev. Code Ann. §§ 2903.01, O.R.C. § 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to Nicole Diar. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 2, 9, 10, and 16. Further, Ohio's death penalty statute violates the United States' obligations under international law.

The Eighth Amendment to the United States Constitution and Article I, § 9 of the Ohio Constitution prohibit the infliction of cruel and unusual punishment. The Eighth Amendment's protections are applicable to the states through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660 (1962). Punishment that is "excessive" constitutes cruel and unusual punishment. Coker v. Georgia, 433 U.S. 584 (1977). The underlying principle of governmental respect for human dignity is the Court's guideline to determine whether this statute is constitutional. See Furman v. Georgia, 408 U.S. 238 (1972) (Brennan, J., concurring); Rhodes v. Chapman, 452 U.S. 337, 361 (1981); Trop v. Dulles, 356 U.S. 86 (1958). The Ohio scheme offends this bedrock principle in the following ways:

#### **1. Arbitrary and unequal punishment.**

The Fourteenth Amendment's guarantee of equal protection requires similar treatment of similarly situated persons. This right extends to the protection against cruel and unusual punishment. Furman, 408 U.S. at 249 (Douglas, J., concurring). A death penalty imposed in violation of the Equal Protection guarantee is a cruel and unusual punishment. See id. Any arbitrary use of the death penalty also offends the Eighth Amendment. Id.

Ohio's capital punishment scheme allows the death penalty to be imposed in an arbitrary and discriminatory manner in violation of Furman and its progeny. Prosecutors' virtually uncontrolled indictment discretion allows arbitrary and discriminatory imposition of the death

penalty. Mandatory death penalty statutes were deemed fatally flawed because they lacked standards for imposition of a death sentence and were therefore removed from judicial review. Woodson v. North Carolina, 428 U.S. 280 (1976). Prosecutors' uncontrolled discretion violates this requirement.

Ohio's system imposes death in a racially discriminatory manner. Blacks and those who kill white victims are much more likely to get the death penalty. While African-Americans are less than twenty percent of Ohio's population, forty-nine percent (49%) of Ohio's death row inmates are African-American. See Ohio Public Defender Commission Report, 1999; see also The Report of the Ohio Commission on Racial Fairness, 1999. While few Caucasians are sentenced to death for killing African-Americans, over forty African-Americans sit on Ohio's death row for killing a Caucasian. Id. Ohio's statistical disparity is tragically consistent with national findings. The General Accounting Office found victim's race influential at all stages, with stronger evidence involving prosecutorial discretion in charging and trying cases. "Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities," U.S. General Accounting Office, Report to Senate and House Committees on the Judiciary (February 1990).

Ohio courts have not evaluated the implications of these racial disparities. While the General Assembly established a disparity appeals practice in post-conviction that may encourage the Ohio Supreme Court to adopt a rule requiring tracking the offender's race, O.R.C. § 2953.21(A)(2), no rule has been adopted. Further, this practice does not track the victim's race and does not apply to crimes committed before July 1, 1996. In short, Ohio law fails to assure against race discrimination playing a role in capital sentencing.

Due process prohibits the taking of life unless the state can show a legitimate and compelling state interest. Commonwealth v. O'Neal II, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro,

C.J., concurring); Utah v. Pierre, 572 P.2d 1338 (Utah 1977) (Maughan, J., concurring and dissenting). Moreover, where fundamental rights are involved personal liberties cannot be broadly stifled "when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479 (1960). To take a life by mandate, the State must show that it is the "least restrictive means" to a "compelling governmental end." O'Neal, 339 N.E.2d at 678.

The death penalty is neither the least restrictive nor an effective means of deterrence. Both isolation of the offender and retribution can be effectively served by less restrictive means. Society's interests do not justify the death penalty.

## **2. Unreliable sentencing procedures.**

The Due Process and Equal Protection Clauses prohibit arbitrary and capricious procedures in the State's application of capital punishment. Gregg v. Georgia, 428 U.S. 153, 188, 193-95 (1976); Furman, 408 U.S. at 255, 274. Ohio's scheme does not meet those requirements. The statute does not require the State to prove the absence of any mitigating factors or that death is the only appropriate penalty.

The statutory scheme is unconstitutionally vague which leads to the arbitrary imposition of the death penalty. The language "that the aggravating circumstances ... outweigh the mitigating factors" invites arbitrary and capricious jury decisions. "Outweigh" preserves reliance on the lesser standard of proof by a preponderance of the evidence. The statute requires only that the sentencing body be convinced beyond a reasonable doubt that the aggravating circumstances were marginally greater than the mitigating factors. This creates an unacceptable risk of arbitrary or capricious sentencing.

Additionally, the mitigating circumstances are vague. The jury must be given "specific and detailed guidance" and be provided with "clear and objective standards" for their sentencing discretion to be adequately channeled. Gregg; Godfrey v. Georgia, 446 U.S. 420 (1980).

Ohio courts continually hold that the weighing process and the weight to be assigned to a given factor is within the individual decision-maker's discretion. State v. Fox, 69 Ohio St. 3d 183, 193, 631 N.E.2d 124, 132 (1994). Giving so much discretion to juries inevitably leads to arbitrary and capricious judgments. The Ohio open discretion scheme further risks that constitutionally relevant mitigating factors that must be considered as mitigating [youth or childhood abuse (Eddings v. Oklahoma, 455 U.S. 104 (1982)), mental disease or defect (Penry v. Lynaugh, 492 U.S. 302 (1989)), level of involvement in the crime (Enmund v. Florida, 458 U.S. 782 (1982)), or lack of criminal history (Delo v. Lashley, 507 U.S. 272 (1993))] will not be factored into the sentencer's decision. While the federal constitution may allow states to shape consideration of mitigation, see Johnson v. Texas, 509 U.S. 350 (1993), Ohio's capital scheme fails to provide adequate guidelines to sentencers, and fails to assure against arbitrary, capricious, and discriminatory results.

Empirical evidence is developing in Ohio and around the country that, under commonly used penalty phase jury instructions, juries do not understand their responsibilities and apply inaccurate standards for decision. See Cho, Capital Confusion: The Effect of Jury Instructions on the Decision To Impose Death, 85 J. Crim. L. & Criminology 532, 549-557 (1994), and findings of Zeisel discussed in Free v. Peters, 12 F.3d 700 (7th Cir. 1993). This confusion violates the federal and state constitutions. Because of these deficiencies, Ohio's statutory scheme does not meet the requirements of Furman and its progeny.

**3. Defendant's right to a jury is burdened.**

The Ohio scheme is unconstitutional because it imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial. A defendant who pleads guilty or no contest benefits from a trial judge's discretion to dismiss the specifications "in the interest of justice." Ohio R. Crim. P. 11(C)(3). Accordingly, the capital indictment may be dismissed regardless of mitigating circumstances. There is no corresponding provision for a capital defendant who elects to proceed to trial before a jury.

Justice Blackmun found this discrepancy to be constitutional error. Lockett v. Ohio, 438 U.S. 586, 617 (1978) (Blackmun, J., concurring). This disparity violated United States v. Jackson, 390 U.S. 570 (1968), and needlessly burdened the defendant's exercise of his right to a trial by jury. Since Lockett, this infirmity has not been cured and Ohio's statute remains unconstitutional.

**4. Mandatory submission of reports and evaluations.**

Ohio's capital statutes are unconstitutional because they require submission of the pre-sentence investigation report and the mental evaluation to the jury or judge once requested by a capital defendant. O.R.C. § 2929.03(D)(1). This mandatory submission prevents defense counsel from giving effective assistance and prevents the defendant from effectively presenting his case in mitigation.

**5. O.R.C. § 2929.04(A)(7) is constitutionally invalid when used to aggravate O.R.C. § 2903.01(B) aggravated murder.**

"[T]o avoid [the] constitutional flaw of vagueness and over breadth under the Eighth Amendment, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence of a defendant as compared to others found guilty of (aggravated) murder." Zant v. Stephens, 462

U.S. 862, 877 (1983). Ohio's statutory scheme fails to meet this constitutional requirement because O.R.C. § 2929.04(A)(7) fails to genuinely narrow the class of individuals eligible for the death penalty.

O.R.C. § 2903.01(B) defines the category of felony-murderers. If any factor listed in O.R.C. § 2929.04(A) is specified in the indictment and proved beyond a reasonable doubt the defendant becomes eligible for the death penalty. O.R.C. §§ 2929.02(A) and 2929.03.

The scheme is unconstitutional because the O.R.C. § 2929.04(A)(7) aggravating circumstance merely repeats, as an aggravating circumstance, factors that distinguish aggravated felony-murder from murder. O.R.C. § 2929.04(A)(7) repeats the definition of felony-murder as alleged, which automatically qualifies the defendant for the death penalty. O.R.C. § 2929.04(A)(7) does not reasonably justify the imposition of a more severe sentence on felony-murderers. But, the prosecuting attorney and the sentencing body are given unbounded discretion that maximizes the risk of arbitrary and capricious action and deprivation of a defendant's life without substantial justification. The aggravating circumstance must therefore fail. Zant, 462 U.S. at 877.

As compared to other aggravated murderers, the felony-murderer is treated more severely. Each O.R.C. § 2929.04(A) circumstance, when used in connection with O.R.C. § 2903.01(A), adds an additional measure of culpability to an offender such that society arguably should be permitted to punish him more severely with death. But the aggravated murder defendant alleged to have killed during the course of a felony is automatically eligible for the death penalty--not a single additional proof of fact is necessary.

The killer who kills with prior calculation and design is treated less severely, which is also nonsensical because his blameworthiness or moral guilt is higher, and the argued ability to

deter him less. From a retributive stance, this is the most culpable of mental states. Comment, The Constitutionality of Imposing the Death Penalty for Felony Murder, 15 Hous. L. Rev. 356, 375 (1978).

Felony-murder also fails to reasonably justify the death sentence because this Court has interpreted O.R.C. § 2929.04(A)(7) as not requiring that intent to commit a felony precede the murder. State v. Williams, 74 Ohio St. 3d 569, 660 N.E.2d 724, syl. 2 (1996). The asserted state interest in treating felony-murder as deserving of greater punishment is to deter the commission of felonies in which individuals may die. Generally courts have required that the killing result from an act done in furtherance of the felonious purpose. Id., referencing the Model Penal Code. Without such a limitation, no state interest justifies a stiffer punishment. This Court has discarded the only arguable reasonable justification for the death sentence to be imposed on such individuals, a position that engenders constitutional violations. Zant v. Stephens, 462 U.S. 862 (1983). Further, this Court's current position is inconsistent with previous cases, thus creating the likelihood of arbitrary and inconsistent applications of the death penalty. See e.g., State v. Rojas, 64 Ohio St. 3d 131, 592 N.E.2d 1376 (1992).

Equal protection of the law requires that legislative classifications be supported by, at least, a reasonable relationship to legitimate State interests. Skinner v. Oklahoma, 316 U.S. 535 (1942). The State has arbitrarily selected one class of murderers who may be subjected to the death penalty automatically. This statutory scheme is inconsistent with the purported State interests. The most brutal, cold-blooded and premeditated murderers do not fall within the types of murder that are automatically eligible for the death penalty. There is no rational basis or any State interest for this distinction and its application is arbitrary and capricious.

6. **O.R.C. §§ 2929.03 (D)(1) and 2929.04 are unconstitutionally vague.**

O.R.C. § 2929.03(D)(1)'s reference to "the nature and circumstances of the aggravating circumstance" incorporates the nature and circumstances of the offense into the factors to be weighed in favor of death. The nature and circumstances of an offense are, however, statutory mitigating factors under O.R.C. § 2929.04 (B). O.R.C. § 2929.03(D)(1) makes Ohio's death penalty weighing scheme unconstitutionally vague because it gives the sentencer unfettered discretion to weigh a statutory mitigating factor as an aggravator.

To avoid arbitrariness in capital sentencing, states must limit and channel the sentencer's discretion with clear and specific guidance. Lewis v. Jeffers, 497 U.S. 764, 774 (1990); Maynard v. Cartwright, 486 U.S. 356, 362 (1988). A vague aggravating circumstance fails to give that guidance. Walton v. Arizona, 497 U.S. 639, 653 (1990), Godfrey, 446 U.S. at 428. Moreover, a vague aggravating circumstance is unconstitutional whether it is an eligibility or a selection factor. Tuilaepa v. California, 512 U.S. 967 (1994). The aggravating circumstances in O.R.C. § 2929.04(A)(1)-(8) are both.

O.R.C. § 2929.04(B) tells the sentencer that the nature and circumstances of the offense are selection factors in mitigation. Moreover, because the nature and circumstances of the offense are listed only in O.R.C. § 2929.04(B), they must be weighed only as selection factors in mitigation. See State v. Wogenstahl, 75 Ohio St. 3d 344, 356, 662 N.E.2d 311, 321-22 (1996). However, the clarity and specificity of O.R.C. § 2929.04(B) is eviscerated by O.R.C. § 2929.03(D)(1); selection factors that are strictly mitigating become part and parcel of the aggravating circumstance.

Despite wide latitude, Ohio has carefully circumscribed its selection factors into mutually exclusive categories. See O.R.C. § 2929.04(A) and (B); Wogenstahl, 75 Ohio St. 3d at 356, 662

N.E.2d at 321-22. O.R.C. § 2929.03(D)(1) makes O.R.C. § 2929.04(B) vague because it incorporates the nature and circumstances of an offense into the aggravating circumstances. The sentencer cannot reconcile this incorporation. As a result of O.R.C. § 2929.03(D)(1), the “nature and circumstances” of any offense become “too vague” to guide the jury in its weighing or selection process. See Walton, 497 U.S. at 654. O.R.C. § 2929.03(D)(1) therefore makes O.R.C. § 2929.04(B) unconstitutionally arbitrary.

O.R.C. § 2929.03(D)(1) is also unconstitutional on its face because it makes the selection factors in aggravation in O.R.C. § 2929.04(A)(1)-(8) “too vague.” See Walton, 497 U.S. at 654. O.R.C. § 2929.04(A)(1)-(8) gives clear guidance as to the selection factors that may be weighed against the defendant’s mitigation. However, O.R.C. § 2929.03(D)(1) eviscerates the narrowing achieved. By referring to the “nature and circumstances of the aggravating circumstance,” O.R.C. § 2929.03(D)(1) gives the sentencer “open-ended discretion” to impose the death penalty. See Maynard, 486 U.S. at 362. That reference allows the sentencer to impose death based on (A)(1)-(8) plus any other fact in evidence arising from the nature and circumstances of the offense that the sentencer considers aggravating. This eliminates the guided discretion provided by O.R.C. § 2929.04(A). See Stringer v. Black, 503 U.S. 222, 232 (1992) . at 232.

#### **7. Proportionality and appropriateness review.**

Ohio Revised Code §§ 2929.021 and 2929.03 require data be reported to the courts of appeals and to the Supreme Court of Ohio. There are substantial doubts as to the adequacy of the information received after guilty pleas to lesser offenses or after charge reductions at trial. O.R.C. § 2929.021 requires only minimal information on these cases. Additional data is necessary to make an adequate comparison in these cases. This prohibits adequate appellate review.

Adequate appellate review is a precondition to the constitutionality of a state death penalty system. Zant, 462 U.S. at 879; Pulley v. Harris, 465 U.S. 37 (1984). The standard for review is one of careful scrutiny. Zant, 462 U.S. at 884-85. Review must be based on a comparison of similar cases and ultimately must focus on the character of the individual and the circumstances of the crime. Id.

Ohio's statutes' failure to require the jury or three-judge panel recommending life imprisonment to identify the mitigating factors undercuts adequate appellate review. Without this information, no significant comparison of cases is possible. Without a significant comparison of cases, there can be no meaningful appellate review. See State v. Murphy, 91 Ohio St. 3d 516, 562, 747 N.E.2d 765, 813 (2001) (Pfeifer, J., dissenting) ("When we compare a case in which the death penalty was imposed only to other cases in which the death penalty was imposed, we continually lower the bar of proportionality. The lowest common denominator becomes the standard.")

The comparison method is also constitutionally flawed. Review of cases where the death penalty was imposed satisfies the proportionality review required by O.R.C. § 2929.05(A). State v. Steffen, 31 Ohio St. 3d 111, 509 N.E.2d 383, syl. 1 (1987). However, this prevents a fair proportionality review. There is no meaningful manner to distinguish capital defendants who deserve the death penalty from those who do not.

This Court's appropriateness analysis is also constitutionally infirm. O.R.C. § 2929.05(A) requires appellate courts to determine the appropriateness of the death penalty in each case. The statute directs affirmance only where the court is persuaded that the aggravating circumstances outweigh the mitigating factors and that death is the appropriate sentence. Id. This Court has not followed these dictates. The appropriateness review conducted is very cursory. It does not

"rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano v. Florida, 468 U.S. 447, 460 (1984).

The cursory appropriateness review also violates the capital defendant's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The General Assembly provided capital appellants with the statutory right of proportionality review. When a state acts with significant discretion, it must act in accordance with the Due Process Clause. Evitts v. Lucey, 469 U.S. 387, 401 (1985). The review currently used violates this constitutional mandate. An insufficient proportionality review violates Diar's due process, liberty interest in O.R.C. § 2929.05.

**8. Lethal injection is cruel and unusual punishment.**

Ohio Revised Code § 2949.22(B)(1) provides that death by lethal injection "shall be executed by causing the application to the person of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death[.]" This mode of punishment offends contemporary standards of decency. Trop v. Dulles, 356 U.S. 86, 101 (1958). It also violates the United States' obligations under the International Convention on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT). Lethal injection causes unnecessary pain. See Marian J. Borg and Michael Radelet, Botched Lethal Injections, 53 Capital Report, March/April 1998; Kathy Sawyer, Protracted Execution In Texas Draws Criticism; Lethal Injection Delayed by Search for Vein, Washington Post, March 14, 1985; Killer Lends a Hand to Find Vein for Execution, LA Times, August 20, 1986; Killer's Drug Abuse Complicates Execution, Chicago Tribune, April 24, 1992; Murderer Executed After a Leaky Lethal Injection, New York Times, December 14, 1988; Rector's Time Came, Painfully Late, Arkansas Democrat Gazette, January 26, 1992; Moans

Pierced Silence During Wait, Arkansas Democrat Gazette, January 26, 1992; Gacy Lawyers Blast Method: Lethal Injections Under Fire After Equipment Malfunction, Chicago Sun-times, May 11, 1994; Lou Ortiz and Scott Fornek Witnesses Describe Killer's 'Macabre' Final Few Moments, Chicago Sun-Times, May 11, 1994; Cf. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (Eighth Amendment proscribes "the unnecessary and wanton infliction of pain.")

Prisoners have been repeatedly stuck with a needle for almost an hour in an effort to find a vein suitable for use. Marian J. Borg and Michael Radelet, Botched Lethal Injections, 53 Capital Report, March/April 1998; Murderer of Three Women is Executed in Texas, NY Times, March 14, 1985; Kathy Sawyer, Protracted Execution in Texas Draws Criticism; Lethal Injection Delayed by Search for Vein, Washington Post, March 14, 1985; Killer's Drug Abuse Complicates Execution, Chicago Tribune, April 24, 1992; Rector's Time Came, Painfully Late, Arkansas Democrat Gazette, January 26, 1992. Prisoners have actually had to assist technicians in finding a vein suitable to use. Killer Lends a Hand to Find Vein for Execution, LA Times, August 20, 1986; Moans Pierced Silence During Wait, Arkansas Democrat Gazette, January 26, 1992. Equipment failures are not uncommon. Murderer Executed After a Leaky Lethal Injection, New York Times, December 14, 1988; Marian J. Borg and Michael Radelet, Botched Lethal Injections, 53 Capital Report, March/April 1998. Gasping and choking from the prisoner is not uncommon. Marian J. Borg and Michael Radelet, Botched Lethal Injections, 53 Capital Report, March/April 1998. Because the prisoner is restrained and paralyzed there may be no reaction to the pain felt, but death by lethal injection is not painless. Rather, it is cruel and unusual punishment prohibited under the Eighth Amendment to the United States Constitution, the ICCPR, and the CAT.

## **9. Ohio's statutory death penalty scheme violates international law.**

International law binds each of the states that comprise the United States. Ohio is bound by international law whether found in treaty or in custom. Because the Ohio death penalty scheme violates international law, Diar's capital convictions and sentences cannot stand.

### **9.1 International law binds the State of Ohio.**

"International law is a part of our law[.]" The Paquete Habana, 175 U.S. 677, 700 (1900). A treaty made by the United States is the supreme law of the land. Article VI, United States Constitution. Where state law conflicts with international law, it is the state law that must yield. See Zschernig v. Miller, 389 U.S. 429, 440 (1968); Clark v. Allen, 331 U.S. 503, 508 (1947); United States v. Pink, 315 U.S. 203, 230 (1942); Kansas v. Colorado, 206 U.S. 46, 48 (1907); The Paquete Habana, 175 U.S. at 700; The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815); Asakura v. Seattle, 265 U.S. 332, 341 (1924). In fact, international law creates remediable rights for United States citizens. Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987).

### **9.2 Ohio's obligations under international charters, treaties, and conventions.**

The United States' membership and participation in the United Nations (U.N.) and the Organization of American States (OAS) creates obligations in all fifty states. Through the U.N. Charter, the United States committed itself to promote and encourage respect for human rights and fundamental freedoms. Art. 1(3). The United States bound itself to promote human rights in cooperation with the United Nations. Art. 55-56. The United States again proclaimed the fundamental rights of the individual when it became a member of the OAS. OAS Charter, Art. 3.

The U.N. has sought to achieve its goal of promoting human rights and fundamental freedoms through the creation of numerous treaties and conventions. The United States has ratified several of these including: the International Covenant on Civil and Political Rights (ICCPR) ratified in 1992, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ratified in 1994, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) ratified in 1994. Ratification of these treaties by the United States expressed its willingness to be bound by these treaties. Pursuant to the Supremacy Clause, the ICCPR, the ICERD, and the CAT are the supreme laws of the land. As such, the United States must fulfill the obligations incurred through ratification. President Clinton recently reiterated the United States' need to fulfill its obligations under these conventions when he issued Executive Order 13107. In pertinent part, the Executive Order states:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and bearing in mind the obligations of the United States pursuant to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination on All Forms of Racial Discrimination (CERD), and other relevant treaties concerned with the protection and promotion of human rights to which the United States is now or may become a party in the future, it is hereby ordered as follows:

**Section 1. Implementation of Human Rights Obligations.**

(a) It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.

Ohio is not fulfilling the United States' obligations under these conventions. Rather, Ohio's death penalty scheme violates each convention's requirements and thus must yield to the requirements of international law. (See discussion infra Subsection 1).

### **9.2.1 Ohio's statutory scheme violates the ICCPR's and ICERD's guarantees of equal protection and due process.**

Both the ICCPR, ratified in 1992, and the ICERD, ratified in 1994, guarantee equal protection of the law. ICCPR Art. 2(1), 3, 14, 26; ICERD Art. 5(a). The ICCPR further guarantees due process via Articles 9 and 14, which includes numerous considerations: a fair hearing (Art. 14(1)), an independent and impartial tribunal (Art. 14(1)), the presumption of innocence (Art. 14(2)), adequate time and facilities for the preparation of a defense (Art. 14(3)(a)), legal assistance (Art. 14(3)(d)), the opportunity to call and question witnesses (Art. 14(3)(e)), the protection against self-incrimination (Art. 14(3)(g)), and the protection against double jeopardy (Art. 14(7)). However, Ohio's statutory scheme fails to provide equal protection and due process to capital defendants as contemplated by the ICCPR and the ICERD.

Ohio's statutory scheme denies equal protection and due process in several ways. It allows for arbitrary and unequal treatment in punishment. (See discussion infra § 1). Ohio's sentencing procedures are unreliable. (See discussion infra § 2). Ohio's statutory scheme fails to provide individualized sentencing. (See discussion infra § 1, 2). Ohio's statutory scheme burdens a defendant's right to a jury. (See discussion infra § 3). Ohio's requirement of mandatory submission of reports and evaluations precludes effective assistance of counsel. (See discussion infra § 4). O.R.C. § 2929.04(B)(7) arbitrarily selects certain defendants who may be automatically eligible for death upon conviction. (See discussion infra § 5). Ohio's proportionality and appropriateness review is wholly inadequate. (See discussion infra § 7). As a result, Ohio's statutory scheme violates the ICCPR's and the ICERD's guarantees of equal

protection and due process. This is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

### **9.2.2 Ohio's statutory scheme violates the ICCPR's protection against arbitrary execution.**

The ICCPR speaks explicitly to the use of the death penalty. The ICCPR guarantees the right to life and provides that there shall be no arbitrary deprivation of life. Art. 6(1). It allows the imposition of the death penalty only for the most serious offenses. Art. 6(2). Juveniles and pregnant women are protected from the death penalty. Art. 6(5). Moreover, the ICCPR contemplates the abolition of the death penalty. Art. 6(6).

However, several aspects of Ohio's statutory scheme allow for the arbitrary deprivation of life. Punishment is arbitrary and unequal. (See discussion infra § 1). Ohio's sentencing procedures are unreliable. (See discussion infra § 2). Ohio's statutory scheme lacks individualized sentencing. (See discussion infra § 1, 2). The (A)(7) aggravator maximizes the risk of arbitrary and capricious action by singling one class of murders who may be eligible automatically for the death penalty. (See discussion infra § 5). The vagueness of O.R.C. §§ 2929.03(D)(1) and 2929.04 similarly render sentencing arbitrary and unreliable. (See discussion infra § 6). Ohio's proportionality and appropriateness review fails to distinguish those who deserve death from those who do not. (See discussion infra § 7). As a result, executions in Ohio result in the arbitrary deprivation of life and thus violate the ICCPR's death penalty protections. This is a direct violation of international law and a violation of the Supremacy Clause of the United States Constitution.

**9.2.3 Ohio's statutory scheme violates the ICERD's protections against race discrimination.**

The ICERD, speaking to racial discrimination, requires that each state take affirmative steps to end race discrimination at all levels. Art. 2. It requires specific action and does not allow states to sit idly by when confronted with practices that are racially discriminatory. However, Ohio's statutory scheme imposes the death penalty in a racially discriminatory manner. (See discussion *infra* § 1). A scheme that sentences blacks and those who kill white victims more frequently and which disproportionately places African-Americans on death row is in clear violation of the ICERD. Ohio's failure to rectify this discrimination is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

**9.2.4 Ohio's statutory scheme violates the ICCPR's and the CAT's prohibitions against cruel, inhuman or degrading punishment.**

The ICCPR prohibits subjecting any person to torture or to cruel, inhuman or degrading treatment or punishment. Art. 7. Similarly, the CAT requires that states take action to prevent torture, which includes any act by which severe mental or physical pain is intentionally inflicted on a person for the purpose of punishing him for an act committed. See Art. 1-2. As administered, Ohio's death penalty inflicts unnecessary pain and suffering, see discussion *infra* § I, in violation of both the ICCPR and the CAT. Thus, there is a violation of international law and the Supremacy Clause of the United States Constitution.

**9.2.5 Ohio's obligations under the ICCPR, the ICERD, and the CAT are not limited by the reservations and conditions placed on these conventions by the Senate.**

While conditions, reservations, and understandings accompanied the United States' ratification of the ICCPR, the ICERD, and the CAT, those conditions, reservations, and understandings cannot stand for two reasons. Article II, § 2 of the United States Constitution provides for the advice and consent of two-thirds of the Senate when a treaty is adopted.

However, the United States Constitution makes no provision for the Senate to modify, condition, or make reservations to treaties. The Senate is not given the power to determine what aspects of a treaty the United States will and will not follow. Their role is to simply advise and consent.

Thus, the Senate's inclusion of conditions and reservations in treaties goes beyond that role of advice and consent. The Senate picks and chooses which items of a treaty will bind the United States and which will not. This is the equivalent of the line-item veto, which is unconstitutional. Clinton v. City of New York, 524 U.S. 417, 438 (1998). The United States Supreme Court specifically spoke to the enumeration of the president's powers in the Constitution in finding that the president did not possess the power to issue line item vetoes. Id. If it is not listed, then the President lacks the power to do it. See id. Similarly, the Constitution does not give the power to the Senate to make conditions and reservations, picking and choosing what aspects of a treaty will become law. Thus the Senate lacks the power to do just that. Therefore, any conditions or reservations made by the Senate are unconstitutional. See id.

The Vienna Convention on the Law of Treaties further restricts the Senate's imposition of reservations. It allows reservations unless: they are prohibited by the treaty, the treaty provides that only specified reservations, not including the reservation in question, may be made, or the reservation is incompatible with the object and purpose of the treaty. Art. 19(a)-(c). The ICCPR specifically precludes derogation of Articles 6-8, 11, 15-16, and 18. Pursuant to the Vienna Convention, the United States' reservations to these articles are invalid under the language of the treaty. See id. Further, it is the purpose of the ICCPR to protect the right to life and any reservation inconsistent with that purpose violates the Vienna Convention. Thus, United States reservations cannot stand under the Vienna Convention as well.

**9.2.6 Ohio's obligations under the ICCPR are not limited by the Senate's declaration that it is not self-executing.**

The Senate indicated that the ICCPR is not self-executing. However, the question of whether a treaty is self-executing is left to the judiciary. Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985) (citing Restatement (Second) of Foreign Relations Law of the United States, Sec. 154(1) (1965)). It is the function of the courts to say what the law is. See Marbury v. Madison, 5 U.S. 137 (1803).

Further, requiring the passage of legislation to implement a treaty necessarily implicates the participation of the House of Representatives. By requiring legislation to implement a treaty, the House can effectively veto a treaty by refusing to pass the necessary legislation. However, Article II, § 2 excludes the House of Representatives from the treaty process. Therefore, declaring a treaty to be not self-executing gives power to the House of Representatives not contemplated by the United States Constitution. Thus, any declaration that a treaty is not self-executing is unconstitutional. See Clinton, 524 U.S. at 438.

**9.3 Ohio's obligations under customary international law.**

International law is not merely discerned in treaties, conventions and covenants. International law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law." United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820). Regardless of the source "international law is a part of our law[.]" The Paquete Habana, 75 U.S. at 700.

The judiciary and commentators recognize the Universal Declaration of Human Rights (DHR) as binding international law. The DHR "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the

international community.” Filartiga, 630 F.2d at 883 (internal citations omitted); see also William A. Schabas, The Death Penalty as Cruel Treatment and Torture (1996).

The DHR guarantees equal protection and due process (Art. 1, 2, 7, 11), recognizes the right to life (Art. 3), prohibits the use of torture or cruel, inhuman or degrading punishment (Art. 5) and is largely reminiscent of the ICCPR. Each of the guarantees found in the DHR are violated by Ohio’s statutory scheme. (See discussion infra §§ 1-8). Thus, Ohio’s statutory scheme violates customary international law as codified in the DHR and cannot stand.

However, the DHR is not alone in its codification of customary international law. Smith directs courts to look to “the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law” in ascertaining international law. 18 U.S. (5 Wheat.) at 160-61. Ohio should be cognizant of the fact that its statutory scheme violates numerous declarations and conventions drafted and adopted by the United Nations and the OAS, which may, because of the sheer number of countries that subscribe to them, codify customary international law. See id. Included among these are:

1. The American Convention on Human Rights, drafted by the OAS and entered into force in 1978. It provides numerous human rights guarantees, including: equal protection (Art. 1, 24), the right to life, (Art. 4(1)), prohibition against arbitrary deprivation of life (Art. 4(1)), imposition of the death penalty only for the most serious crimes (Art. 4(2)), no re-establishment of the death penalty once abolished (Art. 4(3)), prohibits torture, cruel, inhuman or degrading punishment (Art. 5(2)), and guarantees the right to a fair trial (Art. 8).

2. The United Nations Declaration on the Elimination of All Forms of Racial Discrimination proclaimed by U.N. General Assembly resolution 1904 (XVIII) in 1963. It

prohibits racial discrimination and requires that states take affirmative action in ending racial discrimination.

3. The American Declaration of the Rights and Duties of Man adopted by the Ninth International Conference of American States in 1948. It includes numerous human rights guarantees: the right to life (Art. 1), equality before the law (Art. 2), the right to a fair trial (Art. 16), and due process (Art. 26).

4. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the U.N. General Assembly in Resolution 3452 (XXX) in 1975. It prohibits torture, defined to include severe mental or physical pain intentionally inflicted by or at the instigation of a public official for a purpose including punishing him for an act he has committed, and requires that the states take action to prevent such actions. Art. 1, 4.

5. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty adopted by the U.N. Economic and Social Council in Resolution 1984/50 in 1984. It provides numerous protections to those facing the death penalty, including: permitting capital punishment for only the most serious crimes, with the scope not going beyond intentional crimes with lethal or other extremely grave consequences (1), requiring that guilt be proved so as to leave no room for an alternative explanation of the facts (4), due process, and the carrying out of the death penalty so as to inflict the minimum possible suffering (9).

6. The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, adopted and proclaimed by the U.N. General Assembly in Resolution 44/128 in 1989. This prohibits execution (Art. 1(1)) and requires that states abolish the death penalty (Art. 1(2)).

These documents are drafted by the people Smith contemplates and are subscribed to by a substantial segment of the world. As such they are binding on the United States as customary international law. A comparison of the §§ 1-9 clearly demonstrates that Ohio's statutory scheme is in violation of customary international law.

#### **10. Conclusion.**

Ohio's death penalty scheme fails to ensure that arbitrary and discriminatory imposition of the death penalty will not occur. The procedures actually promote the imposition of the death penalty and, thus, are constitutionally intolerable. Ohio Revised Code §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution and international law. Diar's death sentence must be vacated.<sup>5</sup>

---

<sup>5</sup> In State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), this Court upheld this death penalty statute and this Court may, therefore, reject this claim on its merits if it disagrees with Appellant's federal constitutional arguments. State v. Poindexter, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988).

## CONCLUSION

For each of the foregoing reasons, this Court must reverse Nicole Diar's convictions and remand for a new trial. Alternatively, her death sentence must be vacated and her case remanded for a new penalty phase hearing.

Respectfully submitted,

DAVID H. BODIKER  
Ohio Public Defender



LINDA E. PRUCHA - 0040689  
Assistant State Public Defender  
Counsel of Record

T. KENNETH LEE - 0065158  
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(614) 466-5394  
(614) 644-9972 (Fax)

COUNSEL FOR NICOLE DIAR

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing MERIT BRIEF OF APPELLANT NICOLE DIAR was forwarded by regular U.S. Mail to Dennis P. Will, Prosecuting Attorney, and Anthony Cillo, Assistant Prosecuting Attorney, Lorain County, 3rd Floor, Justice Center, 225 Court Street, Elyria, Ohio 44035, on this 16th day of January, 2007.

  
LINDA E. PRUCHA

COUNSEL FOR NICOLE DIAR

249030

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, :  
 :  
 -vs- : Case No. 2005-2264  
 :  
 NICOLE DIAR, :  
 :  
 Defendant-Appellant. : **DEATH PENALTY CASE**

---

ON APPEAL FROM THE COURT OF  
APPEALS OF LORAIN COUNTY, CASE NO. 04CR065248

---

**APPENDIX TO MERIT BRIEF OF APPELLANT NICOLE DIAR**

---

	DAVID H. BODIKER Ohio Public Defender
	LINDA E. PRUCHA - 0040689 Assistant State Public Defender Counsel of Record
DENNIS P. WILL - 0038129 Lorain County Prosecuting Attorney	T. KENNETH LEE - 0065158 Assistant State Public Defender
ANTHONY CILLO - 0062497 Assistant Prosecuting Attorney Counsel of Record	JUSTIN C. THOMPSON – 0078817 Assistant State Public Defender
Lorain County 3rd Floor, Justice Center 225 Court Street Elyria, Ohio 44035 (440) 329-5389 (440) 323-1015 (Fax)	Office of the Ohio Public Defender 8 East Long Street – 11th Floor Columbus, Ohio 43266-0587 (614) 466-5394 (614) 644-9972 (Fax)
COUNSEL FOR STATE OF OHIO	COUNSEL FOR NICOLE DIAR

ORIGINAL

NOTICE OF APPEAL FROM A COURT OF COMMON PLEAS

ON COMPUTER - HCG

IN THE SUPREME COURT OF OHIO

Nicole Diar )

Appellant, )

v. )

State of Ohio )

Appellee. )

05-2264

On Appeal from the Lorain  
County Court of Common Pleas,  
Ninth Appellate District

Court of Common Pleas  
Case No. 04CR065248

NOTICE OF APPEAL OF APPELLANT NICOLE DIAR

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Counsel for Appellee State of Ohio:  
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Reg. #0038129 - Ohio  
Lorain County Prosecutor

Anthony D. Cillo, Esq.  
(COUNSEL OF RECORD)

FILED  
DEC 02 2005  
MARCIA J. MENGEL, CLERK  
SUPREME COURT OF OHIO

RECEIVED  
DEC 07 2005  
MARCIA J. MENGEL, CLERK  
SUPREME COURT OF OHIO

Assistant Lorain County Prosecutor  
Reg. #0062497 - Ohio

Lorain County Prosecutor's Office  
225 Court Street, 3<sup>rd</sup> Floor  
Elyria, OH 44035  
440-329-5385  
440-328-2183 Fax

**Notice of Appeal of Appellant Nicole Diar**

Appellant Nicole Diar hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Common Pleas Court of Lorain County, Ninth Appellate District, entered in Common Pleas Court of Lorain County Case No. 04CR065248 on November 3, 2005.

This Appeal comes to this Honorable Court as an appeal of right due to the death penalty imposed in the above-captioned Lorain County Common Pleas case. (for an offense committed on or after January 1, 1995).

Respectfully submitted,



Carl J. Rose, Esq.  
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**Certificate of Service**

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellee, Dennis Will, Lorain County Prosecutor, and Anthony D. Cillo, Assistant Lorain County Prosecutor, Lorain County Prosecutor's Office, 225 Court Street, 3<sup>rd</sup> Floor, Elyria, Ohio 44035 on November 30, 2005.



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FILED  
LORAIN COUNTY

IN THE COURT OF COMMON PLEAS  
LORAIN COUNTY, OHIO

2005 NOV -4 A 9:59

STATE OF OHIO  
CLERK OF COMMON PLEAS  
RON NABAKOWSKI

Plaintiff,

-vs-

NICOLE DIAR

Defendant.

Case No. 04CR065248  
JUDGE KOSMA J. GLAVAS

JUDGMENT ENTRY OF  
CONVICTION AND SENTENCE

On October 17, 2005 a jury of twelve (12) having been sequestered during deliberations returned the following verdicts upon proof beyond a reasonable doubt:

- (a) Guilty of Aggravated Murder, purposely and with prior calculation and design in violation of Ohio Revised Code 2903.01(A) (Count Six);
- (b) Guilty of purposely causing the death of another who was under the Age of thirteen (13) years at the time of the commission of the offense and offender was the principal offender in violation of Ohio Revised Code 2929.04 (A)(9) (Specification One to Count Six);
- (c) Guilty of Aggravated Murder, did purposely cause the death of another Who was under the age of thirteen (13) years at the time of the commission Of the offense in violation of Ohio Revised Code 2903.01(C) (Count Seven);
- (d) Guilty of purposely causing the death of another who was under thirteen (13) years of age at the time of the offense and the offender was the Principal offender in violation of Ohio Revised Code 2929.04 (A)(9) (Specification One to Count Seven).

On November 1 & 2, 2005 the jury again being sequestered during deliberations, found by proof beyond a reasonable doubt that the aggravating circumstances of which the Defendant was found guilty outweighed the mitigating factors.

Mitigating factors are factors about an individual or an offense that weigh in favor of a decision that a life sentence rather than a death sentence is appropriate.

Mitigating factors include age/youth of offender as well as any factors that are relevant to the issue of whether the offender should be sentenced to death along with Defendant's lack of prior criminal convictions and adjudications of delinquency.

As a result thereof, the jury returned a verdict sentencing the Defendant to death for the offense of Aggravated Murder with specification for Count 6 and Count 7.

On November 2, 2005 the Defendant and her counsel were present in open court for sentencing and each was afforded an opportunity to speak.

In accordance with the law, this Court considered and reviewed the testimony and evidence presented at the trial and the mitigation hearing, the reports submitted to the Court, the arguments of counsel and the statement of Defendant made before sentencing. Having conducted an independent review, the Court finds by proof beyond a reasonable doubt that the aggravating circumstances of which the Defendant was found guilty outweigh the mitigating factors. Upon consideration of all matters set forth by law, it is the judgment of the law and sentence of the Court that the Defendant is hereby sentenced to death for the crime of Aggravated Murder, Revised Code 2903.01(A).

A writ of execution of the death penalty is hereby ordered issued to the Lorain County Sheriff directing him to convey the Defendant in a private manner and within thirty (30) days to the Marysville Correctional Institution and to deliver her to the warden of said facility. The Defendant shall then remain in the custody of said warden or if transferred by the Ohio Department of Corrections, she shall remain in the custody of the warden of such state prison until January 10, 2007 at which time the sentence of death shall be executed in accordance with R. C. 2949.22.

Upon the conclusion of the hearing, the Defendant was read her Criminal Rule 32 appellate rights. The Defendant, in response to said rule, advised that she had funds to

process said appeal and would hire her own attorney.

It is so ordered.

Dated: 11-03-05



Kosma J. Glavas, Judge

Cc:  
Lorain County Sheriff  
Lorain County Prosecutor  
Jack Bradley, Esq.  
John Pyle, Esq.  
Clerk of 9<sup>th</sup> District Court of Appeals  
Clerk of Ohio Supreme Court

FILED  
LORAIN COUNTY JOURNAL ENTRY  
COURT OF COMMON PLEAS

2005 NOV -3 P 2:58  
Lorain County, Ohio  
Ron Nabakowski, Clerk

CLERK OF COMMON PLEAS  
RON NABAKOWSKI

Case No. 04CR065248

STATE OF OHIO Plaintiff ANTHONY CILLO/MICHAEL NOLAN Asst. Pros.

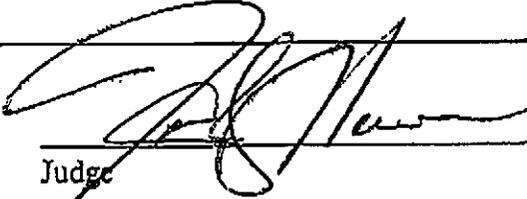
-vs-

NICOLE DIAR Defendant JACK BRADLEY/JOHN PYLE Atty for Defendant

Date NOVEMBER 2, 2005 J.E. Vol. \_\_\_\_\_ Page \_\_\_\_\_

DEFENDANT IN COURT WITH COUNSEL FOR SENTENCING: DEFENDANT SENTENCED TO PRISON/DEATH SENTENCING JUDGMENT ENTRY.

POST SENTENCE REPORT ORDERED.

  
Judge

COURT OF COMMON PLEAS  
LORAIN COUNTY, OHIO  
Ron Nabakowski, Clerk

STATE OF OHIO,  
Plaintiff

CASE NO: 04CR065248

ANTHONY CILLO/MICHAEL NOLAN  
Assistant Prosecuting Attorney

v.

NICOLE DIAR  
Defendant

JACK BRADLEY/JOHN PYLE  
Counsel for Defendant

**JUDGMENT ENTRY OF CONVICTION AND SENTENCE**

1. Defendant appeared in Court for sentencing after having been found guilty of the following to the following charge(s) and specifications:

1. Complicity To Corrupting Another With Drugs

a violation of O.R.C. 2925.02(A)(4)(b) a 2<sup>nd</sup> degree felony.

2. Felonious Assault

a violation of O.R.C. 2903.11(A)(1) a 2<sup>nd</sup> degree felony

3. Murder

a violation of O.R.C. 2903.02(B) an unclassified felony.

4. Aggravated Arson

a violation of O.R.C. 2909.02(A)(1) a 1st degree felony.

5. Aggravated Arson

a violation of O.R.C. 2909.02(A)(2) a 2<sup>nd</sup> degree felony.

6. Aggravated Murder with Aggravated Circumstance Capital Specification

a violation of O.R.C. 2903.01(A)/2929.04(A)(9) an unclassified felony.

7. Aggravated Murder with Aggravated Circumstance Capital Specification

a violation of O.R.C. 2903.01(C)/2929.04(A)(10) an unclassified felony.

8. Tampering With Evidence

a violation of O.R.C. 2921.12(A)(1) a 3<sup>rd</sup> degree felony.

9. Felonious Assault

a violation of O.R.C. 2903.11(A)(2) a 2<sup>nd</sup> degree felony.

10. Complicity To Corrupting Another With Drugs

a violation of O.R.C. 2925.02(A)(4)(a) a 2<sup>nd</sup> degree felony.

( ) IF CHECKED, see additional charges on attached page.

2. ( ) IF CHECKED, a pre-sentence report and investigation were ordered and completed. A copy was/was not made available to defense.
3. Defendant was present with counsel in open court for sentencing November 2, 2005. A stenographer was present. Defendant's counsel and defendant were afforded an opportunity to speak and present any information in mitigation of punishment, pursuant to Criminal Rule 32(A)(1).

4. **EXCEEDING THE MINIMUM FOR FIRST PRISON TERM:**

The court finds, pursuant to Ohio Rev. Code §2929.14(B) that:

X  The shortest prison term will demean the seriousness of the defendant's conduct;

(or)

\_\_\_\_\_ The shortest prison term will not adequately protect the public from future crime by the defendant or others.

5. **IMPOSING THE MAXIMUM PRISON TERM:**

The court finds for the reasons stated on the record, pursuant to Ohio Rev. Code §2929.14(C) that:

\_\_\_\_\_ The defendant has committed the worst form of the offense;

\_\_\_\_\_ The defendant poses the greatest likelihood of recidivism.

6. **FIREARM SPECIFICATION:**

An additional term of (1, 3, 5, or 6) years is imposed as a mandatory and consecutive term pursuant to Ohio Rev. Code §2929.14(D)(1), to be served before any other time is served.

**7. CONSECUTIVE SENTENCES:**

Pursuant to Ohio Rev. Code §2929.14(E), the court finds for the reasons stated on the record that:

  X   Consecutive sentences are necessary to protect the public from future crime or to punish the defendant and not disproportionate to the seriousness of the defendant's conduct and the danger the defendant poses to the public.

\_\_\_\_\_ Consecutive sentences are required by law pursuant to division (E)(1) or (E)(2) of Ohio Rev. Code §2929.14.

The court also finds that:

\_\_\_\_\_ The defendant committed the multiple offenses while the defendant was:

- \_\_\_\_\_ awaiting trial or sentencing;
- \_\_\_\_\_ under a community sanction;
- \_\_\_\_\_ under a post release control sanction

When the offense was committed.

  X   The harm caused by the defendant was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the defendant's conduct.

\_\_\_\_\_ The defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the defendant.

**THEREFORE**, the sentences are to be served consecutively.

**8. REPEAT VIOLENT OFFENDER OR MAJOR DRUG OFFENDER:**

The court finds that the defendant is a:

- \_\_\_\_\_ repeat violent offender under Ohio Rev. Code §2929.14(D)(2);
- \_\_\_\_\_ major drug offender under Ohio Rev. Code §2929.14(D)(3).

The court also finds that a maximum basic prison term is inadequate to protect the public because one or more applicable factors under Ohio Rev. Code §2929.12 indicating a defendant is more likely

to commit future crimes outweigh any applicable factors indicating that a defendant is less likely to commit future crimes.

The court also finds that a maximum basic prison term is demeaning to the seriousness of the offense because one or more factors under Ohio Rev. Code §2929.12 that increase the seriousness of the offense outweigh any applicable factors indicating that the offense is less serious.

The court therefore orders an additional term of \_\_\_\_\_ years beyond the maximum basic prison term pursuant to Ohio Revised Code §2929.14(D)(2)(b) on: Count(s) \_\_\_\_\_.

The court has considered the presumptions under Ohio Revised Code §2929.13(D). It is therefore ordered that the defendant serve a stated prison term of \_\_\_\_\_ years/months in prison, of which \_\_\_\_\_ is a mandatory prison term pursuant to Ohio Revised Code §2929.13(F) on Count(s) \_\_\_\_\_.

9. All contraband and/or drugs are hereby ordered destroyed by the law enforcement agency in possession of same.
10. Seized money or property in the custody of a law enforcement agency is ordered forfeited pursuant to defendant's plea agreement. Said money or property may be used or sold by the law enforcement agency. Said money or proceeds of sale shall be distributed according to law.
11. All property not forfeited is hereby ordered returned to the victim(s)/owner(s) or, if said victim(s)/owner(s) cannot be located, sold at public auction with proceeds distributed according to law.

12. **DRUG OFFENSES:**

Pursuant to Ohio Rev. Code §2929.18(B), a mandatory fine of \$\_\_\_\_\_ is imposed.

13. Upon consideration of all matters set forth by law it is the judgment of law and sentence of the Court that defendant be sentenced to:

Count 1: 7 years in ORW and pay a fine of \$\_\_\_\_\_;

Count 2: NO SENTENCE IMPOSED AS A LESSER INCLUDED OFFENSE OF COUNT SIX AND SEVEN;

Count 3: NO SENTENCE IMPOSED AS A LESSER INCLUDED OFFENSE OF COUNT SIX AND SEVEN;

Count 4: 9 years in ORW and pay a fine of \$\_\_\_\_\_;

Count 5: NO SENTENCE IMPOSED AS IT IS A ALLIED OFFENSE OF SIMILAR IMPORT WITH COUNT FOUR;

Count 6: NO SENTENCE IMPOSED AS IT IS AN ALLIED OFFENSE OF SIMILAR IMPORT WITH COUNT SEVEN AND THE STATE ELECTED TO SENTENCE ON COUNT SEVEN

Count 7: DEATH AS WAS RECOMMENDED BY THE JURY AND IMPOSED BY THE TRIAL COURT, SENTENCE TO BE CARRIED OUT ON JANUARY 10, 2007

Count 8: 4 years in ORW and pay a fine of \$ \_\_\_\_\_;

Count 9: 7 years in ORW and pay a fine of \$ \_\_\_\_\_;

Count 10: 7 years in ORW and pay a fine of \$ \_\_\_\_\_;

**THE SENTENCES IN COUNTS ONE, TWO, THREE, EIGHT, NINE AND TEN ARE TO RUN CONCURRENTLY WITH EACH OTHER.**

**THE SENTENCE IMPOSED IN COUNT FOUR IS TO RUN CONSECUTIVELY TO THE SENTENCE IMPOSED IN COUNTS ONE, TWO, THREE, EIGHT, NINE AND TEN.**

**ALL SENTENCES ARE TO RUN CONCURRENTLY WITH THE DEATH SENTENCE IMPOSED IN COUNT SEVEN.**

( ) IF CHECKED, see additional sentences on attached page.

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**14. FINES:**

(a) Pay a mandatory fine pursuant to O.R.C. 2925.03(H) of:

\$ \_\_\_\_\_ on Ct 1; \$ \_\_\_\_\_ on Ct 2; \$ \_\_\_\_\_ on Ct 3; \$ \_\_\_\_\_ on Ct 4.

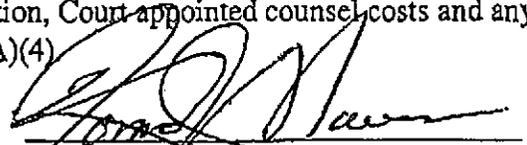
(b) The mandatory fine listed shall be paid to the Clerk of Courts, who in turn shall pay the same to \_\_\_\_\_ and 25% to the Lorain County Prosecutor.

(c) Mandatory drug fines under any section of O.R.C. 2925 (other than R.C. 2925.03) shall be disbursed by the Clerk of Courts as follows:

50% in care of the Ohio Board of Pharmacy, \_\_\_% to \_\_\_\_\_, and 25% to the Lorain County Prosecutor.

15. The defendant is therefore ordered conveyed to the custody of the Ohio Department of Rehabilitation and Correction. Credit for \_\_\_\_\_ days is granted as of this date along with future custody days while the defendant awaits transportation to the appropriate state institution. The defendant is ordered to pay restitution of \$\_\_\_\_\_, all costs of prosecution, Court appointed counsel costs and any fees permitted pursuant to Ohio Revised Code §2929.18(A)(4)

Dated: 11/3/05

  
\_\_\_\_\_  
JUDGE

THE SUPREME COURT OF OHIO

In the Common Pleas Court of LORAIN County

Disposition of a Capital Case by the Trial Court

This form is used pursuant to Rule 20 of the Rules of Superintendence for the Courts of Ohio to report the disposition of a capital case. Return this form within two weeks of disposition to: Cindy Johnson, Supreme Court of Ohio, 30 E. Broad Street, Third Floor, Columbus, OH 43215-3431.

Defendant's Name: NICOLE DIAR Case No. 04CR065248

Lead Trial Counsel: Jack Bradley Trial Co-Counsel John Pyle

Outcome of the Proceedings in this Court:

- Found not guilty
  - Pleaded guilty
  - Pleaded guilty to lesser offense: \_\_\_\_\_
  - Found guilty of aggravated murder & specification by jury
  - Found guilty of lesser offense by jury: \_\_\_\_\_
  - Found guilty of aggravated murder & specification by three judge panel
  - Found guilty of lesser offense by three judge panel: \_\_\_\_\_
  - Other: \_\_\_\_\_
- Sentence: Death

Complete the following ONLY if the defendant was sentenced to death. Attach a copy of the sentencing entry.

This court has appointed the following two counsel to represent defendant on appeal:

DEFENDANT HAVING ADVISED THE COURT SHE WOULD HIRE HER OWN ATTORNEY, NO COUNSEL

Name: \_\_\_\_\_  
 Atty. Reg. No. \_\_\_\_\_  
 Address: \_\_\_\_\_  
 Telephone: \_\_\_\_\_

Name: WAS APPOINTED  
 Atty. Reg. No. \_\_\_\_\_  
 Address: \_\_\_\_\_  
 Telephone: \_\_\_\_\_

Certified under Sup.R. 20 as:  
 Lead Counsel \_\_\_\_\_  
 Co-Counsel \_\_\_\_\_  
 Appellate Counsel \_\_\_\_\_

Certified under Sup.R. 20 as:  
 Lead Counsel \_\_\_\_\_  
 Co-Counsel \_\_\_\_\_  
 Appellate Counsel \_\_\_\_\_

Judge: Kosma J. Glavas, Visiting Judge Date of Appointment: \_\_\_\_\_

**ATTORNEY CERTIFICATION**

We hereby accept appointment as appellate counsel in this case, affirm that we are currently certified under Sup.R. 20 to accept appointment as appellate counsel, and certify that this appointment will not create a total workload so excessive that it interferes with or prevents the rendering of quality representation in accordance with constitutional and professional standards.

Appellate Counsel \_\_\_\_\_ Date \_\_\_\_\_  
Rev. 7/22/02

Appellate Counsel \_\_\_\_\_ Date \_\_\_\_\_

CONSTITUTION OF THE STATE OF OHIO  
ARTICLE I. BILL OF RIGHTS

Current through 1995 portion of 121st G.A., laws passed and filed through 12-31-95.

O CONST I § 2 EQUAL PROTECTION AND BENEFIT

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

CONSTITUTION OF THE STATE OF OHIO  
ARTICLE I. BILL OF RIGHTS

Current through 1995 portion of 121st G.A., laws passed and filed through 12-31-95.

O CONST I § 9 BAIL; CRUEL AND UNUSUAL PUNISHMENTS

All persons shall be bailable by sufficient sureties, except for capital offences where the proof is evident, or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

CONSTITUTION OF THE STATE OF OHIO  
ARTICLE I. BILL OF RIGHTS

Current through 1995 portion of 121st G.A., laws passed and filed through 12-31-95.

O CONST I § 10 RIGHTS OF CRIMINAL DEFENDANTS

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

CONSTITUTION OF THE STATE OF OHIO  
ARTICLE I. BILL OF RIGHTS

Current through 1995 portion of 121st G.A., laws passed and filed through 12-31-95.

O CONST I § 16 REDRESS FOR INJURY; DUE PROCESS

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

BALDWIN'S OHIO REVISED CODE ANNOTATED  
CONSTITUTION OF THE STATE OF OHIO  
ARTICLE I. BILL OF RIGHTS

Current through 1995 portion of 121st G.A., laws passed and  
filed through 12-31-95.

O CONST I § 20 POWERS NOT ENUMERATED RETAINED BY PEOPLE

This enumeration of rights shall not be construed to impair or deny  
others retained by the people; and all powers, not herein delegated, remain with  
the people.

BALDWIN'S OHIO REVISED CODE ANNOTATED  
CONSTITUTION OF THE STATE OF OHIO  
ARTICLE IV. JUDICIAL

Current through 1995 portion of 121st G.A., laws passed and filed through 12-31-95.

O CONST IV § 2 ORGANIZATION AND JURISDICTION OF SUPREME COURT

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

- (i) Cases originating in the courts of appeals;

(ii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained,

(c) In direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in cases in which the death penalty has been imposed;

(d) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(e) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(f) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

THE CONSTITUTION OF THE UNITED STATES  
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

THE CONSTITUTION OF THE UNITED STATES  
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT V

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.

THE CONSTITUTION OF THE UNITED STATES  
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

THE CONSTITUTION OF THE UNITED STATES  
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor  
cruel and unusual punishments inflicted.

THE CONSTITUTION OF THE UNITED STATES  
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

THE CONSTITUTION OF THE UNITED STATES  
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT XIV

Section 1

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.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE UNITED STATES OF AMERICA  
ARTICLE II. EXECUTIVE POWER

USCS Const. Art. II, § 2, Cl 2

Sec. 2, Cl 2. Treaties--Appointment of officers.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

THE CONSTITUTION OF THE UNITED STATES  
ARTICLE VI. MISCELLANEOUS

US CONST ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

UNITED STATES CODE SERVICE

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE  
PART VI. PARTICULAR PROCEEDINGS  
CHAPTER 153. HABEAS CORPUS

28 USCS § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual

determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [28 USCS § 2254].

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2901. GENERAL PROVISIONS  
IN GENERAL

ORC Ann. 2901.05 (2006)

§ 2901.05. Burden and degree of proof

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

(B) As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.

(C) As used in this section, an "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

(D) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

Ohio Revised Code

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2903. HOMICIDE AND ASSAULT  
HOMICIDE

ORC Ann. 2903.01 (2006)

§ 2903.01. Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

(1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.

(2) It is the offender's specific purpose to kill a law enforcement officer.

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(G) As used in this section:

(1) "Detention" has the same meaning as in section 2921.01 of the Revised Code.

(2) "Law enforcement officer" has the same meaning as in section 2911.01 of the Revised Code.

Ohio Revised Code

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2903. HOMICIDE AND ASSAULT  
HOMICIDE

ORC Ann. 2903.02 (2006)

§ 2903.02. Murder

- (A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.
- (B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.
- (C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.
- (D) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2903. HOMICIDE AND ASSAULT  
ASSAULT

ORC Ann. 2903.11 (2006)

§ 2903.11. Felonious assault

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another or to another's unborn;

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

(1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;

(2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;

(3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under section 2907.02 of the Revised Code.

(D) Whoever violates this section is guilty of felonious assault, a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree. If the victim of the offense is a peace officer, or an investigator of the

bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(E) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(3) "Sexual conduct" has the same meaning as in section 2907.01 of the Revised Code, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(4) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under section 109.541 [109.54.1] of the Revised Code.

(5) "Investigator" has the same meaning as in section 109.541 [109.54.1] of the Revised Code..

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2925. DRUG OFFENSES  
CORRUPTING; TRAFFICKING

ORC Ann. 2925.02 (2006)

§ 2925.02. Corrupting another with drugs

(A) No person shall knowingly do any of the following:

(1) By force, threat, or deception, administer to another or induce or cause another to use a controlled substance;

(2) By any means, administer or furnish to another or induce or cause another to use a controlled substance with purpose to cause serious physical harm to the other person, or with purpose to cause the other person to become drug dependent;

(3) By any means, administer or furnish to another or induce or cause another to use a controlled substance, and thereby cause serious physical harm to the other person, or cause the other person to become drug dependent;

(4) By any means, do any of the following:

(a) Furnish or administer a controlled substance to a juvenile who is at least two years the offender's junior, when the offender knows the age of the juvenile or is reckless in that regard;

(b) Induce or cause a juvenile who is at least two years the offender's junior to use a controlled substance, when the offender knows the age of the juvenile or is reckless in that regard;

(c) Induce or cause a juvenile who is at least two years the offender's junior to commit a felony drug abuse offense, when the offender knows the age of the juvenile or is reckless in that regard;

(d) Use a juvenile, whether or not the offender knows the age of the juvenile, to perform any surveillance activity that is intended to prevent the detection of the offender or any other person in the commission of a felony drug abuse offense or to prevent the arrest of the offender or any other person

for the commission of a felony drug abuse offense.

(B) Division (A)(1), (3), or (4) of this section does not apply to manufacturers, wholesalers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code.

(C) Whoever violates this section is guilty of corrupting another with drugs. The penalty for the offense shall be determined as follows:

(1) Except as otherwise provided in this division, if the drug involved is any compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, corrupting another with drugs is a felony of the second degree, and, subject to division (E) of this section, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the drug involved is any compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, and if the offense was committed in the vicinity of a school, corrupting another with drugs is a felony of the first degree, and, subject to division (E) of this section, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) Except as otherwise provided in this division, if the drug involved is any compound, mixture, preparation, or substance included in schedule III, IV, or V, corrupting another with drugs is a felony of the second degree, and there is a presumption for a prison term for the offense. If the drug involved is any compound, mixture, preparation, or substance included in schedule III, IV, or V and if the offense was committed in the vicinity of a school, corrupting another with drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(3) Except as otherwise provided in this division, if the drug involved is marihuana, corrupting another with drugs is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the drug involved is marihuana and if the offense was committed in the vicinity of a school, corrupting another with drugs is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(D) In addition to any prison term authorized or required by division (C) or (E) of this section and sections 2929.13 and 2929.14 of the Revised Code and in addition to any other sanction imposed for the offense under this section or sections 2929.11 to 2929.18 of the Revised Code, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section or the clerk of that court shall do all of the following that are applicable regarding the offender:

(1) (a) If the violation is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of section 2929.18 of the Revised Code unless, as specified in that division, the court determines that the offender is indigent.

(b) Notwithstanding any contrary provision of section 3719.21 of the Revised Code, any mandatory fine imposed pursuant to division (D)(1)(a) of this section and any fine imposed for a violation of this section pursuant to division (A) of section 2929.18 of the Revised Code shall be paid by the clerk of the court in accordance with and subject to the requirements of, and shall be used as specified in, division (F) of section 2925.03 of the Revised Code.

(c) If a person is charged with any violation of this section that is a felony of the first, second, or third degree, posts bail, and forfeits the bail, the forfeited bail shall be paid by the clerk of the court pursuant to division (D)(1)(b) of this section as if it were a fine imposed for a violation of this section.

(2) The court shall suspend for not less than six months nor more than five years the offender's driver's or commercial driver's license or permit. If an offender's driver's or commercial driver's license or permit is suspended pursuant to this division, the offender, at any time after the expiration of two years from the day on which the offender's sentence was imposed or from the day on which the offender

finally was released from a prison term under the sentence, whichever is later, may file a motion with the sentencing court requesting termination of the suspension. Upon the filing of the motion and the court's finding of good cause for the termination, the court may terminate the suspension.

(3) If the offender is a professionally licensed person, in addition to any other sanction imposed for a violation of this section, the court immediately shall comply with section 2925.38 of the Revised Code.

(E) Notwithstanding the prison term otherwise authorized or required for the offense under division (C) of this section and sections 2929.13 and 2929.14 of the Revised Code, if the violation of division (A) of this section involves the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and if the court imposing sentence upon the offender finds that the offender as a result of the violation is a major drug offender and is guilty of a specification of the type described in section 2941.1410 [2941.14.10] of the Revised Code, the court, in lieu of the prison term that otherwise is authorized or required, shall impose upon the offender the mandatory prison term specified in division (D)(3)(a) of section 2929.14 of the Revised Code and may impose an additional prison term under division (D)(3)(b) of that section.

Ohio Revised Code

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2929. PENALTIES AND SENTENCING  
PENALTIES FOR MURDER

ORC Ann. 2929.02 (2006)

§ 2929.02. Penalties for murder

(A) Whoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022 [2929.02.2], 2929.03, and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life, except that, if the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information that charged the murder, the court shall impose upon the offender a term of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to the offender or to the dependents of the offender, or will prevent the offender from making reparation for the victim's wrongful death..

Ohio Revised Code

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2929. PENALTIES AND SENTENCING  
PENALTIES FOR MURDER

ORC Ann. 2929.021 (2006)

§ 2929.021. Notice to supreme court of indictment charging aggravated murder; plea

(A) If an indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the clerk of the court in which the indictment is filed, within fifteen days after the day on which it is filed, shall file a notice with the supreme court indicating that the indictment was filed. The notice shall be in the form prescribed by the clerk of the supreme court and shall contain, for each charge of aggravated murder with a specification, at least the following information pertaining to the charge:

- (1) The name of the person charged in the indictment or count in the indictment with aggravated murder with a specification;
- (2) The docket number or numbers of the case or cases arising out of the charge, if available;
- (3) The court in which the case or cases will be heard;
- (4) The date on which the indictment was filed.

(B) If the indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the defendant pleads guilty or no contest to any offense in the case or if the indictment or any count in the indictment is dismissed, the clerk of the court in which the plea is entered or the indictment or count is dismissed shall file a notice with the supreme court indicating what action was taken in the case. The notice shall be filed within fifteen days after the plea is entered or the indictment or count is dismissed, shall be in the form prescribed by the clerk of the supreme court, and shall contain at least the following information:

- (1) The name of the person who entered the guilty or no contest plea or who is named in the indictment or count that is dismissed;
- (2) The docket numbers of the cases in which the guilty or no contest plea is entered or in which the indictment or count is dismissed;
- (3) The sentence imposed on the offender in each case.

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2929. PENALTIES AND SENTENCING  
PENALTIES FOR MURDER

ORC Ann. 2929.022 (2006)

§ 2929.022. Determination of aggravating circumstances of prior conviction

(A) If an indictment or count in an indictment charging a defendant with aggravated murder contains a specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code, the defendant may elect to have the panel of three judges, if he waives trial by jury, or the trial judge, if he is tried by jury, determine the existence of that aggravating circumstance at the sentencing hearing held pursuant to divisions (C) and (D) of section 2929.03 of the Revised Code.

(1) If the defendant does not elect to have the existence of the aggravating circumstance determined at the sentencing hearing, the defendant shall be tried on the charge of aggravated murder, on the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code, and on any other specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code in a single trial as in any other criminal case in which a person is charged with aggravated murder and specifications.

(2) If the defendant does elect to have the existence of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code determined at the sentencing hearing, then, following a verdict of guilty of the charge of aggravated murder, the panel of three judges or the trial judge shall:

(a) Hold a sentencing hearing pursuant to division (B) of this section, unless required to do otherwise under division (A)(2)(b) of this section;

(b) If the offender raises the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and is not found at trial to have been eighteen years of age or older at the time of the commission of the offense, conduct a hearing to

determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. After conducting the hearing, the panel or judge shall proceed as follows:

(i) If that aggravating circumstance is proven beyond a reasonable doubt or if the defendant at trial was convicted of any other specification of an aggravating circumstance, the panel or judge shall impose sentence according to division (E) of section 2929.03 of the Revised Code;

(ii) If that aggravating circumstance is not proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance, the panel or judge shall impose sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) At the sentencing hearing, the panel of judges, if the defendant was tried by a panel of three judges, or the trial judge, if the defendant was tried by jury, shall, when required pursuant to division (A)(2) of this section, first determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. If the panel of judges or the trial judge determines that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt or if they do not determine that the specification is proven beyond a reasonable doubt but the defendant at trial was convicted of a specification of any other aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge and trial jury shall impose sentence on the offender pursuant to division (D) of section 2929.03 and section 2929.04 of the Revised Code. If the panel of judges or the trial judge does not determine that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised

Code is proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge shall terminate the sentencing hearing and impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2929. PENALTIES AND SENTENCING  
PENALTIES FOR MURDER

ORC Ann. 2929.023 (2006)

§ 2929.023. Defendant may raise matter of age

A person charged with aggravated murder and one or more specifications of an aggravating circumstance may, at trial, raise the matter of his age at the time of the alleged commission of the offense and may present evidence at trial that he was not eighteen years of age or older at the time of the alleged commission of the offense. The burdens of raising the matter of age, and of going forward with the evidence relating to the matter of age, are upon the defendant. After a defendant has raised the matter of age at trial, the prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the defendant was eighteen years of age or older at the time of the alleged commission of the offense.

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2929. PENALTIES AND SENTENCING  
PENALTIES FOR MURDER

ORC Ann. 2929.03 (2006)

§ 2929.03. Imposing sentence for aggravated murder

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:

(1) Except as provided in division (A)(2) of this section, the trial court shall impose one of the following sentences on the offender:

- (a) Life imprisonment without parole;
- (b) Life imprisonment with parole eligibility after serving twenty years of imprisonment;
- (c) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;
- (d) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section

2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) (1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose sentence on the offender as follows:

(a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose one of the following sentences on the offender:

- (i) Life imprisonment without parole;
- (ii) Life imprisonment with parole eligibility after serving twenty years of imprisonment;
- (iii) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;
- (iv) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(2) (a) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be one of the following:

(i) Except as provided in division (C)(2)(a)(ii) of this section, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(ii) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the penalty to be imposed on the offender shall be death or life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(b) A penalty imposed pursuant to division (C)(2)(a)(i) or (ii) of this section shall be determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:

(i) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

(ii) By the trial jury and the trial judge, if the offender was tried by jury.

(D) (1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding

conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a

reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following:

(a) Except as provided in division (D)(2)(b) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is a sentence of life imprisonment without parole imposed under division (D)(2)(b) of this section, the sentence shall be served pursuant to section 2971.03 of the Revised Code. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Except as provided in division (D)(3)(b) of

this section, one of the following:

(i) Life imprisonment without parole;

(ii) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iii) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Except as provided in division (E)(2) of this section, one of the following:

(a) Life imprisonment without parole;

(b) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(c) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating

circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) (1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2929. PENALTIES AND SENTENCING  
PENALTIES FOR MURDER

ORC Ann. 2929.04 (2006)

§ 2929.04. Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in section 2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

(a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.

(b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer, as defined in section 2911.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's

testimony in any criminal proceeding.

(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

(10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2929. PENALTIES AND SENTENCING  
PENALTIES FOR MURDER

ORC Ann. 2929.05 (2006)

§ 2929.05. Appellate review of death sentence

(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall review upon appeal the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They also shall review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

A court of appeals that reviews a case in which the sentence of death is imposed for an offense committed before January 1, 1995, shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

(B) The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed and, except as otherwise provided in this section, shall conduct the review in accordance with the Rules of Appellate Procedure.

(C) At any time after a sentence of death is imposed pursuant to section 2929.022 [2929.02.2] or 2929.03 of the Revised Code, the court of common pleas that sentenced the offender shall vacate the sentence if the offender did not present evidence at trial that the offender was not eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced and if the offender shows by a preponderance of the evidence that the offender was less than eighteen years of age at the time of the commission of the aggravated murder for which the offender was sentenced. The court is not required to hold a hearing on a motion filed pursuant to this division unless the court finds, based on the motion and any supporting information submitted by the defendant, any information submitted by the prosecuting attorney, and the record in the case, including any previous hearings and orders, probable cause to believe that the defendant was not eighteen years of age or older at the time of the commission of the aggravated murder for which the defendant was sentenced to death.

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2941. INDICTMENT  
FORM AND SUFFICIENCY

ORC Ann. 2941.04 (2006)

§ 2941.04. Two or more offenses in one indictment

An indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated.

The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict. The court in the interest of justice and for good cause shown, may order different offenses or counts set forth in the indictment or information tried separately or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts is not an acquittal of any other count.

Ohio Revised Code

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2945. TRIAL  
WITNESSES

ORC Ann. 2945.59 (2006)

§ 2945.59. Proof of defendant's motive

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2949. EXECUTION OF SENTENCE  
DEATH SENTENCE

ORC Ann. 2949.22 (2006)

§ 2949.22. Execution of death sentence

(A) Except as provided in division (C) of this section, a death sentence shall be executed by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death. The application of the drug or combination of drugs shall be continued until the person is dead. The warden of the correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed.

(B) A death sentence shall be executed within the walls of the state correctional institution designated by the director of rehabilitation and correction as the location for executions, within an enclosure to be prepared for that purpose, under the direction of the warden of the institution or, in the warden's absence, a deputy warden, and on the day designated by the judge passing sentence or otherwise designated by a court in the course of any appellate or postconviction proceedings. The enclosure shall exclude public view.

(C) If a person is sentenced to death, and if the execution of a death sentence by lethal injection has been determined to be unconstitutional, the death sentence shall be executed by using any different manner of execution prescribed by law subsequent to the effective date of this amendment instead of by causing the application to the person of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death, provided that the subsequently prescribed different manner of execution has not been determined to be unconstitutional. The use of the subsequently prescribed different manner of execution shall be continued until the person is dead. The warden of the state correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the sentence of death is executed.

(D) No change in the law made by the amendment to this section that took effect on October 1, 1993, or by this amendment constitutes a declaration by or belief of the general assembly that execution of a death sentence by electrocution is a cruel and unusual punishment proscribed by the Ohio Constitution or the United States Constitution.

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2953. APPEALS; OTHER POSTCONVICTION REMEDIES  
POSTCONVICTION REMEDIES

ORC Ann. 2953.21 (2006)

§ 2953.21. Petition for postconviction relief

(A) (1) (a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to

death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring

a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of the court. The clerk of the court in which the petition is filed immediately shall forward a copy of the petition to the prosecuting attorney of that county.

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(F) At any time before the answer or motion is filed, the petitioner may amend the petition with or without

leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any time thereafter.

(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (E) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (E) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(H) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(I) (1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (I)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney

expressly request the appointment. The court shall appoint as counsel under division (I)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (I) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (I)(2) of this section.

(J) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

FEDERAL RULES OF EVIDENCE

ARTICLE IV. RELEVANCY AND ITS LIMITS

USCS Fed Rules Evid R 401

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

OHIO RULES OF CRIMINAL PROCEDURE

Ohio Crim. R. 8 (2006)

Rule 8. JOINDER OF OFFENSES AND DEFENDANTS

(A) *Joinder of offenses.* --Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.

(B) *Joinder of defendants.* --Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

OHIO RULES OF CRIMINAL PROCEDURE

Ohio Crim. R. 11 (2006)

Rule 11. PLEAS, RIGHTS UPON PLEA

(A) *Pleas.* --A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) *Effect of guilty or no contest pleas.* --With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim. R. 32.

(C) *Pleas of guilty and no contest in felony cases.*

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of

the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to

have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

**(D) Misdemeanor cases involving serious offenses.** -- In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

**(E) Misdemeanor cases involving petty offenses.** -- In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

The counsel provisions of Crim. R. 44(B) and (C) apply to division (E) of this rule.

**(F) Negotiated plea in felony cases.** -- When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

**(G) Refusal of court to accept plea.** -- If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

**(H) Defense of insanity.** -- The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

OHIO RULES OF CRIMINAL PROCEDURE

Ohio Crim. R. 13 (2006)

Rule 13. TRIAL TOGETHER OF INDICTMENTS OR INFORMATIONS OR COMPLAINTS

The court may order two or more indictments or informations or both to be tried together, if the offenses or the defendants could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

The court may order two or more complaints to be tried together, if the offenses or the defendants could have been joined in a single complaint. The procedure shall be the same as if the prosecution were under such single complaint.

OHIO RULES OF CRIMINAL PROCEDURE

Ohio Crim. R. 14 (2006)

Rule 14. RELIEF FROM PREJUDICIAL JOINDER

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires. In ruling on a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule 16(B)(1)(a) any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.

When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately, unless the court orders the defendants to be tried jointly, upon application by the prosecuting attorney or one or more of the defendants, and for good cause shown.

OHIO RULES OF CRIMINAL PROCEDURE

Ohio Crim. R. 29 (2006)

Rule 29. MOTION FOR ACQUITTAL

(A) *Motion for judgment of acquittal.* --The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

(B) *Reservation of decision on motion.* --If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.

(C) *Motion after verdict or discharge of jury.* --If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

OHIO RULES OF EVIDENCE

ARTICLE IV. RELEVANCY AND ITS LIMITS

Ohio Evid. R. 403 (2006)

Rule 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR UNDUE DELAY

(A) *Exclusion mandatory.* --Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(B) *Exclusion discretionary.* --Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

OHIO RULES OF EVIDENCE

ARTICLE IV. RELEVANCY AND ITS LIMITS

Ohio Evid. R. 404 (2006)

Rule 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(A) *Character evidence generally.* --Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, subject to the following exceptions:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(3) Character of witness. Evidence of the character of a witness on the issue of credibility is admissible as provided in Rules 607, 608, and 609.

(B) *Other crimes, wrongs or acts.* --Evidence of the other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

OHIO RULES OF EVIDENCE

ARTICLE VI. WITNESSES

Ohio Evid. R. 611 (2006)

Rule 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

(A) *Control by court.* --The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(B) *Scope of cross-examination.* --Cross-examination shall be permitted on all relevant matters and matters affecting credibility.

(C) *Leading questions.* --Leading questions could not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.