

In The Supreme Court of Ohio

State Of Ohio, :  
Appellee, :  
-Vs- : Case No. 05-2364  
Kerry Perez, : **This Is A Capital Case.**  
Appellant. :

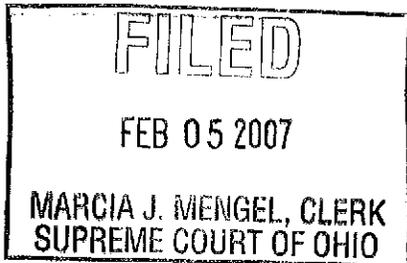
---

On Appeal From the Court of  
Common Pleas of Clark County  
Case No. 03-CR-1010

---

**MERIT BRIEF OF APPELLANT KERRY PEREZ**

---



Stephen A. Schumaker – 0014643  
Clark County Prosecutor

Clark County Prosecutor's Office  
50 E. Columbia St.  
Springfield, Ohio 45502  
(937) 328-2574  
(937) 328-2657 (FAX)

Counsel For Appellee

David H. Bodiker  
Ohio Public Defender

Pamela J. Prude-Smithers – 0062206  
Supervisor, Death Penalty Division  
Counsel of Record

Brie A. Friedman – 0079414  
Assistant State Public Defender

Robert K. Lowe – 0072264  
Assistant State Public Defender

Office of the Ohio Public Defender  
8 East Long Street, 11th Floor  
Columbus, Ohio 43215-2998  
(614)466-5394  
(614)644-0708 (FAX)

Counsel For Appellant

## Table of Contents

Page No.

<b>Table of Contents</b> .....	i
<b>Table of Authorities</b> .....	v
<b>Statement of Facts and Case</b> .....	1
<b>Proposition of Law No. I</b> .....	8
The trial court's failure to give the required narrowing construction to a course-of-conduct specification in a capital case creates a substantial risk that the death penalty will be inflicted in an arbitrary and capricious manner in violation of the United States Constitution. U.S. Const. amends. VIII and XIV. ....	8
<b>Proposition of Law No. II</b> .....	20
Where evidence of other crimes lacks a distinct behavioral fingerprint, such evidence is inadmissible. Even where such evidence may be admissible, undue emphasis on it may prejudice a capital defendant's right to a fair trial and reliable death sentence. U.S. Const. amends. V, VI, VIII, and XIV.....	20
<b>Proposition of Law No. III</b> .....	30
The admission of taped statements of communications made between Perez and his wife without Perez's waiver of the marital privilege constituted a violation of Perez's right to exclude spousal testimony under Ohio law as well as his rights under the Due Process Clause of the United States Constitution. O.R.C. § 2317.02(D); U.S. Const. amend. VIII and XIV.....	30
<b>Proposition of Law No. IV</b> .....	39
A pervasive pattern of police coercion violates a defendant's rights, as guaranteed by the Fifth Amendment and Due Process, to be free from compelled self-incrimination and renders a waiver of <u>Miranda</u> rights and subsequent confession involuntary and inadmissible at trial. U.S. Const. amends. V, XIV; Ohio Const. art. I, § 10. ....	39
<b>Proposition of Law No. V</b> .....	61
The trial court's admission of a taped conversation between a defendant and his wife, when the wife did not testify concerning the tape, constituted impermissible hearsay and violated the defendant's right to confrontation. U.S. Const. amend. VI. ....	61
<b>Proposition of Law No. VI</b> .....	66
Perez's right to effective assistance of counsel was violated when counsel's performance failed to meet the prevailing standards of practice, thus prejudicing Perez. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 10. ....	66

<b>Proposition of Law No. VII</b> .....	82
A defendant’s right to a fair and impartial sentencing jury is denied when the trial court overrules a challenge for cause against a prospective juror who is biased in favor of capital punishment. U.S. Const. amend. XIV; Ohio Const. art. I, § 16.....	82
<b>Proposition of Law No. VIII</b> .....	94
A capital defendant’s rights to due process are violated when the trial court’s jury instructions fail to limit the jury’s use of other acts evidence and fails to provide a complicity instruction after the testimony of an accomplice. U.S. Const. amend. VIII and XIV.....	94
<b>Proposition of Law No. IX</b> .....	101
The failure of the trial court to merge duplicative capital specifications skews the weighing process and renders a death sentence invalid in violation of the Eighth and Fourteenth Amendments to the United States Constitution. ....	101
<b>Proposition of Law No. X</b> .....	108
A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9 and 16 of the Ohio Constitution when a prosecutor commits acts of misconduct during the trial phase and the sentencing phase of his capital trial. ....	108
<b>Proposition of Law No. XI</b> .....	117
When the death sentence is disproportionate to the sentences received by the co-defendant and accomplice, the death sentence must be vacated and a life sentence imposed. Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10 and 16 of the Ohio Constitution. ....	117
<b>Proposition of Law No. XII</b> .....	120
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.....	120
<b>Proposition of Law No. XIII</b> .....	126
Ohio’s death penalty law in unconstitutional. Ohio Rev. Code Ann. §§ 2903.01, 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 Kerry Perez. 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. ....	126
<b>Conclusion</b> .....	146
<b>Certificate of Service</b> .....	147

**Appendix:**

Notice of Appeal .....	A-1
Judgment Entry of Conviction .....	A-3
Sentencing Opinion .....	A-6
Ohio Const. art. I, § 2 .....	A-11
Ohio Const. art. I, § 5 .....	A-12
Ohio Const. art. I, § 9 .....	A-13
Ohio Const. art. I, § 10 .....	A-14
Ohio Const. art. I, § 16 .....	A-15
Ohio Const. art. I, § 20 .....	A-16
U.S. Const. amend. V .....	A-17
U.S. Const. amend. VI.....	A-18
U.S. Const. amend. VIII.....	A-19
U.S. Const. amend. XIV.....	A-20
U.S. Const. art. II, § 2.....	A-21
U.S. Const. art. VI.....	A-22
O.R.C. § 2313.42.....	A-23
O.R.C. § 2313.43.....	A-24
O.R.C. § 2317.02.....	A-25
O.R.C. § 2901.05.....	A-32
O.R.C. § 2903.01.....	A-33
O.R.C. § 2903.02.....	A-34

O.R.C. § 2911.01 .....	A-35
O.R.C. § 2921.12.....	A-36
O.R.C. § 2923.02.....	A-37
O.R.C. § 2923.03.....	A-38
O.R.C. § 2923.13.....	A-39
O.R.C. § 2929.02.....	A-40
O.R.C. § 2929.021 .....	A-41
O.R.C. § 2929.022.....	A-42
O.R.C. § 2929.023.....	A-44
O.R.C. § 2929.03.....	A-45
O.R.C. § 2929.04.....	A-49
O.R.C. § 2929.05.....	A-51
O.R.C. § 2929.06.....	A-52
O.R.C. § 2945.25.....	A-54
O.R.C. § 2945.59.....	A-55
O.R.C. § 2953.21 .....	A-56
Ohio R. Crim. P. 11 .....	A-59
Ohio R. Crim. P. 24.....	A-61
Ohio R. Evid. 403.....	A-64
Ohio R. Evid. 404.....	A-65
Ohio R. Evid. 601 .....	A-66
Ohio R. Evid. 804.....	A-67

## Table of Authorities

Page No.

### CASES

<u>Arizona v. Fulminante</u> , 499 U.S. 279 (1991).....	58, 59
<u>Asakura v. City of Seattle</u> , 265 U.S. 332 (1924) .....	136
<u>Barclay v. Florida</u> , 463 U.S. 939 (1983).....	19, 106
<u>Baxter v. State</u> , 91 Ohio St. 167, 110 N.E. 456 (1914), <i>rev'd on other grounds</i> , <u>Scott v. State</u> , 107 Ohio St. 475, 141 N.E. 19 (1923).....	97
<u>Berger v. United States</u> , 295 U.S. 78 (1935) .....	passim
<u>Blake v. Kemp</u> , 758 F.2d 523 (11th Cir. 1985) .....	80
<u>Bram v. United States</u> , 168 U.S. 532 (1897) .....	46
<u>Brecht v. Abrahamson</u> , 507 U.S. 619 (1993).....	91
<u>Brown v. Mississippi</u> , 297 U.S. 278 (1936).....	42
<u>Bruton v. United States</u> , 391 U.S. 123 (1968) .....	18, 27, 58
<u>Burger v. Zant</u> , 718 F.2d 979 (11th Cir. 1983).....	79
<u>Cage v. Louisiana</u> , 498 U.S. 39 (1990).....	120, 125
<u>Caldwell v. Mississippi</u> , 472 U.S. 320 (1985) .....	112
<u>Callins v. Collins</u> , 510 U.S. 1141 (1994).....	114
<u>Chapman v. California</u> , 386 U.S. 18 (1967) .....	59, 99
<u>Clark v. Allen</u> , 331 U.S. 503 (1947).....	136
<u>Clinton v. City of New York</u> , 524 U.S. 417 (1998).....	141, 142
<u>Coker v. Georgia</u> , 433 U.S. 584 (1977).....	126
<u>Colorado v. Connelly</u> , 479 U.S. 157 (1986) .....	44
<u>Commonwealth v. O'Neal II</u> , 339 N.E.2d 676 (Mass. 1975).....	128
<u>Cook v. Bordenkircher</u> , 602 F.2d 117 (6th Cir. 1979).....	111
<u>Crawford v. Washington</u> , 541 U.S. 36 (2004) .....	62, 63, 64, 65
<u>Cross v. Ledford</u> , 161 Ohio St. 469, 120 N.E.2d 118. (1954) .....	123
<u>Cruz v. New York</u> , 481 U.S. 186 (1987) .....	58
<u>Delo v. Lashley</u> , 507 U.S. 272 (1993) .....	129
<u>Dennis v. United States</u> , 339 U.S. 162 (1950).....	68
<u>Dickerson v. United States</u> , 530 U.S. 428 (2000).....	44, 45, 46
<u>Donnelly v. DeChristoforo</u> , 416 U.S. 637 (1974).....	108, 116

<u>Eddings v. Oklahoma</u> , 455 U.S. 104 (1982).....	79, 106, 114, 129
<u>Enmund v. Florida</u> , 458 U.S. 782 (1982).....	129
<u>Evitts v. Lucey</u> , 469 U.S. 387 (1985) .....	37, 136
<u>Filartiga v. Pena-Irala</u> , 630 F.2d 876 (2nd Cir. 1980).....	137, 143
<u>Forti v. Suarez-Mason</u> , 672 F. Supp. 1531 (N.D. Cal. 1987) .....	137
<u>Franklin v. Anderson</u> , 434 F.3d 412 (6th Cir. 2006) .....	91
<u>Free v. Peters</u> , 12 F.3d 700 (7th Cir. 1993).....	129
<u>Frolova v. Union of Soviet Socialist Republics</u> , 761 F.2d 370 (7th Cir. 1985) .....	142
<u>Furman v. Georgia</u> , 408 U.S. 238 (1972) .....	119, 126, 128, 129
<u>Gideon v. Wainwright</u> , 372 U.S. 335 (1963).....	66
<u>Glenn v. Tate</u> , 71 F.3d 1204 (6th Cir. 1995).....	75, 76
<u>Godfrey v. Georgia</u> , 446 U.S. 420 (1980).....	17, 106, 129, 133
<u>Goodwin v. Johnson</u> , 2006 U.S. Dist. LEXIS 11915 (N.D. Ohio March 22, 2006) .....	79
<u>Gravley v. Mills</u> , 87 F.3d 779 (6th Cir. 1996) .....	108, 113
<u>Gregg v. Georgia</u> , 428 U.S. 153 (1976).....	passim
<u>Griffin v. California</u> , 380 U.S. 609 (1965) .....	108
<u>Hamblin v. Mitchell</u> , 354 F.3d 482 (6th Cir. 2003).....	75
<u>Harris v. Wood</u> , 64 F.3d 1432 (9th Cir. 1995).....	81
<u>Hartnett v. State</u> , 42 Ohio St. 568 (1885) .....	92, 93
<u>Haynes v. Washington</u> , 373 U.S. 503 (1963) .....	45, 46
<u>Holland v. United States</u> , 348 U.S. 121 (1954) .....	122, 125
<u>Illinois v. Perkins</u> , 496 U.S. 292 (1990) .....	56
<u>In re Winship</u> , 397 U.S. 358 (1970).....	19, 120
<u>Irvin v. Dowd</u> , 366 U.S. 717 (1961) .....	86
<u>Jackson v. Virginia</u> , 443 U.S. 307 (1979).....	19
<u>Johnson v. Armontrout</u> , 961 F.2d 748 (8th Cir. 1992) .....	67
<u>Johnson v. Texas</u> , 509 U.S. 350 (1993).....	129
<u>Jones v. United States</u> , 527 U.S. 373 (1999) .....	106
<u>Kansas v. Colorado</u> , 206 U.S. 46 (1907) .....	136
<u>Kirby v. Illinois</u> , 406 U.S. 682 (1972).....	67
<u>Kubat v. Thieret</u> , 867 F.2d 351 (7th Cir. 1989).....	75

<u>Lewis v. Jeffers</u> , 497 U.S. 764 (1990) .....	17, 133
<u>Lockett v. Ohio</u> , 438 U.S. 586 (1978).....	passim
<u>Malloy v. Hogan</u> , 378 U.S. 1 (1964).....	46
<u>Marbury v. Madison</u> , 5 U.S. 137 (1803).....	142
<u>Marshall v. Hendricks</u> , 307 F.3d 36 (3rd Cir. 2002).....	75
<u>Mayer v. Gibson</u> , 210 F.3d 1284 (10th Cir. 2000) .....	75
<u>Maynard v. Cartwright</u> , 486 U.S. 356 (1988).....	17, 133, 134
<u>McCall v. Dutton</u> , 863 F.2d 454 (6th Cir. 1988) .....	44
<u>McCleskey v. Kemp</u> , 481 U.S. 279 (1987).....	17
<u>McCoy v. Court of Appeals, Dist. 1</u> , 486 U.S. 429 (1988) .....	112
<u>McMann v. Richardson</u> , 397 U.S. 759 (1970).....	67
<u>Miller v. Fenton</u> , 474 U.S. 104 (1985).....	56
<u>Mills v. Maryland</u> , 486 U.S. 367 (1988).....	107
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1966) .....	passim
<u>Missouri v. Seibert</u> , 542 U.S. 600 (2004) .....	57
<u>Monk v. Zelez</u> , 901 F.2d 885 (10th Cir. 1990).....	122
<u>Morgan v. Illinois</u> , 504 U.S. 719 (1992).....	67, 68, 87
<u>Mu’Min v. Virginia</u> , 500 U.S. 415 (1991).....	68
<u>Ohio v. Roberts</u> , 448 U.S. 56 (1980), <i>overruled on other grounds by</i> <u>Crawford v. Washington</u> , 541 U.S. 36 (2004) .....	61, 62
<u>Oregon v. Elstad</u> , 470 U.S. 298 (1985).....	57
<u>Palmer v. State</u> , 42 Ohio St. 596 (1885) .....	90
<u>Parker v. Dugger</u> , 498 U.S. 308 (1991) .....	117
<u>Patton et al v. Yount</u> , 467 U.S. 1025 (1984).....	91
<u>Penry v. Lynaugh</u> , 492 U.S. 302 (1989) <i>rev'd on other grounds</i> <u>Penry v.</u> <u>Johnson</u> , 532 U.S. 782 (2001).....	129
<u>Powell v. Alabama</u> , 287 U.S. 45 (1932) .....	80
<u>Pulley v. Harris</u> , 465 U.S. 37 (1984).....	117, 135
<u>Rhode Island v. Innis</u> , 446 U.S. 291 (1980).....	42
<u>Rhodes v. Chapman</u> , 452 U.S. 337 (1981) .....	126
<u>Robinson v. California</u> , 370 U.S. 660 (1962) .....	126
<u>Rogers v. Richmond</u> , 365 U.S. 534 (1961).....	45, 46
<u>Rompilla v. Beard</u> , 545 U.S. 374 (2005) .....	75

<u>Rosales-Lopez v. United States</u> , 451 U.S. 182 (1981).....	68
<u>Rufer v. Ohio</u> , 25 Ohio St. 464 (1874) .....	46
<u>Rufer v. State</u> , 25 Ohio St. 464 (1874) .....	45
<u>Schneckloth v. Bustamonte</u> , 412 U.S. 218 (1973).....	44
<u>Scurry v. United States</u> , 347 F.2d 468 (D.C. Cir. 1965).....	122
<u>Shelton v. Tucker</u> , 364 U.S. 479 (1960) .....	128
<u>Skinner v. Oklahoma</u> , 316 U.S. 535 (1942).....	132
<u>Smith v. Phillips</u> , 455 U.S. 209 (1982).....	115
<u>Snyder v. Massachusetts</u> , 291 U.S. 97 (1934), <i>rev'd in part</i> <u>Malloy v. Hogan</u> , 378 U.S. 1 (1964) .....	37
<u>Spano v. New York</u> , 360 U.S. 315 (1959).....	46, 47
<u>Spaziano v. Florida</u> , 468 U.S. 447 (1984).....	86, 136
<u>State v. Allen</u> , 73 Ohio St. 3d 626, 653 N.E.2d 675 (1995) .....	88, 90
<u>State v. Arrington</u> , 14 Ohio App. 3d 111, 470 N.E.2d 211 (1984).....	50, 51, 53
<u>State v. Breedlove</u> , 26 Ohio St. 2d 178, 271 N.E.2d 238 (1971).....	27
<u>State v. Broom</u> , 40 Ohio St. 3d 277, 533 N.E.2d 682 (1988) .....	21
<u>State v. Burson</u> , 38 Ohio St. 2d 157, 311 N.E.2d 526 (1974).....	23
<u>State v. Chase</u> , 55 Ohio St. 2d 237, 378 N.E.2d 1064 (1978) .....	44, 45, 46
<u>State v. Cornwell</u> , 86 Ohio St. 3d 560, 715 N.E.2d 1144 (1999) .....	92, 93, 99
<u>State v. Crenshaw</u> , 51 Ohio App. 2d 63, 366 N.E.2d 84 (1977).....	123
<u>State v. Dailey</u> , 53 Ohio St. 3d 88, 559 N.E.2d 459 (1990) .....	44
<u>State v. Davis</u> , 38 Ohio St. 3d 361, 528 N.E.2d 925 (1988).....	19
<u>State v. Dotson</u> , 35 Ohio App. 3d 135, 520 N.E.2d 240 (1987) .....	96
<u>State v. Evans</u> , 63 Ohio St. 3d 231, 586 N.E.2d 1042 (1992) .....	68
<u>State v. Flonnory</u> , 31 Ohio St. 2d 124, 285 N.E.2d 726 (1972) .....	97, 98
<u>State v. Fox</u> , 69 Ohio St. 3d 183, 631 N.E.2d 124 (1994).....	129
<u>State v. Freeman</u> , 138 Ohio App. 3d 408, 741 N.E.2d 566 (2000).....	115
<u>State v. Frost</u> , No. 77AP-728 (Franklin Ct. App. May 2, 1978).....	122
<u>State v. Garner</u> , 74 Ohio St. 3d 49, 656 N.E.2d 623 (1995) .....	104
<u>State v. Getsy</u> , 84 Ohio St. 3d 180, 702 N.E.2d 866 (1988).....	117
<u>State v. Getsy</u> , 84 Ohio St. 3d 180, 702 N.E.2d 866 (1998).....	99
<u>State v. Grimsley</u> , 131 Ohio App. 3d 44, 721 N.E.2d 488 (1995).....	96
<u>State v. Hall</u> , 57 Ohio App. 3d 144, 567 N.E.2d 305 (1989).....	24, 25, 27

<u>State v. Hector</u> , 19 Ohio St. 2d 167, 249 N.E.2d 912 (1969) .....	21, 23
<u>State v. Hutton</u> , 53 Ohio St. 3d 36, 559 N.E.2d 432 (1990) .....	26
<u>State v. Jackson</u> , 107 Ohio St. 3d 53, 836 N.E.2d 1173 (2005) .....	68
<u>State v. Jamison</u> , 49 Ohio St. 3d 182, 552 N.E.2d 180 (1990) .....	23
<u>State v. Jenkins</u> , 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984) .....	103, 104
<u>State v. Johnson</u> , 24 Ohio St. 3d 87, 494 N.E.2d 1061 (1986) .....	91, 96
<u>State v. Johnson</u> , 71 Ohio St. 3d 332, 643 N.E.2d 1098 (1994) .....	29
<u>State v. Jones</u> , 91 Ohio St. 3d 335, 744 N.E.2d 1163 (2001) .....	11, 105
<u>State v. Jurek</u> , 52 Ohio App. 3d 30, 556 N.E.2d 1191 (1989) .....	98
<u>State v. Keairns</u> , 9 Ohio St.3d 228, 460 N.E.2d 245 (1984) .....	65
<u>State v. Keenan</u> , 66 Ohio St. 3d 402, 613 N.E.2d 203 (1993) .....	109, 115
<u>State v. Lewis</u> , 66 Ohio App. 3d 37, 583 N.E.2d 404 (1990) .....	98
<u>State v. Lott</u> , 51 Ohio St. 3d 160, 555 N.E.2d 293 (1990) .....	115
<u>State v. Lowe</u> , 69 Ohio St. 3d 527, 634 N.E.2d 616 (1994) .....	22, 23, 24, 26
<u>State v. Lytle</u> , 48 Ohio St. 2d 391, 358 N.E. 2d 623 (1976) .....	99
<u>State v. Madrigal</u> , 87 Ohio St. 3d 378, 721 N.E.2d 52 (2000) .....	115
<u>State v. Murphy</u> , 91 Ohio St. 3d 516, 747 N.E.2d 765 (2001) .....	135
<u>State v. Nabozny</u> , 54 Ohio St. 2d 195, 375 N.E.2d 784 (1978) .....	122
<u>State v. Petitjean</u> , 140 Ohio App. 3d 517, 748 N.E.2d 133 (2000) .....	45
<u>State v. Pigott</u> , 1 Ohio App. 2d 22, 197 N.E.2d 911 (1964) .....	98
<u>State v. Poindexter</u> , 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988) .....	125
<u>State v. Post</u> , 32 Ohio St. 3d 380, 513 N.E.2d 754 (1987) .....	32
<u>State v. Rahman</u> , 23 Ohio St. 3d 146, 492 N.E.2d 401 (1986) .....	31, 32
<u>State v. Roberts</u> , No. C-950277, 1996 Ohio App. LEXIS 814 (Hamilton Ct. App. Mar. 6, 1996) .....	22, 23
<u>State v. Rojas</u> , 64 Ohio St. 3d 131, 592 N.E.2d 1376 (1992) .....	132
<u>State v. Sapp</u> , 105 Ohio St. 3d 104, 822 N.E.2d 1239 (2004) .....	passim
<u>State v. Savage</u> , 30 Ohio St. 3d 1, 506 N.E.2d 196 (1987) .....	31
<u>State v. Shedrick</u> , 61 Ohio St. 3d 331, 574 N.E.2d 1065 (1991) .....	21, 24
<u>State v. Shipley</u> , 94 Ohio App. 3d 771, 641 N.E.2d 822 (1994) .....	32
<u>State v. Slagle</u> , 65 Ohio St. 3d 597, 605 N.E.2d 916 (1992) .....	115
<u>State v. Smith</u> , 14 Ohio St. 3d 13, 470 N.E.2d 883 (1984) .....	109
<u>State v. Smith</u> , 49 Ohio St. 3d 137, 551 N.E.2d 190 (1990) .....	23, 24, 69

<u>State v. Smith</u> , 89 Ohio St. 3d 323, 731 N.E.2d 645 (2000).....	69
<u>State v. Spisak</u> , 36 Ohio St. 3d 80, 521 N.E.2d 800 (1988) .....	104
<u>State v. Stahl</u> , 111 Ohio St. 3d 186, 855 N.E.2d 834 (2006).....	64
<u>State v. Steffen</u> , 31 Ohio St. 3d 111, 509 N.E.2d 383 (1987).....	135
<u>State v. Thayer</u> , 124 Ohio St. 1, 176 N.E. 656 (1931).....	109
<u>State v. Thompson</u> , 33 Ohio St. 3d 1, 514 N.E.2d 407 (1987) .....	28, 29, 115
<u>State v. Tyler</u> , 50 Ohio St. 3d 24, 553 N.E.2d 576 (1990).....	92, 93
<u>State v. Van Gundy</u> , 64 Ohio St. 3d 230, 594 N.E.2d 604 (1992).....	125
<u>State v. Van Sickle</u> , 90 Ohio App. 3d 301, 629 N.E.2d 39 (1993).....	23
<u>State v. White</u> , 82 Ohio St. 3d 16, 693 N.E.2d 772 (1998) .....	88, 91
<u>State v. White</u> , No. 20324, 2005 Ohio 212, 2005 Ohio App. LEXIS 192 (2nd Dist. Jan 21, 2005).....	62
<u>State v. Williams</u> , 74 Ohio St. 3d 569, 660 N.E.2d 724 (1996) .....	132
<u>State v. Williams</u> , 79 Ohio St. 3d 1, 679 N.E.2d 646 (1997) .....	92, 93, 109
<u>State v. Wilson</u> , 74 Ohio St. 3d 381, 659 N.E.2d 292 (1996).....	68
<u>State v. Wogenstahl</u> , 75 Ohio St. 3d 344, 662 N.E.2d 311 (1996) .....	133, 134
<u>State v. Zuern</u> , 32 Ohio St. 3d 56, 512 N.E.2d 585 (1987).....	18, 27
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).....	passim
<u>Stringer v. Black</u> , 503 U.S. 222 (1992).....	19, 103, 114, 134
<u>Sullivan v. Louisiana</u> , 508 U.S. 275 (1993).....	121
<u>The Nereide</u> , 13 U.S. (9 Cranch) 388 (1815).....	136
<u>The Paquete Habana</u> , 175 U.S. 677 (1900).....	136, 143
<u>Travelers Indemnity Co. v. Cochrane</u> , 155 Ohio St. 305, 98 N.E.2d 840 (1951).....	31
<u>Trop v. Dulles</u> , 356 U.S. 86 (1958).....	126
<u>Tuilaepa v. California</u> , 512 U.S. 967 (1994).....	133
<u>Turner v. Louisiana</u> , 379 U.S. 466 (1965).....	87
<u>Turner v. Murray</u> , 476 U.S. 28 (1986).....	69
<u>United States v. Blount</u> , 479 F.2d 650 (6th Cir. 1973) .....	70
<u>United States v. Carter</u> , 236 F.3d 777 (6th Cir. 2001).....	109
<u>United States v. Colon</u> , 835 F.2d 27 (2nd Cir. 1987) .....	122
<u>United States v. Conley</u> , 523 F.2d 650 (8th Cir. 1975) .....	122
<u>United States v. Cromer</u> , 389 F.3d 662 (6th Cir. 2004).....	64

<u>United States v. Henry</u> , 447 U.S. 264 (1980) .....	56
<u>United States v. Hill</u> , 738 F.2d 152 (6th Cir. 1984).....	70
<u>United States v. Jackson</u> , 390 U.S. 570 (1968).....	130
<u>United States v. Pink</u> , 315 U.S. 203 (1942).....	136
<u>United States v. Pinkney</u> , 551 F.2d 1241 (D.C. Cir. 1976) .....	122
<u>United States v. Rohrbach</u> , 813 F.2d 142 (8th Cir. 1987) .....	44
<u>United States v. Smith</u> , 18 U.S. (5 Wheat.) 153 (1820).....	142, 143, 145
<u>United States v. Tingle</u> , 658 F.2d 1332 (9th Cir. 1981).....	51
<u>United States v. Young</u> , 470 U.S. 1 (1985) .....	109
<u>Utah v. Pierre</u> , 572 P.2d 1338 (Utah 1977).....	128
<u>Victor v. Nebraska</u> , 511 U.S. 1 (1994) .....	123, 124
<u>Walton v. Arizona</u> , 497 U.S. 639 (1990), <i>vacated on other grounds</i> <u>Ring</u> <u>v. Arizona</u> , 536 U.S. 584 (2002).....	133, 134
<u>Wardius v. Oregon</u> , 412 U.S. 470 (1973) .....	37
<u>Washington v. Texas</u> , 388 U.S. 14 (1967).....	95
<u>White v. Mitchell</u> , 431 F.3d 517 (6th Cir. 2005) .....	86
<u>Wiggins v. Smith</u> , 539 U.S. 510 (2003).....	67, 75, 77, 80
<u>Williams v. Taylor</u> , 529 U.S. 362 (2000) .....	80
<u>Woodson v. North Carolina</u> , 428 U.S. 280 (1976) .....	75, 114, 118, 127
<u>Zant v. Stephens</u> , 462 U.S. 862 (1983).....	114, 131, 132, 135
<u>Zschernig v. Miller</u> , 389 U.S. 429 (1968).....	136

## CONSTITUTIONAL PROVISIONS

Ohio Const. art. I, § 2.....	126, 145
Ohio Const. art. I, § 5.....	70
Ohio Const. art. I, § 9.....	passim
Ohio Const. art. I, § 10.....	passim
Ohio Const. art. I, § 16.....	passim
Ohio Const. art. I, § 20.....	114, 116
U.S. Const. amend. V.....	passim
U.S. Const. amend. VI .....	passim
U.S. Const. amend. VIII.....	passim
U.S. Const. amend. XIV .....	passim
U.S. Const. art. II, § 2 .....	141

U.S. Const. art. VI.....	136
--------------------------	-----

**STATUTES**

O.R.C. § 2313.42 .....	88, 89
O.R.C. § 2313.43 .....	88, 89
O.R.C. § 2317.02 .....	30, 31, 37, 38
O.R.C. § 2901.05 .....	passim
O.R.C. § 2903.01 .....	passim
O.R.C. § 2903.02 .....	101
O.R.C. § 2911.01 .....	102
O.R.C. § 2921.12 .....	5, 101, 118
O.R.C. § 2923.02 .....	101
O.R.C. § 2923.03 .....	passim
O.R.C. § 2923.13 .....	101
O.R.C. § 2929.02 .....	126, 131, 145
O.R.C. § 2929.021 .....	126, 134, 145
O.R.C. § 2929.022 .....	126, 145
O.R.C. § 2929.023 .....	126, 145
O.R.C. § 2929.03 .....	passim
O.R.C. § 2929.04 .....	passim
O.R.C. § 2929.05 .....	passim
O.R.C. § 2929.06 .....	19, 81
O.R.C. § 2945.25 .....	68
O.R.C. § 2945.59 .....	21, 23
O.R.C. § 2953.21 .....	127

**RULES**

Ohio R. Crim. P. 11 .....	130
Ohio R. Crim. P. 24 .....	68
Ohio R. Evid. 403 .....	23, 24
Ohio R. Evid. 404 .....	passim
Ohio R. Evid. 601 .....	31
Ohio R. Evid. 804 .....	65

## OTHER AUTHORITIES

(Restatement (Second) of Foreign Relations Law of the United States, Sec. 154(1) (1965) .....	142
ABA Guidelines for the Appointment of Counsel in Death Penalty Cases.....	75, 76
Cho, <u>Capital Confusion: The Effect of Jury Instructions on the Decision To Impose Death</u> , 85 J. Crim. L. & Criminology 532 (1994) .....	129
Comment, 83 Colum.L.Rev. 1544 (1983) .....	79
Comment, <u>The Constitutionality of Imposing the Death Penalty for Felony Murder</u> , 15 Hous. L. Rev. 356 (1978).....	132
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment .....	137, 138, 140, 141
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).....	127
International Convention on the Elimination of All Forms of Racial Discrimination (1994) .....	passim
International Covenant on Civil and Political Rights (1992).....	passim
Ohio Public Defender Commission Statistics, July 14, 2006 .....	127
The Report of the Ohio Commission on Racial Fairness, 1999 .....	127
Webster's New World Dictionary of American English (Third College Ed. 1988) .....	89
William A. Schabas, <u>The Death Penalty as Cruel Treatment and Torture</u> (1996).....	143

## **Statement of Facts and Case**

On March 5, 2003, the Do Drop Inn was robbed by two men. (Tr. 1070). During the robbery, Ronald Johnson, one of the patrons in the bar, was shot and killed. (Tr. 1077). Initially, officers did not have any leads as to the perpetrators of the robbery and shooting. However, on October 20, 2003, Robert Smith, Kerry Perez's stepson, informed his guidance counselor that Kerry Perez committed the murder. (Tr. 1218; State's Ex. Number 80). Upon learning that the police were at the school to speak with her son, Robert's mother, Debra Perez, advised him not to tell the police anything. (Tr. 1514). However, her admonition came too late. Robert had already informed the police of the information he possessed regarding the murder. Subsequently, Robert assisted the police in the homicide investigation. (Tr. 1219). Robert advised the Springfield police about the purchase and exchange of guns by his mother and Perez. (Tr. 1219). Robert also retrieved some masks from his home that he believed to have been used during the robberies. (Tr. 1220-21; State's Exs. 81-A and C).

After Robert provided information to the police, the police began talking to Perez's wife, Robert's mother about her involvement in the crimes. (Tr. 1224). In fact, the police spoke to Debra between seven to ten times about the crime. (Tr. 1525). Debra purchased the gun that was used in the murder at the Do Drop Inn and later, after learning of the murder, traded it for a different gun. (Tr. 1518). Debra disclosed to police that she knew about the robbery and murder, admitted to purchasing several guns for Perez and admitted to helping him clean a gun wound. (Tr. 1515-20). During Debra's conversation with the police she was informed that in some cases someone who is complicit in a crime can be penalized the same as the person who committed the crime. (Tr. 1526).

Ultimately, Debra agreed to visit Perez in the county jail and allowed investigators to record her conversations with her husband. (7/5/05 Mtn. Supp. Tr. 31-32, Tr. 1515). Debra's first visit with Perez took place on October 24, 2003. (Tr. 1252; State's Exhibit 84). Debra advised Perez that the police found something in her name and came to her house to question her. (Tr. 1260). Debra further advised her husband that she told the police she did not know anything about the Do Drop Inn murder (Tr. 1262). Debra presented herself as being extremely distressed over the prospect of being arrested for her involvement in the robbery and murder. (Tr. 1258-69).

Debra's next visit with Perez took place on November 12, 2003. (Tr. 1271; State's Ex. 83). During that visit, Debra again informed Perez that the police came to the house. This time she stated that she acted like she was not home. (Tr. 1272). Perez immediately asked his wife what she wanted him to do. Later, Perez stated, "Is if the only way to... short stop this is—is for me to say okay, blah blah blah, I did whatever, you know what I'm saying?" (Tr. 1274). Debra stressed that she did not want to go to jail and that she was scared that she was going to be arrested and lose custody of Perez's daughter. (Tr. 1273-75). Again, Perez asked what Debra wanted him to do. (Tr. 1289). Although Debra did not answer this question specifically, she told him that if she ended up in jail, she would kill herself. (Tr. 1295). That same day, Perez contacted detectives to tell them that he wanted to speak with them. (Tr. 1325).

During his discussions with detectives, Perez implicated himself in the robbery and murder stating that he "[a]pproached the building from the side. Way out front, walked in the door, told everybody don't move, everybody get down on the floor. [Johnson] said I ain't gotta do a goddamn thing you say, nigger, something to that effect. Told him don't move, don't look. He looked and moved and ran his mouth. It cost him his life. Happened that quick." (Tr. 1416,

1438-39). Perez also implicated himself in several other robberies that took place in the Springfield area. (Tr. 1423-26).

Perez was indicted on one count of aggravated murder with two death penalty specifications. (O.R.C. § 2903.01; O.R.C. §§ 2929.04(A)(5) and (A)(7)). (Dkt. 1). In addition, Perez was indicted on one count of attempted murder, nine counts of aggravated robbery, one count of tampering with evidence, eight counts of weapon under a disability, and ten gun specifications. (Dkt. 1). Perez waived his right to jury trial for all counts except the aggravated murder count and specifications. (Jury Waiver and Motions Tr. 12). After Perez waived his right to trial, the prosecutor questioned whether Perez's competence should be raised as an issue. (Jury Waiver and Motions Tr. 14). Thereafter, a competency evaluation was conducted by the Forensic Psychiatry Center of Western Ohio. Perez was found to be competent to stand trial. (Joint Exhibit 1).

Before trial, defense counsel filed a motion with the court requesting the court to sever the aggravated murder count from the other counts in the indictment. (Dkt. 120). In addition, defense counsel filed a motion in limine to prevent the admission of prior crimes and bad acts. (Dkt. 125). After holding a hearing on this issue, the trial court denied both of the motions. (Dkt. 128).

Defense counsel also filed two motions seeking to suppress the statements made by Perez to law enforcement officials. (Dkt. 50, 54). A hearing was held August 16-18, 2004 in front of Judge Richard O'Neill on the motions to suppress. During the pendency of these motions, and after the hearing, Judge William McCracken was assigned to hear Perez's case. (Dkt. 90). Defense counsel filed a motion to have Judge McCracken hear and rule on all motions. (Dkt. 107). Without ruling on this motion, Judge O'Neill overruled the motions to suppress, and

issued findings of facts and conclusions of law, finding that Perez statements could be used against him at trial. (Dkt. 117).

A second hearing was held on July 5, 2005 on the defense's motion to suppress and motion to sever. (7/5/05 Mtn. Supp. and Mtn. Sever, Tr. 1-51). Defense counsel filed the second motion to suppress because counsel learned at the suppression hearing that Perez's wife had been working with law enforcement. (7/5/07 Mtn. Supp. Tr. 23). Defense counsel argued that since he was in custody and Debra was a police informant, Perez's Sixth Amendment right to counsel was also violated. (7/5/05 Mtn. Supp. Tr. 24). The trial court, on the basis of testimony and argument from counsel, as well as a review of the transcript from the prior suppression hearing, overruled Perez's motion to suppress. (Dkt. 122). The trial court found that Perez's Sixth Amendment right to counsel was not implicated by the police's scheme. (Dkt. 122).

Defense counsel filed an additional motion in limine to exclude the introduction of the taped statements of the conversation between Debra and Perez. (Dkt. 124). The trial court denied defense counsel's motion finding that the admission of the taped statements were not subject to the marital privilege because the statements were made in the presence of a third party and Perez did not have a valid expectation of privacy. (Tr. 58-60).

Perez's trial commenced on August 30, 2005. Defense counsel began their opening statements by conceding that Perez was guilty of the robbery at the Do Drop Inn and the murder of Johnson. Defense counsel informed the jury that in all probability the jury would be deliberating about whether to sentence Perez to death. (Tr. 787). Although the jury was reaching a determination as to guilt, defense counsel requested the jury to consider Perez's loyalty to his wife and remorse for the murder. (Tr. 787-88).

During the trial, the State admitted the tapes of Perez's conversation with his wife through the testimony of Detective Daniel DeWine. (Tr. 1252; State's Ex. 84-A, Tr. 1270; State's Ex. 83).<sup>1</sup> The State also played the videotapes of Perez's statements to detectives. (Tr. 1327; State's Ex. 26).

Debra also testified. She did not testify about the recorded conversations with her husband, but instead the State limited her to testimony to information regarding the purchase of weapons for her husband. During her testimony Debra admitted to committing numerous criminal acts. Debra admitted to acting as a "strawman" to purchase firearms for Perez, trading in the gun used to murder Mr. Johnson,<sup>2</sup> and assisting Perez with his gunshot wound. (Tr. 1516-18, 1520). Debra never exercised her right to remain silent during her testimony. In fact, being charged with these crimes did not seem to concern her. (Tr. 1527). When asked why she decided to come forward after all of these months, presumably knowing that her husband was using the guns to rob bars, Debra did not admit to any attempts to avoid prosecution for her involvement in the crimes, but instead stated, "Because my sister was murdered in L.A. They still don't know who killed her; and I don't think that's fair for anybody (sic) take anybody else's life; and the fact that if I didn't, we were afraid for our lives." (Tr. 1521). Although she was asked whether she was scared of being prosecuted, no one questioned whether she was ever promised any consideration for her testimony.

---

<sup>1</sup> Defense counsel objected to the admission of the tape because the statements constituted hearsay. (Tr. 1253).

<sup>2</sup> Perez was indicted for concealing or removing a firearm with purpose to impair its value or availability as evidence in such proceeding or investigation in violation of O.R.C. § 2921.12. Although Debra was the actual person who took the gun and traded it in, she faced no criminal charges for her actions.

The trial testimony indicated that the second robber at the Do Drop Inn, and the other robberies, was Cecil Howard. (Tr. 1209-10). The jury found Perez guilty of aggravated murder, the two death penalty specification and a gun specifications.

Defense counsel presented very little mitigation evidence despite the fact they informed the jury during the trial phase that Perez was guilty and that there would be a mitigation phase. Ray Joseph Paris, Perez's stepfather testified on behalf of Perez. The first part of defense counsel's questioning seemed to focus on demonstrating that Mr. Paris was a good person. Mr. Paris testified that he coached little league baseball, was in Vietnam, sustained injuries during his time in Vietnam, and worked a press operator for 33 years. (Tr. 1732-34). Mr. Paris further testified that he has known Perez since he was four years old and that Perez's life from age four to twelve was pretty good. (Tr. 1734). He went on to testify that Perez's father was never around and his mother was a prostitute. For some of those years, Mr. Paris looked after Perez. (Tr. 1735). Mr. Paris then asked that the jury spare Perez's life. (Tr. 1736).

Defense counsel's mitigation case witness was helpful to the State. Therefore, the prosecutor continued with defense counsel's theme of demonstrating that Perez's stepfather was a good person. During cross-examination the prosecutor stressed that Mr. Paris mentored a lot of young men in the community and watched out for Perez even after he was twelve. (Tr. 1737). Mr. Paris testified that he had a number of children and all of his children turned out well. (Tr. 1737). The State concluded its cross-examination by emphasizing, as defense counsel did, that Mr. Paris was a good role model for Perez. (Tr. 1738).

During closing arguments, defense counsel again acknowledged that they knew they would be at this stage of the trial. (Tr. 1750). Defense counsel then told the jury to discount one of the only relevant pieces of mitigation evidence presented, that Perez's mother was a prostitute.

“You know, his mom was a prostitute; that’s not an excuse. We wanted you to know some of the things about his childhood, but that’s not an excuse. That didn’t cause him to do what he did, and so I make no excuse.” (Tr. 1751). Defense counsel instead advised the jury to consider as mitigation that Perez was not a snitch and was remorseful for Johnson’s death. (Tr. 1756).

The jury found that the aggravating circumstances outweighed the mitigating factors of remorse and loyalty and imposed a sentence of death. (Tr. 1793). During sentencing hearing, defense counsel advised the court that Perez’s background carried the least weight in terms of the mitigation evidence. (Disposition Tr. 6). Defense counsel argued that the court should instead focus on Perez’s remorse and loyalty despite the fact that defense counsel recognized that such evidence was given little weight by Ohio’s courts. (Disposition Tr. 7-8).

The trial court, in its opinion sentencing Perez to death, noted that Mr. Paris helped raise Perez from the age of 4 to 12. The trial court noted that Mr. Paris was a life-long resident of Clark County, a Vietnam Veteran, a community leader who was active in coaching little-league, and a mentor to young men. The trial court further noted Mr. Paris’s testimony that defendant’s early childhood was pretty good. (Dkt. 144 at p. 3). “The testimony of Mr. Paris, the defendant’s step-father, showed that while Kerry Perez may not have had a perfect childhood, he did have the benefit of this relationship during his early upbringing.” *Id.* at p. 4. The trial court determined that the aggravating circumstances of which the defendant was found guilty of committing were sufficient to outweigh the mitigating factors present in the case, and therefore sentenced Perez to death. *Id.* at p. 5. Perez timely filed his Notice of Appeal and is now before this Court on his direct appeal of right.

## Proposition of Law No. I

The trial court's failure to give the required narrowing construction to a course-of-conduct specification in a capital case creates a substantial risk that the death penalty will be inflicted in an arbitrary and capricious manner in violation of the United States Constitution. U.S. Const. amends. VIII and XIV.

### A. Facts.

Perez was indicted on one count of aggravated murder with two capital specifications. (O.R.C. § 2903.01; O.R.C. §§ 2929.04(A)(5) and (A)(7)). O.R.C. § 2929.04(A)(5) requires the State to prove beyond a reasonable doubt that "...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." See State v. Sapp, 105 Ohio St. 3d 104, 111, 822 N.E.2d 1239, 1249 (2004).

Although Perez waived his right to a jury trial on all counts except the aggravated murder counts and specifications, the State introduced evidence regarding several robberies that were not being tried to the jury. Specifically, the State sought to present evidence of nine robberies: (1) Do Drop Inn aggravated robbery and aggravated murder, (2) Beverage Oasis aggravated robbery and attempted murder, (3) & (4) Nite Owl aggravated robberies, (5) 19th Hole aggravated robbery, (6) Sugarbakers aggravated robbery, (7) Lantern Bar aggravated robbery, (8) Dragon China aggravated robbery, and (9) Cassano's aggravated robbery. The State argued that the robberies proved the course of conduct specification. The State's theory was that Perez's course of conduct involved a "team," (Perez and Howard), "weapons," the underlying crime of aggravated robbery, and the selection of establishments that "all sell beverages." (Tr. 1620.) The State also claimed that Perez's "plan" was "if he met resistance, to kill." (Tr. 1641.) Defense argued against admission of the robberies, except for the two incidents that alleged a

killing or attempt to kill, (1) Do Drop Inn and (2) Beverage Oasis. (7/5/05 Mtn. Supp. Tr. 4-6, 15).

The trial court ruled that the other robberies could be introduced as evidence at trial. (Dkt. 121, 128, Tr. 766). The trial court's entry noted that the evidence was admissible because it "represented a course of criminal conduct constituting part of a common scheme or plan." (Dkt. 128). It also found that the evidence was admissible "for the purpose of establishing defendants opportunity or plan, identity or proof of his modus operandi." (Dkt. 121). Immediately before the trial began, the trial court granted Perez's motion to sever Count 20, the aggravated robbery at Cassano's. (Tr. 767-68). The State then presented at trial, as proof supporting the course of conduct specification, evidence of five of the robberies—Nite Owl aggravated robberies, 19th Hole aggravated robbery, Sugarbakers aggravated robbery, Lantern Bar aggravated robbery. In addition, the State presented evidence of the aggravated robberies at the Do Drop Inn and Beverage Oasis.<sup>3</sup> (Tr. 996-1034).

The Do Drop Inn and Beverage Oasis robberies occurred eight months apart. Other than being robberies, the two had little in common. The other seven robberies (counts 8-20 in the indictment, items 3-9 listed above) were aggravated robberies. None of these incidents involved a murder or attempted murder. They were separate crimes which had no relation to the aggravated murder or attempted murder with which Perez was charged. (7/5/05 Mtn. Supp. Tr. 4-5). He was not charged with murder or attempted murder in conjunction with any of those incidents. In fact, the State argued that these robberies were part of the course of conduct *because* they did not involve killing or the attempt to kill. The State argued:

---

<sup>3</sup> The aggravated robbery at the Do Drop Inn was a specification to the aggravated murder charge. The Beverage Oasis robbery was connected to an attempted murder count with which Perez was charged.

this is the course of conduct that basically involves showing that these individuals are robbing business establishments, both armed with firearms, and if there's resistance, they are going to kill. If there's not resistance, **they're not going to kill, and the other aggravated robberies that are alleged shows that...** Otherwise the jury is going to be left with the impression that whenever these two rob, they're automatically going to kill. When, in fact, we believe that the totality of the evidence indicates that although they have an intent to kill if they believe it's necessary, if they encounter any resistance to their crimes whatsoever, they are not simply going to walk in and kill. They are going to kill if they meet resistance. That's what this course of conduct shows.

(7/5/05 Mtn. Supp. Tr. 11, 14) (emphasis added).

The trial court's erroneous decision permitted the introduction of prejudicial evidence of other acts which do not support the course of conduct specification. This court must reverse.

**B. The Trial Court Erred in Admitting Evidence of Seven Robberies.**

**B.1 The Course of Conduct Specification Requires Purposeful Killing or Attempt to Kill.**

The plain language of O.R.C. § 2929.04(A)(5) indicates that the specification is intended to narrow the group of persons to which the death penalty may be applied to those whose actions constitute a “course of conduct *involving the purposeful killing of or attempt to kill* two or more persons.” O.R.C. § 2929.04(A)(5) (emphasis added). By enacting O.R.C. § 2929.04(A)(5), the General Assembly chose to make offenders who commit or attempt multiple murders eligible for the death penalty by the inclusion of the “course of conduct” element in this specification.<sup>4</sup>

The plain text of the Revised Code makes clear, however, that not all who commit multiple crimes and murders are exposed to death penalty eligibility through the (A)(5) specification. This is so because the language in the (A)(5) specification “course of conduct” is modified by the inclusion of the phrase “purposeful killing or attempt to kill two or more persons”. Had the General Assembly wished to do so, it could have drafted the (A)(5)

---

<sup>4</sup> The prior purposeful murder element in O.R.C. § 2929.03(A)(5) is not in issue in this case.

specification to simply state that the accused is death-eligible anytime he or she purposely kills or attempts to kill two or more persons and commits other crimes. In other words, the phrase “purposeful killing of or attempt to kill two or more persons” narrows the application of the phrase “course of conduct” to a limited class of those who commit multiple crimes *and* murders. No part of the statutory language can be treated as a mere surplus in the (A)(5) specification. Cf. State v. Jones, 91 Ohio St. 3d 335, 347, 744 N.E.2d 1163, 1178 (2001) (statutory component “offense committed by the offender” is essential element of (A)(3) specification and therefore is essential element of capital murder charge itself). The General Assembly requires more than just committing additional crimes as a predicate for death eligibility under the (A)(5) specification.

This Court’s holding in Sapp supports a finding that the plain language of the statute requires a killing or an attempt to kill. The Court’s entire discussion of the course of conduct specification is predicated on the assumption that the crimes which would make up the course of conduct each involve killing or attempted killing, as the statute specifies.

The aggravated robberies introduced at Perez’s trial do not fall within the statutory language of (A)(5) which requires a “course of conduct *involving the purposeful killing of or attempt to kill* two or more persons.” O.R.C. § 2929.04(A)(5) (emphasis added). Stretching the language of the course of conduct specification to include separate crimes in which there was no killing or attempt to kill eviscerates the function of the specification. Allowing evidence of other crimes under the guise of proving a course of conduct effectively permits the State to add a death specification to any case where a defendant has committed any other crime in addition to a murder or attempted murder. This is clearly not the intent of the statute.

## **B.2 The State Must Prove a Factual Link Between the Aggravated Murder and Attempted Murder.**

This Court's holding in Sapp also required the State to "establish some factual link between the aggravated murder with which the defendant is charged and the other murders or attempted murders that are alleged to make up the course of conduct." Sapp, 105 Ohio St. 3d at 112, 822 N.E.2d at 1250. "In order to find that two offenses constitute a single course of conduct under O.R.C. § 2929.04(A)(5), the trier of fact must discern some connection, common scheme or some pattern or psychological thread that ties the offenses together." Id. The factual link could be a number of things, including "time, location, murder weapon, or cause of death. It might involve the killing of victims who are close in age or who are related." Id. Or it could "involve a similar motivation on the killer's part for his crimes...or perhaps a similar pattern of secondary crimes (such as rape) involving each victim." Id. "Whatever the link or links between the multiple murders might be, the statutory words 'course of conduct' compel the government to present evidence of those connections." Id.

In Sapp, the defendant was charged with raping and murdering two young girls, raping and murdering an adult woman, and raping and attempting to murder another adult woman. Id. at 105, 822 N.E.2d at 1244. This Court found that the murders and attempted murder constituted a course of conduct because the defendant "removed the pants from [the victims] in the same distinctive fashion, by using his knife to cut the seams open...Each victim was raped and left nude from the waist down. Each victim was battered in the head with an object picked up at the scene of the crime, and each suffered a fractured skull." Id. at 113, 822 N.E.2d at 1251. Furthermore, this Court found evidence of a common motive—the defendant "committed each of these murders for pleasure, to gratify his recurring 'taste [for] blood.'" Id. The defendant also perceived in each case that the victim had somehow provoked him. Id. This Court found that

*the murders and attempted murder* were part of a single course of conduct involving more than one intentional killing or attempted killing. Id. (emphasis added).

Here, the State impermissibly used evidence of separate crimes as its factual link. The State argued that the evidence of these other, unrelated aggravated robberies provided a factual link between the incidents at the Do Drop Inn and Beverage Oasis because they were all aggravated robberies. The State argued that this was permissible under Sapp because the aggravated robberies were a similar pattern of secondary crimes. (7/5/05 Mtn. Supp. Tr. 10-11). This is an unwarranted extension of Sapp. The secondary crimes in Sapp were the rapes of the women that the defendant killed or attempted to kill. Those secondary crimes were committed in conjunction with the murders and attempted murder. The aggravated robberies in this case were allegedly committed on completely separate dates and locations than the murder and attempted murder. They were, quite simply, separate crimes. (Dkt. 121, p. 1). Nothing in the language or facts of Sapp indicates that such use of separate crimes would be a permissible method of establishing a factual link as required to prove a course of conduct.

**B.3 The Court Must Consider the Amount of Time Between the Incidents as a Relevant Factor, and Must Consider All the Circumstances of the Offenses.**

The crimes in the Sapp case took place over a significant period of time. This Court held that despite the length of time between commission of the crimes, the admission of the evidence to support course of conduct was permissible. However, this Court acknowledged that “when two or more offenses are alleged to constitute a course of conduct...the amount of time elapsing between the offenses is a relevant factor.” Sapp, 105 Ohio St. 3d at 112, 822 N.E.2d at 1200. This Court required, “all the circumstances of the offenses must be taken into account. ‘The farther apart the acts are temporally, the more incumbent it is upon a court to carefully consider other factors....’” Id. (citations omitted).

Here, there was a lapse of eight months between the attempted murder at Beverage Oasis and the murder at Do Drop Inn. The State argued this as an additional reason that evidence of the other robberies was necessary to show a course of conduct. (7/5/05 Mtn. Supp. Tr. 8). However, the use of the other, separate robberies to prove a course of conduct was particularly misleading to the jury particularly when “all of the circumstances of the offenses” are taken into account.

Three of the robberies occurred prior to the incident at Beverage Oasis. The Nite Owl robbery of 5/29/02, 19th Hole robbery of 6/7/02, and Sugarbakers robbery of 6/19/02 all occurred prior to the attempted murder at Beverage Oasis on 6/22/02. There was no murder or attempted murder at any of those three incidents. They cannot be considered as a part of the course of conduct—they did not even occur during the time between the murder and attempted murder. The Lantern Bar robbery and second Nite Owl robbery both occurred in September of 2002. While they occurred during the span of time between the Beverage Oasis and Do Drop Inn incidents, neither of those robberies involved either a murder or attempted murder.

Furthermore, the State presented its case in such an order to make it appear that the chronological order of the crimes was: (1) Beverage Oasis, (2) & (3) Nite Owl, (4) 19th Hole, (5) Sugarbakers, (6) Lantern Bar, (7) Do Drop Inn. (Tr. 977-1079). This evidence was particularly misleading and prejudicial as introduced at trial because, although the dates were specified during testimony regarding each incident, it created the inaccurate inference to the jury that Perez was on a crime spree beginning with a robbery and attempted murder followed by a series of robberies, culminating in a robbery and murder.

None of the other robberies should have been introduced as a factor for consideration of a course of conduct. Only the circumstances of the incidents involving a killing or attempted

killing should have been considered in making a determination about whether a course of conduct existed. Any consideration of the other robberies as support for the course of conduct specification was in error. This court must reverse.

**B.4 Trial Court Ruling and State's Concession Demonstrate Evidence was Improperly Admitted as Course of Conduct Evidence**

Before the presentation of defense's mitigation case, the trial court ruled on what trial phase evidence could be admitted for the jury's consideration during the penalty phase. The court ruled, "Further, the Court's gonna rule that the testimony with regard to the other acts other than the Beverage Oasis, that no reference be made to those during this phase of the trial." (Tr. 1716). The prosecutor agreed, "Yes, sir. It's not one of the aggravating circumstances." (Tr. 1716). Later, the trial court again recognized that the evidence of other robberies was not proper for consideration as course of conduct evidence. During the jury's deliberations the jury asked the date of the Sugarbaker's robbery and the time of the confession tape. The trial court stated that it would provide the following answer: "For purposes of this phase of the trial, you may only consider the aggravated circumstances that the Court has previously instructed you on. You may not consider evidence of any other acts, period." (Tr. 1785).

This ruling by the trial court, and concession by the prosecutor, further demonstrates that the introduction of evidence of the other aggravated robberies did not meet the course of conduct specification and thus were improperly admitted for the jury's consideration during the trial phase.

**C. The Incidents at the Do Drop Inn and Beverage Oasis Do Not Support a Finding of a Course of Conduct.**

The only two incidents in this case which could have properly been considered by the jury as constituting a course of conduct are the murder at Do Drop Inn and the attempted murder

at Beverage Oasis. These two incidents, although both were aggravated robberies, do not constitute a course of conduct, and when considered apart from the improperly admitted evidence of the other robberies, do not support a finding of course of conduct.

### **C.1 Lapse of Time and Lack of Factual Link Negates Course of Conduct.**

The attempted murder at the Beverage Oasis occurred on June 22, 2002. The murder at the Do Drop Inn occurred on March 5, 2003. These incidents occurred eight months apart. The Beverage Oasis is a drive-thru business. The incident at the Beverage Oasis was committed by two men in green pullovers or raincoats, wearing full facial masks with a filter in the front, like gas masks. (Tr. 979-80, 890). They were both carrying shotguns. (Tr. 980). They walked in to the drive-thru and approached the employee-only door. (Tr. 888). The employees, who were in the store, ran out another door before the intruders came in. (Tr. 891). One of the intruders went into the store, and the other went out the east overhead door. (Tr. 891). The man who was inside the store began to hit the cash register with his weapon. (Tr. 892). The owner of the Beverage Oasis, Cliff Conley, took out his gun and went from his office into the drive-thru. (Tr. 892-93). A gun battle ensued. (Tr. 892-901). Conley fired multiple shots first, and Perez returned fire. (Tr. 893-901).

The Do Drop Inn is a bar. The door to the bar was kicked open, and two men came through the door. (Tr. 1044). The shorter of the two men said to the bar patrons, "This is a robbery, don't anybody move, this is not a joke." (Tr. 1045). The bar patrons were told to put their hands on the bar. (Tr. 1070). Johnson, whose leg was in an immobilizer, started to turn. (Id.). When he turned to look at the intruders, he was shot. (Tr. 1071). After Johnson was shot, the intruders had one of the patrons empty the cash register, and attempted to take money from some of the other patrons. (Tr. 1073-74).

Although both incidents involved the use of firearms and can properly be classified as aggravated robberies, they were not similar in any other respect. The incidents took place eight months apart from each other, at different locations, at different types of businesses, using different kinds of guns. The victims were not related to each other or to Perez. The victims were not attacked in the same manner. Conley was attacked only after he opened fire on Howard during the robbery. Only after he had shot Howard and was approaching him on the ground did Perez fire at him. The murder at the Do Drop Inn was the result of Perez shooting Johnson when he moved in his bar stool. These two incidents do not constitute a course of conduct.

**D. The Course of Conduct Specification as Applied in this Case Violates the United States and Ohio Constitutions.**

The phrase “course of conduct” narrows some, but not all, multiple murder or attempted murder offenses into the realm of death penalty eligible offenses. Any application of the “course of conduct” specification to a particular case must therefore guide the jury in a manner that is neither vague nor over-inclusive, so that genuine narrowing for the death penalty is achieved. See, e.g. McCleskey v. Kemp, 481 U.S. 279, 305 (1987); Godfrey v. Georgia, 446 U.S. 420, 428 (1980). Perez’s death sentence is unreliable and arbitrary because the (A)(5) specification, as applied to this case, is too vague and over-inclusive to survive constitutional muster. See Lewis v. Jeffers, 497 U.S. 764, 774 (1990); Maynard v. Cartwright, 486 U.S. 356, 362 (1988); Godfrey, 446 U.S. at 428-29.

The introduction of evidence of unrelated, separate crimes in which there was no killing or attempt to kill to support the course of conduct specification permitted the jury to consider crimes and render a death sentence based on impermissible factors. The specification, as interpreted by the trial court in this case, effectively allowed the State to seek the death penalty on the basis of Perez’s other acts which were separate and unrelated to Johnson’s murder. By

permitting the State to use this evidence of other crimes, the (A)(5) specification as applied here fails to achieve the genuine narrowing function for death eligibility factors that is mandated by the Eighth and Fourteenth Amendments. See, generally, Gregg v. Georgia, 428 U.S. 153 (1976). Such a construction of the specification does not narrow the class of persons eligible for the death penalty, and it effectively allows the State to attach a course of conduct specification to any case where there is a murder or attempted murder, and the defendant has committed other crimes, whether or not they are related to the murders.

Perez's death sentence is unconstitutional because this invalid (A)(5) specification was also weighed as a selection factor at the penalty phase. See O.R.C. §§ 2929.04(A); 2929.03(D)(2) and (3). The State re-introduced all of the testimony from the trial phase for consideration at the penalty phase. (Tr. 1713, 1716). Although the trial court excluded testimony regarding the other robberies during the penalty phase, it also instructed that the jury could consider evidence relevant to the aggravating circumstances, including evidence admitted in support of course of conduct. (Tr. 1770, 1774). The testimony from the culpability phase of the trial regarding those robberies prejudicially impacted the sentencing in this case. Given the amount of time and testimony devoted to introducing evidence of the robberies at the culpability phase of the trial, (tr. 996-1003, 1009-1034), and the State's heavy reliance on that evidence as support for the course of conduct specification in opening statements and closing arguments, (tr. 774-777, 1621-22, 1658-1660), it is inconceivable that the jury did not consider these robberies as part of the course of conduct when determining Perez's sentence. See State v. Zuern, 32 Ohio St. 3d 56, 68, 512 N.E.2d 585, 597 (1987) (Wright, J., dissenting) ("nonadmissible declaration cannot be wiped from the brains of jurors") (citing Bruton v. United States, 391 U.S. 123, 129 (1968)). The (A)(5) specification, as applied in this case, placed an impermissible thumb on

“death’s side of the scale”. See Stringer v. Black, 503 U.S. 222, 232 (1992). See also State v. Davis, 38 Ohio St. 3d 361, 369-70, 528 N.E.2d 925, 933-34 (1988) (citing Barclay v. Florida, 463 U.S. 939 (1983)).

**E. Insufficient Evidence of Course of Conduct.**

A conviction for an alleged criminal offense cannot be based on mere suspicion, but must be predicated on probative evidence of every material element that is necessary to constitute the crime. The burden rests upon the State of Ohio to prove beyond a reasonable doubt every essential element of the offense charged. If even one essential element is not proven beyond a reasonable doubt, the conviction must be reversed as being unsupported by sufficient evidence. In re Winship, 397 U.S. 358, 364 (1970); Jackson v. Virginia, 443 U.S. 307 (1979). Had the trial court excluded the evidence of the aggravated robberies, there would have been insufficient evidence to convict Perez of the (A)(5) “course of conduct” specification. See Jackson, 443 U.S. at 319.<sup>5</sup> His conviction of this specification was also against the manifest weight of the evidence.

**F. Conclusion.**

The trial court erred in letting the State introduce evidence of separate crimes to support the course of conduct specification. The evidence does not meet the statutory requirement, or fall under the interpretation of the (A)(5) specification in Sapp. The jury was misled and Perez was prejudiced by the improper evidence of a course of conduct. His death sentence on the basis of this improperly presented specification is invalid. This Court must reverse Perez’s convictions and order a new trial. Alternatively, Perez is entitled to a new penalty phase. See O.R.C. § 2929.06(B).

---

<sup>5</sup> Even with the evidence of aggravated robberies, the State failed to meet its burden on the course of conduct specification. (See, Defense Counsel’s argument Tr. 1605).

## **Proposition of Law No. II**

Where evidence of other crimes lacks a distinct behavioral fingerprint, such evidence is inadmissible. Even where such evidence may be admissible, undue emphasis on it may prejudice a capital defendant's right to a fair trial and reliable death sentence. U.S. Const. amends. V, VI, VIII, and XIV.

### **A. Facts.**

A portion of the evidence introduced at Perez's trial for the murder of Ronald Johnson concerned incidents that were not related to that murder. Perez was charged with multiple counts of aggravated robbery. (Dkt. 1). The State sought to introduce evidence of these aggravated robberies in order to prove the course of conduct specification attached to the aggravated murder count. (Mtn. Supp. Tr. 8-9; Tr. 775). Perez moved to sever the aggravated counts and subsequently waived his right to a jury trial as to those counts because the presentation of evidence as to the other aggravated robberies violated Ohio R. Evid. 404(B) and does not constitute evidence for purposes of the O.R.C. § 2929.04(A)(5) specification. (July 5, 2005, Mtn. Supp. Tr. 4-8; Dkt. 88, 125). The trial court overruled Perez's objection and permitted the aggravated robberies evidence to prove a "unique identifiable plan of criminal activity which are probative as to the identity of the Defendant and are admissible under Evid. R. 404(B)." (Dkt. 128; Tr. 766). The State produced evidence of these crimes which did not prove a pattern, intent, or identity. Furthermore, this inflammatory impact carried over into the penalty phase and denied Perez a reliable death sentence. This Court must reverse.

### **B. Other acts law.**

Evidence of other crimes may not be used to show that the accused acted in conformity with his bad character. Ohio R. Evid. 404(B). Evidence of other crimes may, "however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan,

knowledge, identity or absence of mistake or accident.” Id. Further, O.R.C. § 2945.59 (Anderson 2006) provides:

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 proven 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.

Although the Revised Code does not list identity as a proper purpose, this 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) (citations omitted).

To be admissible under Evidence Rule 404(B) and O.R.C. § 2945.59, the proponent of the other acts evidence must offer “substantial proof” that the other act happened. State v. Broom, 40 Ohio St. 3d 277, 282, 533 N.E.2d 682, 690 (1988). The proponent’s evidence must also tend to show a proper purpose, such as identity. Id. The standard for admitting other acts evidence is “strict” because Ohio R. Evid. 404(B) and O.R.C. § 2945.59 “codify an exception to the common law with respect to evidence of other acts of wrongdoing.... ” Id. The rule and the statute are therefore “construed against admissibility....” Id.

Other acts evidence of identity permits the jury to find that the accused committed the instant offense if it also finds that he committed the other act. Other acts evidence of identity therefore carries a high risk of prejudice to the accused because “[t]he average individual is prone to much more readily believe that a person is guilty of the crime charged if it is proved to his satisfaction that the defendant has committed a similar crime.” State v. Hector, 19 Ohio St. 2d 167, 174-75, 249 N.E.2d 912, 916-17 (1969). Accordingly, other acts evidence offered for

identity must tend to show by substantial proof that the crime charged and the other act are impressed with the defendant's "behavioral fingerprint." State v. Lowe, 69 Ohio St. 3d 527, 531, 634 N.E.2d 616, 620 (1994).

As Judge Painter of the Court of Appeals of Hamilton County aptly stated:

With regard to identity, the similarities between the actions alone is insufficient. Even if the similarities can be termed as a *modus operandi*, the actions in each instance must also be unique, separating the defendant from other potential actors based on the differences between that *modus operandi* and any others.

State v. Roberts, No. C-950277, 1996 Ohio App. LEXIS 814, at p. 7 (Hamilton Ct. App. Mar. 6, 1996). This uniqueness was lacking in the evidence of other acts introduced by the State.

### **C. Argument.**

The State introduced evidence that Perez had been involved in five bar robberies and one drive-thru between March and December of 2002. (Tr. 997, 1011, 1017, 1023, 1031-32, 1058). This testimony was offered to establish that Perez was involved in a series of robberies targeting bars and that if faced with resistance, he would kill. (Tr. 775). According to the witnesses, Perez would gain access and tell the employees and patrons to get on the floor and not move. (See e.g. 998, 1017, 1033).

The trial court erred to Perez's prejudice when it admitted this other acts testimony because the other acts were similar and lacked a "behavioral fingerprint" that made them sufficiently similar to be relevant to the Johnson killing. The nature of those crimes is too distinct to show intent, plan, or identity under Evidence Rule 404(B).

#### **C.1 Identity not at issue in this case.**

The trial court permitted the other acts evidence because it was "probative as to the identity of the Defendant." (Dkt. 129). This was error. Identity, as to who shot Johnson, was

never an issue at trial because Perez acknowledged this fact from the beginning. (Tr. 787, 1437, 1464, 1482, 1643). Because identity of the shooter was not in question, the trial court erred in permitting this evidence under Evid. R. 404(B) to prove identity. See State v. Burson, 38 Ohio St. 2d 157, 158, 311 N.E.2d 526, 528 (1974) (“Evidence of other acts of a defendant is admissible *only* when it ‘tends to show’ one of the matters enumerated in the statute [R.C. 2945.59, motive, intent, the absence of mistake or accident, scheme, plan or system] and *only* when it is relevant to proof of guilt of the defendant of the offense in question.”) (Emphasis *sic.*) (citing State v. Hector, 19 Ohio St. 2d 167, 175, 249 N.E.2d 912, 917 (1969)); State v. Van Sickle, 90 Ohio App. 3d 301, 306, 629 N.E.2d 39, 42 (1993). Since Perez admitted to shooting Johnson, the probative value of presenting this other act evidence to show identity is greatly outweighed by the danger of unfair prejudice under Evid. R. 403(A). Therefore, the trial court erred by admitting the aggravated robberies evidence for the purpose of showing identity.

## **C.2 Lack of *modus operandi* or plan.**

Even had identity been at issue at trial, the introduction of other acts evidence did not meet strict requirements of admissibility to show identity. Although the other acts evidence need not be the same evidence as the evidence from the instant offense, see State v. Jamison, 49 Ohio St. 3d 182, 186, 552 N.E.2d 180, 184 (1990), it must nevertheless “show a *modus operandi* identifiable with the defendant.” Lowe, 69 Ohio St. 3d at 531, 634 N.E.2d at 619. Indeed, the *modus operandi* must be “unique, separating the defendant from other potential actors based on the differences between that *modus operandi* and any others.” Roberts, 1996 Ohio App. LEXIS 814, at p. 7.

This requirement is illustrated in State v. Smith, 49 Ohio St. 3d 137, 141, 551 N.E.2d 190, 194 (1990). In Smith, this Court held that other acts evidence was proper to show identity

in a multiple murder case because “the circumstances of the deaths were remarkably similar.”

Id. The Court noted that:

Both victims were friends of the defendant. Both victims were overnight guests of defendant at his trailer. Both victims were frequent drug users. Defendant waited one or more hours in both instances before calling the police. Defendant cleaned the trailer both times to remove any incriminating evidence. In both instances, defendant met the officers at his trailer and told them that the victims had apparently died of an overdose of illegal drugs. Both victims died of acute morphine intoxication, having .07 milligrams percent of morphine in their blood.

Id. Accord, Shedrick, 61 Ohio St. 3d at 338, 574 N.E.2d at 1070 (other acts evidence properly used to show identity; both victims thirteen year old girls, both victims raped vaginally and anally, both victims stabbed in the neck). In Smith and Shedrick, the other acts evidence tended to show identity because of the unique and uncommon circumstances of the offenses.

In State v. Hall, however, other acts evidence of rape was improperly admitted to show identity in a rape case because:

*The characteristics shared by all three offenses -- the act of oral intercourse, the robbery, the use of a gun and the conversational demeanor of the offender -- are common in rape cases generally. We hold this conduct is not sufficiently distinctive to demonstrate the identity of the perpetrator. Further, were the evidence to be considered marginally probative, its relevance would be substantially outweighed by the danger of unfair prejudice. Evid. R. 403(A).*

57 Ohio App. 3d 144, 148, 567 N.E.2d 305, 310 (1989) (emphasis added). Hall makes clear that other acts evidence cannot be admitted to show identity when it simply evidences a fact pattern that is “common” to many other offenses. See id. A common fact pattern lacks the defendant’s “behavioral fingerprint” because many other defendant’s could commit the same type of crime. See Lowe 69 Ohio St. 3d at 531, 634 N.E.2d at 620.

As in Hall and Lowe, the other acts evidence presented in this case did not establish a behavioral fingerprint. A substantial number of witnesses testified about Perez's participation in the Nite Owl Tavern, 19th Hole, Sugarbaker's, Lantern Bar, and Do Drop Inn robberies. This testimony detailed a plan to enter a bar, tell the employees and patrons to lay on floor, and not to move. (Tr. 997, 1011, 1017, 1023, 1031-32, 1058). This is a common command in robbery cases and not sufficiently distinctive for identity. See Hall, 57 Ohio App. 3d at 148, 567 N.E.2d at 310. This is not specific to Perez's *modus operandi*. Beyond the fact that each robbery occurred at a bar, except for the Beverage Oasis drive-thru, there are significant differences between the Do Drop Inn and other bar robberies that distinguishes them from the Johnson murder.

First and foremost, evidence was introduced which shows a lack of deadly force. Testimony was presented about Perez's involvement in several aggravated robberies that did not result in murder or an attempted murder. (Tr. 996-1036). The evidence of aggravated robberies shows that in one instance, the robber made contact by grabbing hair. (Tr. 997). At other places, testimony shows no physical contact with employees or patrons of the bars. (Tr. 1017-18; 1021-1029). Furthermore, the robbers did not always rob the patrons. (Compare Tr. 1000, 1011 with 1018, 1029). Each robbery was different, separate, and distinct. (See Entry, Dkt. 121).

There was no deadly violence associated with the Nite Owl Tavern, 19th Hole, Lantern Bar, and Sugarbaker's robberies. None of the victims in these robberies were physically harmed in any way. Perez admits to firing his weapon during the Do Drop Inn robbery, however, he claims it was accidental. (Tr. 1437, 1464, 1482). The testimony of Ms. Allen, Ms. DePriest, and Mr. Delawder supports this version of events. Each testified that the robbers entered the Do Drop Inn, told everyone to get on the floor and then within seconds fired a gun shot. (Tr. 1041,

1061, 1070-71). This testimony demonstrates that Perez did not intentionally fire his weapon during the robbery. Also, Perez stated that the shooting was an accident. (Tr. 1437, 1464). While Perez carried a weapon during the robberies, he showed no inclination to harm anyone. However, the Johnson murder was committed almost instantaneously upon entering the Do Drop Inn. (Tr. 1041). This level of force is a drastic departure from Perez's prior robberies in which there was none. The only other place where a weapon was fired was at the Beverage Oasis drive-thru. There, Perez only fired after being fired upon. (Tr. 893, 896, 900, 903, 1426-27).

Next, evidence of a robbery at a drive-thru is in no way similar to the Johnson case. Robbing a drive-thru and a bar are crimes of a very different nature. Other acts evidence is inadmissible, when the nature of the other act is distinct from the nature of the offense at bar. See e.g. Lowe, 69 Ohio St. 3d at 531, 634 N.E.2d at 620 (other act was *inappropriate sexual activity with juveniles* and offense at bar was *multiple murder*); State v. Hutton, 53 Ohio St. 3d 36, 559 N.E.2d 432 (1990) (other act was *rape* and offense at bar was *aggravated murder and kidnapping*).

Lastly, the manner in which the robberies were committed are too different to show a behavioral fingerprint. During the first robbery of the Nite Owl, Sugarbaker's, Do Drop Inn, and Beverage Oasis drive-thru robberies there were two men. (Tr. 979, 997-98, 1017, 1041, 1061, 1070). However, during the second Nite Owl robbery, 19th Hole, and Lantern Bar robberies there was only one individual. (Tr. 999, 1011, 1024-25, 1028-29, 1033).

The robberies show no behavioral fingerprint. The only similarity between the robberies and the Johnson murder is the fact that almost all of the robberies were at bars. These actions were not unique and, with so many distinguishing features, the other acts evidence offered by the State failed to establish a "behavioral fingerprint." Lowe, 69 Ohio St. 3d at 531, 634 N.E.2d at

620. Without establishing the “behavioral fingerprint,” the risk was very high the jury would use the evidence improperly. Id. The admission of the other acts evidence was improper under Evidence Rule 404(B).

The improper admission of this evidence deprived Perez of his due process right to a fair trial. The introduction of this other acts evidence was prejudicial. Although Perez confessed, the State was able to use the strength of its evidence of those crimes to bolster its case for the Johnson murder and secure a death sentence. Given this fact, Perez was deprived of due process and a fair trial.

**D. Prejudicial effect at penalty phase.**

Even if this Court were to conclude that other acts testimony was admissible during the trial phase, that testimony prejudicially impacted the penalty phase of Perez’s trial. The State re-introduced all of the testimony from the trial phase for consideration at the penalty phase. (Tr. 1713). The trial court did exclude the other acts testimony from the penalty phase because it was not relevant to the aggravating circumstances. (Tr. 1716). However, the court instructed the jury to consider evidence relevant to the aggravating circumstances of which the jury found Perez guilty. (Tr. 1774). This included the course of conduct aggravating circumstance. (Tr. 1770).

Once information is instilled in the juror’s minds, it “cannot be wiped from the brains.” See State v. Zuern, 32 Ohio St. 3d 56, 68, 512 N.E.2d 585, 597 (1987) (Wright, J., dissenting) (“nonadmissible declaration cannot be wiped from the brains of the jurors”) (citing Bruton v. United States, 391 U.S. 123, 129 (1968)); See also State v. Breedlove, 26 Ohio St. 2d 178, 184, 271 N.E.2d 238, 241-42 (1971) (A court’s instructions to the jury to disregard evidence was insufficient to overcome prejudicial mugshot photographs). Thus, all of this testimony about other crimes was before the jury during its consideration of what weight to accord to the

aggravating circumstance of aggravated robbery and/or course of conduct. It is inconceivable that the jury did not consider this evidence in its weighing process, as the prosecutor urged the jury to consider the robbery specification as one with “tremendous weight” because the victims are vulnerable. (Tr. 1745-47). Therefore, the jury considered non-statutory aggravating circumstances or gave the aggravating circumstance of aggravated robbery undue weight because it considered the series of offenses as opposed to one single crime.

The witnesses who testified to the other acts add to the prejudicial impact this evidence had on the jury. A portion of this trial was spent discussing Perez’s tendency to commit robberies. The amount of the evidence added to the weight it carried during the penalty phase and had a prejudicial impact on the jury. Although there was no behavioral fingerprint as to how each robbery occurred, the jury was able to hear that Perez robbed multiple bars. Details of these unrelated robberies improperly influenced the jury and had a very profound impact on Perez’s sentence.

This Court has found that it is proper to uphold the conviction but reverse the sentence where the admission of evidence with a strong emotional impact may have tainted the sentencing phase. State v. Thompson, 33 Ohio St. 3d 1, 514 N.E.2d 407 (1987). In Thompson, the court rejected the proposition that photographic evidence admitted during the trial phase compromised the integrity of the conviction because there was overwhelming evidence of guilt. Id. at 9, 514 N.E.2d at 416. The court vacated the death sentence, however, holding that the improper admission of the photographs coupled with other errors resulted in a proceeding that was infected with emotion. Id. at 15, 514 N.E.2d at 420-21.

If this Court affirms the admission of the other acts testimony in the trial phase, then it must reach the same result as in Thompson for the penalty phase. The question at the penalty

phase of a capital trial is not guilt. Id. Rather, it is the sentencer's obligation to dispassionately evaluate the nature of the sentence without reference to the emotional testimony from the victim of an earlier robbery. By first introducing this evidence as if it were relevant to the determination of the issues in the trial phase and then excluding its admission in the penalty phase, the State created a climate in which the jury was unable to dispassionately weigh the aggravating circumstances against the mitigating factors. Once the jury heard the unrelated robbery testimony, it was on the jury's brain and part of its sentencing decision. This is why the court reversed the sentence in Thompson and why the court should reverse the sentence here.

The consideration of this prejudicial yet irrelevant testimony affected the outcome of Perez's penalty phase. His death sentence was based on a consideration of evidence that improperly tipped the scales in favor of death. Where the sentencer's discretion in a death penalty case is improperly influenced, the Eighth and Fourteenth Amendments to the United States Constitution are violated and this Court must reverse.

**E. Remedy And Conclusion.**

The foregoing analysis shows that the trial court abused its discretion and violated Perez's right to due process when it admitted this other acts evidence at trial. See State v. Johnson, 71 Ohio St. 3d 332, 340, 643 N.E.2d 1098, 1106 (1994) (admission of prejudicial evidence denied defendant his due process right to fair trial). Perez's convictions must be reversed and his case remanded for a new trial.

Moreover, the prejudicial impact during the penalty phase merits reversal of the death sentence even if the court upholds the conviction. This Court cannot conclude that this evidence did not affect the jury's decision. This Court must reverse the death sentence.

### Proposition of Law No. III

The admission of taped statements of communications made between Perez and his wife without Perez's waiver of the marital privilege constituted a violation of Perez's right to exclude spousal testimony under Ohio law as well as his rights under the Due Process Clause of the United States Constitution. O.R.C. § 2317.02(D); U.S. Const. amend. VIII and XIV.

#### A. Facts.

In order to assist law enforcement officials in their investigation of her husband, Debra Perez agreed to visit with her husband and have her conversations with him recorded. Debra visited Perez, who was in the county jail on unrelated charges, on October 24, 2003 and November 12, 2003. The conversations from each of those visits were recorded and played to the jury over defense objection. (Tr. 59; State's Exs. 83 and 84).<sup>6</sup> Defense counsel, through a motion in limine, sought a ruling from the court to exclude the admission of the tapes. (Tr. 51). The state argued that the admission of the taped communications was proper because Debra was not going to testify regarding the communications. The State further argued that since the communications came in the form of tapes and not Debra's testimony, the admission of the evidence was not prohibited by the privilege statute. (Tr. 53-54). The trial court ruled that the admission of the tapes was proper. At one point the trial court based its decision on the fact that with "the use of the recording system on the telephones with the verbal warning that these conversation are recorded, that the Defendant had no expectation of privacy." (Tr. 57-58). However, at another point, the trial court said that Perez had no expectation of privacy because there was a third party present in the room. (Tr. 57). The trial court's decision to admit the tapes, whether based on the jail's recording system or the presence of a deputy outside of the visiting

---

<sup>6</sup> In addition, Debra testified during Perez's trial after agreeing on the record to testify. (Tr. 1513). However, Debra did not testify regarding her conversation with her husband, but instead limited her testimony to the acts she committed in assisting her husband's criminal conduct.

room, was incorrect. The disclosure of confidential communications between Perez and his wife violated Perez's right to exclude privilege spousal testimony under O.R.C. § 2317.02, and was a violation of Perez's rights to due process under the Eighth and Fourteenth Amendments to the United States Constitution.

**B. Law.**

Ohio Revised Code provides that one spouse may not testify against the other at a legal proceeding about private marital communications. O.R.C. § 2317.02(D). This Court has held that the privilege is held by the non-testifying spouse and may be applied to bar testimony of such communications. State v. Savage, 30 Ohio St. 3d 1, 2, 506 N.E.2d 196, 197 (1987). This Court has distinguished Ohio's statutory rule from Ohio Rule of Evidence 601 which deals with witness competency. Rule 601 allows the testifying spouse to agree to testify and thus waive any incompetency issues. Ohio R. Evid. 601(B)(1). This Court has determined that the two rules are separate, independent rules of exclusion. Savage, 30 Ohio St. 3d at 3, 506 N.E.2d at 198. Because the rules are unique, this Court held that the spousal incompetency rule is not subsumed within the statutory spousal privilege. Id. at 4, 506 N.E.2d at 198. Thus, although Rule 601(B)(1) allows the waiver of competency, the marital privilege provided for by O.R.C. § 2317.02(D) confers a substantive right upon the accused to exclude privileged spousal testimony concerning a confidential communication unless a third person was present during the communication. State v. Rahman, 23 Ohio St. 3d 146, 149, 492 N.E.2d 401, 405 (1986).

This Court has previously held a privilege is destroyed by voluntary disclosure to another of the content of the statement. Travelers Indemnity Co. v. Cochrane, 155 Ohio St. 305, 316, 98 N.E.2d 840, 846 (1951). "Waiver of the attorney client privilege by disclosure to third parties is premised on the principal that '[t]he privilege assumes, of course, that the communications are

made with the intention of confidentiality. The reasons for prohibiting disclosure... ceases when the client does not appear to have been desirous of secrecy.” State v. Post, 32 Ohio St. 3d 380, 385, 513 N.E.2d 754, 760 (1987). Similarly, this Court has recognized that disclosure to a third party destroys the marital privilege. See Rahman, 23 Ohio St. 3d at 149, 492 N.E.2d at 405. However, pursuant to the Court’s language in Post, a privilege is not destroyed when the communication is disclosed without the desire or intent of the holder of the privilege. “Accordingly, if privileged information is disclosed by some person who was not entitled or who did not have authority to waive the privilege, the information remains privileged. State v. Shipley, 94 Ohio App. 3d 771, 775, 641 N.E.2d 822, 825 (1994). Perez and Debra were married at the time the recordings of their conversations were made. (Tr. 1514). Since Perez did not waive his privilege regarding the communication, and since a third party was not present during the communications, it was improper for the court to admit the taped conversations between Perez and his wife.

**C. Taped Communications Constitute Testimony.**

The State took the position that because the communication between Perez and Debra came through a tape recording rather than Debra’s testimony, the admission of the tapes was not improper. The State, citing to the privilege statute which prohibits testimony, argued that the plain language of the statute allowed admission of the communication in any form other than testimony. The State’s argument lacks merit. The admission of the taped statements between Perez and his wife was the equivalent of allowing Debra to testify regarding communications with her husband. It would be a contradiction of Ohio law to say that the marital privilege confers a substantive right upon the accused to exclude spousal testimony, but then allow the State to record that privileged communication and play it for the jury. Such actions would

render the marital privilege worthless. Had the State recorded a conversation between Perez and his attorney without Perez's knowledge, there would be no valid argument that the attorney-client privilege was waived. Although Debra agreed to the recording of the conversation, Perez, the holder of the privilege, did not waive this right to assert the marital privilege. The prosecutor's argument lacked merit. The trial court's ruling allowed the State to circumvent Ohio's privilege law and rendered it meaningless.

**D. Valid Expectation of Privacy.**

**D.1 Visiting Room Conversations Not Recorded by Jail Phone System.**

This is not a case where Perez did not have a valid expectation of privacy because of the presence of a third party. Although Perez was in jail at the time he spoke with his wife, he made every attempt to keep his communication with her confidential. Perez's communications with his wife took place while she was visiting him the jail visiting room. There was no indication that Perez's communications with his wife, unlike those made while on the jail telephone system, were being recorded. In fact, there was significant testimony regarding the process the police went through to set up the recording system in the visiting room, indicating that it is not common practice to record the conversations in the visiting room, and that Perez would have no reason to know that he was being recorded. (8/17/04 Mtn. Supp. Tr. 267). Nevertheless, the trial court initially relied on the fact that telephone calls were recorded in reaching its conclusion that Perez did not have a valid expectation of privacy. (Tr. 57-58).

During the hearing on the motion in limine, there appeared to be some confusion on the part of the court as to whether the communications were made on telephones that were recorded by the jail. The trial court apparently relied on testimony during the suppression hearing that

calls from the prison were recorded and that a message was played before the calls indicating that the calls were recorded. (8/17/04 Mtn. Supp. Tr. 286).

During the suppression hearing Anne Woodruff an employee of the Clark County Information Systems Department, who handled all computer phone systems throughout the county, testified that her duties included monitoring and assisting with the telephone system contained within the Clark County jail. (8/17/04 Mtn. Supp. Tr. 285-86). Ms. Woodruff testified that a system is set up within the jail so that when an inmate makes a call from **their pod**, the phone plays a message saying that the phones are subject to monitoring and recording and that the system recorded all calls made. (8/17/04 Mtn. Supp. Tr. 286) (emphasis added). The prosecutor previously relied on that argument to demonstrate that calls that Perez made from the prison phones were admissible because Perez was aware that phone calls from the jail were recorded. (8/18/04 Mtn. Supp. Tr. 347-48).

However, the recordings which were referenced in the suppression hearing dealt with phone calls made from the jail by Perez, not the recorded conversation between Perez and his wife in the visiting area. The State understood this distinction and, recognizing that there was some confusion on the part of the court, attempted to clarify stating, “just to make sure that the record is clear, **the warning is contained in the jail telephone system.**” (Tr. 58) (Emphasis added).

After the State’s clarification, the court altered its ruling, finding that “there were other people in the room with Mr. Perez while he was making the phone call and there are other people in the room recording the phone conversation as Mrs. Perez received it. So, in that sense there was no expectation of privacy on either end of the phone conversation.” (Tr. 58). Again, the State recognized the confusion on the court’s part and again tried to clarify:

MR. SCHUMAKER: If I may, Your Honor, there are several different conversations that I believe are being referred to here. The conversation that I believe Mr. Kavanagh's referring to are conversation that were made when a recording device was placed in the visiting area.

THE COURT: I'm aware of that and I thought I addressed that.

MR. SCHUMAKER: Thank you. **I mean there is no warning system on that.**

(Tr. 59) (emphasis added).

Although the court's ruling was unclear, the court's admission of the conversations ultimately appeared to be based on the fact that the statements were made in the presence of a third person. "If there are other statements that the court is unaware of that the State has in their possession that they intend to introduce that were made during the marriage, then I believe they're privileged under 2945.42 unless they were made in the known presence of a third person." (Tr. 60).

#### **D.2 No Third Party Present.**

Any finding that the conversations between Perez and his wife were made in the presence of a third party is incorrect. In fact, during the motion in limine the State specifically stated that was not the argument being relied upon by the State to admit the taped statements. Instead, the State was relying on the fact that Debra was not testifying to the communications, "so the issue as to whether the third parties were present or what the deputies overheard is really not the issue at this point." (Tr. 56).

During the motion to suppress hearing, Deputy Tad Speary, the deputy sheriff who recorded the conversation between Perez and Debra, testified concerning the recording. Deputy Speary explained that the visiting room is set up so that the visitor and guest speak through an intercom. (8/17/04 Mtn. Supp. Tr. 271). Deputy Speary testified that, for the most part, an officer is present **in the area**, during the visits though sometimes they have to go back to the pod

to assist an inmate. (8/17/04 Mtn. Supp. Tr. 272). Deputy Speary testified that he was at the security desk recording the conversation while Perez was visiting his wife. (8/17/04 Mtn. Supp. Tr. 273). Although Deputy Speary was able to hear talking, he testified that he did not pay that much attention to what was going on. (8/17/04 Mtn. Supp. 273). In fact, Deputy Speary could not testify to anything in specific that Perez said to his wife. (8/17/04 Mtn. Supp. Tr. 275).

Deputy Johny Lemen testified that he also assisted in the recording of a conversation between Perez and Debra. (8/18/04 Mtn. Supp. Tr. 291). Deputy Lemen testified that during the visit he heard Perez say something about a gun and sticking to the story. (8/18/04 Mtn. Supp. Tr. 292). However, Deputy Lemen was not able to recall Perez's exact words. (8/18/04 Mtn. Supp. Tr. 293). And, it was unclear from the testimony whether Deputy Lemen heard the words through the actual recording or by overhearing the conversation.

No person was available to testify that they overheard the conversation between Perez and his wife. Any conversation that was overheard was only done so surreptitiously. It was reasonable for Perez to believe that the conversation between himself and Debra was private. Therefore, a third party presence did not waive the marital privilege.

The fact that a third party presence did not waive the marital privilege is also supported from a review of Debra's actual trial testimony. During trial, Debra only testified about purchasing and exchanging guns for her husband. (Tr. 1516-18). No testimony was introduced through Debra regarding the content of the conversations between her and Perez at the jail. Had the State been relying on the presence of Deputy Speary or Deputy Lemen as a waiver of the marital privilege, Debra could have testified regarding the conversation. Any reliance of the presence of a third party to admit the statements was improper and was not supported by the facts presented to the court.

**E. Due Process.**

In addition to being a rules-based violation of Ohio's statutory law, the admission of the taped conversations between Perez and his wife constituted a violation of Perez's rights to due process. The Due Process Clause does not allow state court proceedings that provide an unfair advantage to the prosecution. Justice is due to both the accused and the accuser. Snyder v. Massachusetts, 291 U.S. 97, 122 (1934), *rev'd in part* Malloy v. Hogan, 378 U.S. 1 (1964). This requires an equitable balance between the accused and the accuser. See Wardius v. Oregon, 412 U.S. 470, 475 (1973).

Beyond requiring fairness, the Due Process Clause also requires that state created procedures be administered in a meaningful manner. Evitts v. Lucey, 469 U.S. 387 (1985). In Evitts the Supreme Court held that when a state creates a system of appeals, that system must comport with Due Process. Id. Here, Ohio created a statutory marital privilege through O.R.C. § 2317.02. The Due Process Clause requires meaningful administration of that statute. Evitts, 469 U.S. 367. ) (“[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause”).

**F. Conclusion.**

The admission of the taped conversations between Perez and his wife violated Perez's right to exclude privileged spousal testimony pursuant to O.R.C. § 2317.02. The conversations were made at a point in time when Perez and Debra were married. (Tr. 1514). Moreover, the conversations did not take place in the presence of a third party, but were instead made with an expectation of privacy. The trial court's admission of the statements was based on an erroneous finding by the court that conversation in the prison visiting room were regularly recorded or that

the presence of third party waived the privilege. The testimony presented did not support the trial court's finding. Furthermore, the State's argument that the tapes were properly admitted because they were recordings and not "testimony" was a blatant attempt to circumvent Ohio's privilege law. The tape recordings were the equivalent of having Debra testify at trial. Their admission was in violation of O.R.C. § 2317.02 and a violation of Perez's right to due process under the Eighth and Fourteenth Amendments to the United States Constitution. This Court must reverse Perez's conviction and vacate his death sentence.

### Proposition of Law No. IV

A pervasive pattern of police coercion violates a defendant's rights, as guaranteed by the Fifth Amendment and Due Process, to be free from compelled self-incrimination and renders a waiver of Miranda rights and subsequent confession involuntary and inadmissible at trial. U.S. Const. amends. V, XIV; Ohio Const. art. I, § 10.

#### A. Facts.

After many months without any leads as to who committed the robbery and murder at the Do Drop Inn, the police got one from Robert Smith, Perez's stepson. (Tr. 1218). Upon learning of Perez's involvement in the shooting, the police approached Perez's wife, Debra Perez. (Tr. 1224). The police visited Debra repeatedly to see if she would be willing to help them, and she agreed. (Tr. 1524-25). She agreed to act as their agent and consented to the recording of her conversations with Perez when she visited him in jail. (Tr. 1524). Debra's tactics when visiting Perez started out by playing on his sympathy for her. (Tr. 1258-69). She repeatedly emphasized how sad she was since he was in jail, and how nervous she was because the police kept coming to her asking about the Do Drop Inn. (Tr. 1258-69). She also heavily emphasized Perez's helplessness—since he was in jail, her life was falling apart, and he was unable to care for or provide for her. (Tr. 1258-69).

When the first conversation failed to generate the type of incriminating statements the police had hoped it would, they sent Debra back again. (Tr. 1271). During this second conversation, she increased the pressure on Perez. This time, she complained that the police were scaring her and threatening her. (Tr. 1272-99). She appealed to him that she had never been to jail before, and that she would lose custody of a child in her care. (Tr. 1274-77, 1279-84, 1288-89, 1293-95). She told him that if she went to jail, she would kill herself. (Tr. 1295). When he asked her if she wanted him to confess, she reiterated that if she went to jail, she would

kill herself. (Tr. 1294-95). As a result of this second conversation, Perez requested to speak with the detectives who were investigating the Do Drop Inn murder. (Tr. 1325).

In Perez's formal interview with the police, they picked up the same theme from Debra's conversations—that she would face criminal charges unless Perez confessed—and began using a version of the same tactic. They repeatedly told Perez that Debra would be arrested and charged unless he confessed. (Tr. 1368-1423). After being worn down by the repeated threats from the police, which were particularly effective in light of the groundwork laid by Debra, Perez confessed. (Tr. 1423-25). He subsequently made phone calls to Debra and Cecil Howard, both of which were recorded. (Tr. 1476-99, 1553-54). He called Howard to warn him that he had confessed. (Tr. 1553-54). He called Debra to assure her that the police would not come after her. (Tr. 1477-80, 1485-87).

In reality, Debra was in no danger of being charged with any crimes. Detective Hicks testified at the suppression hearing that Debra was not afraid of being charged with a crime because “[n]obody ever told her she was gonna be charged with a crime.” (Mtn. Supp. Tr. 256). In fact, he went on to testify that “[s]he may have been told that, but not that I can remember. I know we told Mr. Perez that.” (Mtn. Supp. Tr. 257). Debra testified freely at trial about her own criminal activities, without exercising her right to remain silent at any point during her testimony. (Tr. 1514-30). She seemed unconcerned about being charged with any crimes. She even testified that she wasn't concerned about her well-being “as far as the police department was concerned” and she wasn't concerned about what the police might do to her. (Tr. 1527).

Debra's involvement was merely the beginning of a carefully orchestrated effort by the police to elicit incriminating statements from Perez without affording him his Fifth Amendment

rights. The State, referring to this orchestrated effort at trial stated, “quite frankly, the police had a wonderful plan...[to bring] evidence in...that’s as powerful as it comes.” (Tr. 1631-32).

**B. Procedural History.**

Defense counsel filed two motions to suppress Perez’s statements to Debra and his confession. (Dkt. 50, 54). A hearing was held August 16-18, 2004 in front of Judge Richard O’Neill on the motions to suppress. (Mtn. Supp. Tr. 1-353). Defense counsel filed a post-hearing brief. (Dkt. 91). When the trial court overruled the motions to suppress, (dkt. 93), defense counsel requested findings of facts and moved the trial court to reconsider. (Dkt. 94). During the pendency of these motions, and after the suppression hearing had been held, Judge William McCracken was assigned to hear Perez’s case. (Dkt. 90). Defense counsel filed a motion to have Judge McCracken hear and rule on all motions. (Dkt. 107). Without ruling on this motion, Judge O’Neill again overruled the motions to suppress, and issued findings of facts and conclusions of law. (Dkt. 117).

The trial court specifically found that Perez requested to speak with the police officers while he was being held in the jail, he voluntarily waived his Miranda rights, he was not physically deprived or mistreated during the interview, the interview was moderate in length, and that no coercion or promises were used by the detectives to get any statements from Perez. (Dkt. 117, p. 1). The court held that Perez, “for his own purposes, initiated a conversation with the police detectives then, prior to discussing the case with them, knowingly, voluntarily, and intelligently waived his constitutional right to remain silent. His statement can now be used at trial.” (Dkt. 117, p. 2).

A second hearing was held on July 5, 2005 on Perez’s motion to suppress and motion to sever. (Mtn. Supp. and Mtn. Sever, Tr. 1-51). Judge McCracken, on the basis of testimony and

argument from counsel, as well as a review of the transcript from the prior suppression hearing, overruled Perez's motion to suppress. (Dkt. 122). The trial court found that Perez's Sixth Amendment right to counsel was not implicated by the police's scheme. (Dkt. 122).

**C. Fifth Amendment.**

The Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution each provide that no person shall be compelled in any criminal case to be a witness against himself. The Ohio provisions are identical to the Federal provisions, which are themselves applicable to the states through the due process clause of the Fourteenth Amendment. Brown v. Mississippi, 297 U.S. 278, 286 (1936). The privilege against self-incrimination, which has a long and expansive historical development, is an essential mainstay of our adversary system, and guarantees an individual the "right to remain silent unless he chooses to speak in the unfettered exercise of his own will." Miranda v. Arizona, 384 U.S. 436, 464-65 (1966).

The privilege against self-incrimination guarantees an individual the right to remain silent unless he chooses to speak in the "unfettered exercise of his own will" during a period of custodial interrogation. Miranda, 384 U.S. at 458-65. "Interrogation" means not only express questioning, but also the "functional equivalent"—namely, "any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980). This conclusion was based on the fact that Miranda safeguards "were designed to vest a suspect in custody with an added measure of protection against coercive police practices...." Id. Furthermore, the Miranda Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444. This encompasses "all interrogation practices

which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice.” Id. at 464-65.

**C.1 Debra’s Statements Were The Functional Equivalent Of An Interrogation. Perez Should Have Been Given Miranda Warnings.**

In this case, Perez was in jail on unrelated charges. He was in the custody of law enforcement, and had no freedom of action. Debra’s statements to him during their conversations can fairly be characterized as an interrogation. Her statements were specifically designed to elicit incriminating responses from Perez. In fact, that was the purpose of her conversations with him. The police obviously anticipated that her discussions with Perez would result in incriminating statements by him, which is why they arranged to tape record the conversations. Although the environment in which Perez and Debra spoke was the jail’s visiting booth, which is not an inherently coercive, police-dominated atmosphere, her interrogation of him was engineered in such a way that it created a coercive environment. She emphasized that he was in custody, and had no freedom of movement. Then, she used that fact to reiterate to him that she was being threatened by the police and that he could not do anything to help her, because he was in police custody. As the Court in Miranda said, “[t]he entire thrust of the police interrogation...was to put the defendant in such an emotional state as to impair his capacity for rational judgment.” Id. at 465. That is exactly what Debra did to Perez. Her conversations with him constituted a custodial interrogation. As such, he should have been given appropriate warnings before being interrogated by Debra.

When the police conduct an interrogation in the absence of proper Miranda warnings, the government bears the burden of demonstrating that the defendant knowingly, intelligently, and voluntarily waived his rights. Id. Statements taken in violation of this standard are not admissible against a criminal defendant. “Moreover, any evidence that the accused was

threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.” Id. at 476.

#### **D. Factors In Determining Voluntariness Of Statement.**

##### **D.1 Fifth Amendment.**

Coercive police activity is a necessary predicate to finding that a confession is not voluntary within the Fifth Amendment, on which Miranda was based. Colorado v. Connelly, 479 U.S. 157, 170 (1986); McCall v. Dutton, 863 F.2d 454, 459 (6th Cir. 1988); State v. Dailey, 53 Ohio St. 3d 88, 91, 559 N.E.2d 459, 462 (1990). This requires a determination that the police “extorted [the confession] from the accused by means of coercive activity.” McCall, 863 F.2d at 459 (citing Connelly, 479 U.S. at 167). Once it is established that the police activity was objectively coercive, it is necessary to examine the petitioner's subjective state of mind to determine whether the “coercion” in question was sufficient to overbear the will of the accused. Id. (citing United States v. Rohrbach, 813 F.2d 142, 144 (8th Cir. 1987)). Finally, the defendant must prove that his will was overborne because of the coercive police activity in question. If the police misconduct at issue was not the “crucial motivating factor” behind the defendant’s decision to confess, the confession may not be suppressed. Id.

##### **D.2 Due Process.**

The United States Supreme Court and Ohio courts have both held that the Due Process Clause, separate from considerations about Miranda’s application to custodial interrogations, continues to require an inquiry as to whether a defendant’s will was “overborne by the circumstances surrounding the giving of a confession,” thereby rendering the statement involuntary. Dickerson v. United States, 530 U.S. 428, 434 (2000) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)); State v. Chase, 55 Ohio St. 2d 237, 246, 378 N.E.2d

1064, 1070 (1978); State v. Petitjean, 140 Ohio App. 3d 517, 525-26, 748 N.E.2d 133, 139 (2000). A confession obtained by the police through the use of threats is violative of due process and the “true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.” Haynes v. Washington, 373 U.S. 503, 513 (1963). The Ohio Supreme Court has said, “[l]ong before Miranda, it was well established that a confession, to be admissible, must be voluntary. As it was said in Rufer v. State, 25 Ohio St. 464, 470 (1874), ‘Whilst voluntary confessions are always admissible against a prisoner on trial, it is well settled that confessions of guilt made through the influence of hopes or fears, induced by promises or threats of temporal benefit or disadvantage, are wholly inadmissible.’ This rule is now a matter of federal constitutional law.” State v. Chase, 55 Ohio St. 2d 237, 246, 378 N.E.2d 1064, 1070 (1978) (quoting Rogers v. Richmond, 365 U.S. 534 (1961)).

A court must consider the totality of the circumstances in determining whether the confession was obtained in a manner that violated the Due Process Clause. Determining the voluntariness of a confession requires an inquiry that examines whether a defendant’s will was overborne by the circumstances surrounding the giving of a confession. Dickerson, 530 U.S. at 434. This takes into consideration the totality of all the surrounding circumstances, both the characteristics of the accused and the details of the interrogation. Id. Under this standard, a confession “may be involuntary even where Miranda warnings are given...[and] even where Miranda warnings are not required, a confession may be involuntary if on the totality of the circumstances the ‘defendant’s will was overcome by the circumstances....’” Petitjean, 140 Ohio App. 3d at 526, 748 N.E.2d at 140.

## **E. Perez's Statements Were Not Voluntary.**

### **E.1 Police Coercion.**

#### **E.1.1 Coercion Through Informant Debra Perez Before Miranda Warnings.**

The United States Supreme Court and the Ohio Supreme Court have repeatedly condemned the use of deception and manipulation by the police that is designed to coerce a suspect's confession. See Dickerson, 530 U.S. at 433 (“a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape that no credit ought to be given to it....”); Miranda, 384 U.S. at 464-65 (“The voluntariness doctrine ...encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice.”); Malloy v. Hogan, 378 U.S. 1, 7 (1964) (“the confession...must not be extracted by any sort of threats or violence nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence...we have held impermissible even a confession secured by so mild a whip as the refusal...to allow a suspect to call his wife until he confessed.”); Haynes, 373 U.S. at 513-19 (1963) (“a confession obtained by police through the use of threats is violative of due process...whether there is involved the brutal ‘third degree’ or the more subtle, but no less offensive, methods here obtaining....”); Rogers v. Richmond, 365 U.S. 534, 542 (1961) (“The motive of a person in confessing is of no importance provided the particular confession does not result from threats, fear or promises made by persons in actual or seeming authority.”); Spano v. New York, 360 U.S. 315, 323-24 (1959); Bram v. United States, 168 U.S. 532, 542-43 (1897); Chase, 55 Ohio St. 2d at 246, 378 N.E.2d at 1070; Rufer v. Ohio, 25 Ohio St. 464, 470 (1874) (“it is well settled that confessions of guilt made through the influence of hopes or fears, induced by promises or threats of temporal benefit or disadvantage, are wholly inadmissible.”).

The Court in Spano specifically disapproved the police use of a “childhood friend” of a suspect to coerce a confession. 360 U.S. at 323. When the Court examined the totality of the circumstances surrounding Spano’s confession, it found that the police’s use of Bruno, a childhood friend of Spano’s, was a factor worth mention. Id. “Bruno’s was one face visible to petitioner in which he could put some trust. There was a bond of friendship between them going back a decade....It was with this material that the officers felt that they could overcome petitioner’s will.” Id. The police instructed Bruno to falsely tell Spano repeatedly that Spano had gotten him into trouble, “that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife and his unborn child.” Id. The Court concluded that “petitioner’s will was overborne by official pressure, fatigue and sympathy falsely aroused....” Id. Furthermore, “[t]he police were not....merely trying to solve a crime, or even absolve a suspect. They were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these.” Id. at 323-24 (internal citations omitted).

Here, the police employed the same method as was used in Spano. They used the bond between Perez and his wife to overcome Perez’s will. She made numerous statements to Perez to falsely arouse his sympathy on two separate occasions. First, on October 24, 2003:

- “...I’ve had a visit...[from] DT”
- “Somebody has been talking...and then they found something that’s in my name.”
- “Well, that’s what they said. They told me when they came to the house on Tuesday.”
- “...they said they’ve had a couple people sayin’ stuff.”

- “I don’t know, but it -- my nerves are shot.”
- “Not when they asked me if I knew anything about it, I told ‘em no....they was at my door.”
- “They wanted to know what I knew about Do Drop...And they said the Do Drop Inn because there’s been a couple people have said stuff about that.”
- “I don’t know, my nerves are just shot. I wanted to talk to you.”
- “But, um, I’m trying to find out, um, if anybody comes back, what am I supposed to do.”
- “Well, they said that they found that and it’s registered to me.”
- “They wanted -- wanted to know if I knew anything; and I told ‘em no, I have no idea what they’re talking about.”
- “But I been spending a lot of time in our room ‘cause I just cry all the time.”
- “...But I’m gonna tell you, my nerves are shot.”
- “I just hope they don’t come back to the house...But they said they would...Well, we’ll be back, we’ll be in touch with you.”
- “I don’t know, I just -- I just -- my nerves are shot.”

(Mtn. Supp. Tr. 20-57; Tr. 1258-69). Then again on November 12, 2003:

- “They came again, I think it was Thursday to get (Inaudible) ‘cause they was there Wednesday when I found this out. Then Thursday, they came and I acted like I wasn’t home since I don’t have a car, you know. I just acted like I wasn’t home, but I don’t know what I’m gonna do.”
- “...But, you know, I’m not being arrested for shit, you know?”
- “They’ve talked to me twice and they’re threatening to come arrest me.”
- “I don’t know. I’m just scared.”
- “You’re in there. I’m sitting out here, don’t know what the fuck to do. What about the kids? What am I supposed to do? My chances of being gable to keep custody of Lindee. Her mom’s already threatening to try to take custody of her and I don’t know what to do.”

- “Well, I don’t know what – what to do, but I don’t want to go to jail. I ain’t never been to jail.”
- Perez: “You ain’t gonna go to jail.”  
Debra: “That’s nice for you to say, but what if they come to the house and they come and get me? I haven’t even had a fuckin’ speeding ticket before.”
- “I don’t know what to do. That’s why I’m here. I’m scared when I come down here they’re gonna arrest me when I come to see you. I just don’t know what to do.”
- “They already told me all’s they’re waiting on is to see what the forensics come back.”
- “Well, if I don’t end up comin’ down and seein’ you, you know why.”
- “I don’t even want to be down here today...’cause they’re liable to get me.”
- “I want to be here to see you, but I’m scared that they’ll get me.”
- “...And I also watch programs where innocent people go to fuckin’ prison.”
- “Well, I’m saying, would you want to? Just like you said before about walking down in here, if somebody’s telling you that they’re – they’re gonna come and get you, you conna want to come in here?”
- “Um, one time it was just the one and then the second time it was two of ‘em and then this last time it was the same two that came and said that they’re just waiting for forensics. Is there anything I like to tell ‘em because they will be back in touch with me; and if they get anything back on this, since I – since I don’t know anything, since it’s mine, then they will be there to arrest me.”
- “I don’t know what to think of none of it. I never even got a speeding ticket, you know?”
- “I don’t know. I just know that they heard it from somewhere ‘cause they been -- you know like I said, they’ve talked to me three times.”
- Perez: “...I mean what am I supposed to go in there and tell ‘em? That, uh, yeah, I went in there and blah blah blah blah.”  
Debra: “I don’t know. I just know that, yeah, they got me scared. It -- it’s scary for me just coming down here and visit, you know? ‘Cause I ain’t never even had to come down here and visit nobody before.”
- “No, if -- I’m gonna still come; but if -- if something happens and you don’t see me, if I ain’t came in, like, in two visits, then I’m probably in here with you somewhere.”
- “Well, I don’t want to be in jail.”

- "... 'cause if so, my chances of being able to keep Lindee is over."
- "...I got to check at the pharmacy after 5. 'Cause I need something for depression. I cry every day. Every day."
- Perez: "I mean what am I supposed to do, go in there and admit this shit?"  
Debra: "You know me, I don't like telling you one way or the other, you know?...Because if I said some -- if I said yes and then you do that and then you won't ever get out, I'm gonna feel like that's my fault. But I ain't going -- I ain't gonna be in here. (Inaudible) shoot, huh-uh."
- "I would -- if I ended up in a place like this, I'd probably kill myself. I never even been to jail before."
- "If I ended up in a place like this, yes, I would [kill myself]."

(Mtn. Supp. Tr. 63-76; Tr. 1272-1300).

These comments, in the context of relatively short conversations, were designed to get Perez to make incriminating statements, and to prey upon his inability to come to the aid of his wife while he was incarcerated. They were calculated to create the impression that Debra was being endlessly harassed by the police, that it was happening because of Perez, and that there was nothing he could do about it—but confess. Perez's statement to Debra were made without the benefit of Miranda warnings and were the result of improper coercion.

#### **E.1.2 Coercion By Law Enforcement Officials After Miranda Warnings.**

Ohio courts have also disapproved the type of police coercion at issue during Perez's official interview finding that such conducted amounted to psychological coercion. In State v. Arrington, the court stated that "a confession 'must not be extracted by any sort of threats or violence, *nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence...* a confession is involuntary whether coerced by physical intimidation or psychological pressure...subtle psychological coercion suffices as well, and at times more effectively, to overbear a rational intellect and a free will.'" State v. Arrington, 14 Ohio App. 3d

111, 114, 470 N.E.2d 211, 215 (1984) (quoting United States v. Tingle, 658 F.2d 1332, 1335-36 (9th Cir. 1981)) (emphasis *sic.*). The court in Arrington held that “certain of the officers’ statements constitute[d] direct or indirect promises of leniency or benefit...It is not the police officer’s prerogative to guarantee to an accused what charges, if any will or will not be brought....” Id. at 116, 470 N.E.2d at 216-17 (internal quotes omitted).

Perez’s stated intention, almost immediately after his official interview began, was that he wanted to find out why the police were questioning and threatening his wife. (Tr. 1332-33).

The reason I asked to speak to you is ‘cause **my wife come up to visit me and she said that detectives had been coming to our house questioning her** about some involvement of a firearm or something pertaining to a firearm that may have been used in a case that’s ongoing, so I was tryng to figure out – get a hold of what’s taking place with that, you know what I’m saying? How come ain’t nobody contact me. **‘Cause I know she ain’t did nothing. She’s talking about there been threats made** to where, uh, something to the effect that tests is being ran right now and that if Perez is coming back, blah blah blah, thos or that, **then she’s gonna be placed under arrest**, you know what I’m saying or something to that effect. **In other words, she’s scared and she ain’t never been in jail. She ain’t never had a speeding ticket...So I’m concerned about my wife** and my daughter, you know what I’m saying, and my son. **So that’s mainly what I’m trying to figure out what’s going on.**

(Tr. 1332-33) (emphasis added).

It quickly became apparent to the police that Perez was not going to readily submit to them and confess. At that point, they picked up the theme from Debra’s conversations with Perez—that she would face criminal charges unless Perez confessed—and began using a version of the same tactic. They repeatedly told Perez that Debra would be arrested and charged unless he confessed:

- After Perez refused to take a polygraph – “Okay, now. Just like Debra, if we would ask her to take one. I mean do you think she would or she wouldn’t?”
- “You know, I really don’t think, you know, me as a man, you know, being a married man, you being a married man. I know you don’t want your wife to go through nothing she don’t need to.”

Perez: "That's why I'm sittin' here right now."

- "...You know we wouldn't be going to your wife as much as we did. 'Cause I'm sure she probably told you every time we came by here. 'Cause we know she comes and visits you practically every week. Don't think we watch that stuff? Don't think we been watching that?"
- "She usually gets dropped off."
- "We worry about her."
- "We got a young lady that purchased a gun that was used in a homicide that she properly sold two days after the homicide."
- "No, we got something. If we didn't have nothing, we wouldn't be going to your wife with the information we had about the tape, information to the Grand Jury to get her indicted."
- "Because she bought the gun. When she sold it up (inaudible) we know she know what it was used for or she wouldn't have got rid of it."
- "It's sad that a woman may have to go to jail that may have had a very little part to play in this."
- Perez: "What's she gonna go to jail for?"  
Officer: "Well, let's see, complicity to the homicide, tampering with evidence."
- Perez: "What keeps her from going to jail?"  
Officer: "We're gonna present the evidence to the Grand Jury."
- Detective Flores: "...Your wife, she's brought into this. She is part of this case. Is there a way to help her? There's possible ways, but we've got to know her involvement. Right now, I would have to tell the Grand Jury that she's involved in this, completely, 110 percent. There's only one way -- There's only one way for -- for me to be convinced different. And that's for you to tell me what her involvement is. We know you're involved in this."
- Perez: "...you don't believe in your heart that my wife is involved."  
Flores: "But with the evidence, she is. That's what it is, bottom line."
- "...what's Debra's involvement? I mean Debra come down with you or what -- what's there?"
- "...the one thing you probably have respect for is your wife."
- Perez: "Most important thing in my life. My wife and my daughter."

Flores: “Okay...we are all married, and all of would be married -- we would say the exact same thing. That’s the most important thing. Now time to step up and do the right thing.”

- “...We don’t want to take your wife down for this...Debra’s involvement, let’s clean that up, okay?”
- “...And I don’t know was Debra out in the car waiting? Was she -- what’s all there. Tell us about Debra’s involvement.”
- “And you did something -- you told us something here and then you told me your wife didn’t have anything to do with it. I believe you. I’m not gonna go after her.”

(Tr. 1368-1423).

Immediately thereafter, Perez fully confessed to not only Johnson’s murder, but also to a number of robberies about which he was not even being questioned. (Tr. 1423-25). Upon the promise that his wife would be safe from prosecution, he was fully compliant with the detectives. The police’s use of threats against Debra and promises that she would be safe from prosecution were improper promises like the court found in Arrington. These improper promises constituted coercion by the police sufficient to render any waiver of Miranda involuntary.

Perez also subsequently made phone calls to Debra and to Howard, both of which were recorded. (Tr. 1476-99, 1553-54). He made these phone calls as a result of the police coercion. His phone call to Debra was to assure her that the police would leave her alone. (Tr. 1477-80, 1485-87). This further demonstrates the pervasive nature of the police coercion and the effect it had on Perez. His call to Howard was to warn him that he had confessed. (Tr. 1553-54). Absent the police coercion leading up to and during his confession, these phone calls would not have been made.

## **E.2 Coercion Sufficient To Overcome Perez’s Will Given His State of Mind.**

The totality of the circumstances surrounding Perez’s interrogation makes it clear that not only was the police activity coercive, but that it was sufficiently coercive to overcome his will.

Perez was in the Clark County jail at the time of these conversations. (Dkt. 117, p. 1). He had very limited information available to him other than what his wife told him. He could not verify whether the police were visiting Debra, what they were saying to her, or if they were threatening her. He could not provide any income to his family, who were struggling for money while he was incarcerated. (Tr. 1266, 1288, 1292). All in all, Perez was rendered basically helpless. Each time his wife came to see him, she increased the pressure on him and amplified his feelings of helplessness. From his perspective, his only choice, in order to help his wife, was to talk to the detectives who were harassing and threatening her.

In Perez's mind, at the time his wife came to talk to him and immediately thereafter, she was in real, imminent danger of criminal charges. The detectives' repeated threats to arrest Debra and press criminal charges against her were particularly effective in light of the groundwork Debra laid in her conversations with Perez. Perez was already under the false impression that his wife was under serious threat of criminal charges based on her complaints to him. Where he may have been skeptical of the detectives' threats under other circumstances, in this case, he had every reason to believe that his wife was in true danger of criminal charges. His belief of this is evident from the phone call Perez made to his wife after his confession, and from his concern at the end of his confession about calling his wife so she would not worry about the police harassing her any more. (Tr. 1448-1472).

An additional factor for the court's consideration of Perez's state of mind is Perez's mental state. During his statement to detectives, Perez informed the police that he took eight pills every night because he was bipolar and psychotic. (Tr. 1411). He also informed them that he was "going to mental health." (Tr. 1412). The police did not ask any follow up questions to these statements, they simply proceeded with their interrogation. When Perez again stated to the

police, "...have I got issues? I got major issues...I got some major mental issues..." the police simply asked if he had some "issues" on the night of Johnson's murder. (Tr. 1414). The proper focus in light of this information should have been on the effect of his mental health issues on his ability to voluntarily waive his rights and speak freely with the police.

Furthermore, during the taped conversation between Perez and his wife, which the detectives had listened to prior to their interview with Perez, he informed Debra that a competency evaluation was conducted. (Tr. 1263, 1324-25). Although Perez was found competent, (tr. 1263), the fact that a competency evaluation was conducted for a breaking and entering and possession of criminal tools case should have indicated to the detectives that Perez was exhibiting serious mental health issues which would have had an impact on his mental state during his conversations with Debra and the police, as well as an impact on his susceptibility to the police coercion.

### **E.3 Police Coercion Was the Crucial Motivating Factor Behind Perez's Decision to Confess.**

Perez's will was overcome and he confessed as a direct result of Debra's claims of threats and harassment by the police coupled with the repeated threats to arrest and prosecute Debra by the detectives during his interrogation. The murder at the Do Drop Inn took place on March 5, 2003. (Tr. 1070, 1077). Perez's confession did not occur until eight months later on November 12, 2003—the same day as his second conversation with his wife. (Tr. 1324-25). Prior to his conversations with Debra, Perez had no reason to believe that the police were investigating him as a suspect for the incident at the Do Drop Inn. (Tr. 1259-60). He had expressed no interest or desire in speaking to the police regarding that matter or any other matter. It was only after the second conversation with Debra, where she applied incredible pressure on him—repeatedly insisting that if she went to jail she would kill herself—that Perez requested to speak with the

police. (Tr. 1272-99, 1295, 1324-25). Perez confessed to the detectives as a result of their repeated threats to have his wife arrested and charged with crimes. (Tr. 1368-1423). The use of these threats by the detectives, bolstered by the false claims by Debra that the police had been repeatedly threatening her, resulted in Perez's confession. He told the police during his interview, "[s]he was...cryin' today talkin' about she can't – **this is what made me come over here.**" (Tr. 1448) (emphasis added).

As discussed by Justice Brennan's concurrence in Illinois v. Perkins, "[t]his Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." 496 U.S. 292, 301 (1990) (Brennan, J., concurring) (quoting Miller v. Fenton, 474 U.S. 104, 109-110 (1985)). He went on to discuss: "[t]he police devised a ruse to lure respondent into incriminating himself when he was in jail on an unrelated charge....We have recognized that 'the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents.'...The State is in a unique position to exploit this vulnerability because it has virtually complete control over the suspect's environment. Thus, the State can ensure that a suspect is barraged with questions from an undercover agent until the suspect confesses." Id. at 302-03 (quoting United States v. Henry, 447 U.S. 264, 274 (1980)). Justice Brennan concluded "The deliberate use of deception and manipulation by the police appears to be incompatible with a system that presumes innocence....That the confession was not elicited through means of physical torture, or overt psychological pressure, does not end the inquiry." Id. at 303.

The situation in this case is exactly the type of situation that Justice Brennan raised concerns about. The totality of the circumstances in this case demonstrate that Perez's confession was not elicited in a manner consistent with constitutional protections. Perez was in jail, being held on unrelated charges. The police exploited the fact of his confinement, particularly through Debra's statements to him. Her statements were designed to remind him that he was particularly helpless to protect or aid her because he was in jail. While this type of confinement is not considered inherently coercive, the police, through Debra, increased the coerciveness of the environment to the point of overcoming Perez's will.

#### **E.4 Statement Not an Admission of Secret.**

The Court in Oregon v. Elstad drew a distinction between "coercion of a confession by...deliberate means calculated to break the suspect's will...and...disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question...." 470 U.S. 298, 313 (1985). In fact, the Court specifically stated that "[w]e do not...condone inherently coercive police tactics or methods offensive to due process...[that] undermine the suspect's will to invoke his rights once they are read to him." Id. at 317. The Court directed that "the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." Id. at 318. The Court reasserted this proposition in Missouri v. Seibert, where it expressly rejected the constitutionality of a "question first" strategy designed to circumvent Miranda's Fifth Amendment protections. 542 U.S. 600, 617 (2004).

The police in this case deliberately engaged in a "question first" strategy. Debra, acting as their agent, purposely attempted to elicit incriminating statements from Perez, and used psychologically manipulative tactics to overcome his will. Her conversations with him

compelled him to request to speak with the detectives. His subsequent waiver of Miranda warnings prior to his confession to the detectives was undermined by the coercive tactics employed by the police through Debra.

This was not a situation where Perez had admitted a “guilty secret” to a police officer, and then subsequently, after being warned, gave another statement. He was pressured and coerced by his wife, who was secretly acting as a police agent. As a result of her coercion, he requested an interview with the police. This formal interview, while it had the appearance of a voluntary request by Perez to speak to the police, was a sham. The police had, through their use of Debra as their agent, overcome Perez’s free will, and had coerced him into speaking with them. Their recitation of Miranda warnings to him was, viewed in light of their previous manipulation of him, a mere incantation, and his waiver of his rights was not voluntary.

#### **E.5 Admission of Perez’s Involuntary Confession was Prejudicial and Requires Reversal.**

A confession is evidence to which a jury affords great weight. As the Court said in Arizona v. Fulminante:

**A confession is like no other evidence. Indeed, ‘the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him....The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.’** While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, **a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision.**

499 U.S. 279, 296 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139-140 (1968) (White, J., dissenting), Cruz v. New York, 481 U.S. 186, 195 (1987) (White, J., dissenting))

(emphasis added). The Court in Fulminante determined that the involuntary confession required the reversal of the defendant's conviction, but that the determination is subject to harmless error review. However, "[i]n the case of a coerced confession...the profound impact that the confession has upon the jury requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless." Id. The State cannot demonstrate the admission of the prejudicial hearsay testimony was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 26 (1967)

Here, the admission of Perez's involuntary confession at trial was prejudicial and deprived him of his due process right to a fair trial. Admission of Perez's confession was prejudicial to him at both the culpability and penalty phases of the trial. The State referred to the confession in opening statements. (Tr. 782-83). Over defense objection, the State played the videotape of the confession for the jurors during the culpability phase of the trial. (Tr. 1328-1472). The State talked about Perez's confession at length in closing arguments. (Tr. 1626, 1631-1639, 1657). Perez's confession was characterized by the prosecutor as "evidence...that's as powerful as it comes." (Tr. 1632). Even defense counsel, despite its objections to the admission of the confession, referred to the confession in its opening statement. (Tr. 787-88). And in closing, defense counsel repeatedly encouraged the jury to not only recall the substance of Perez's confessions, but to watch the video again during its deliberations. (Tr. 1645, 1647, 1649-50, 1653).<sup>7</sup>

The videotape of the confession was also re-introduced for consideration at the penalty phase. (Tr. 1713). Although it was not re-played for the jury during the penalty phase, it was available for the jury during its deliberations. There is no reason not to think the jury afforded

---

<sup>7</sup> Defense counsel's repeated emphasis to the jury on Perez's confession was prejudicial ineffective performance. See, Proposition of Law No. VI.

weight to it in making its recommendation of death. The trial court also relied on Perez's confession and referred to it in its sentencing opinion. (Dkt. 144). The admission of Perez's confession infected both the culpability and penalty phases of his trial, and weighed heavily in favor of both his guilt and imposition of the death penalty. Its introduction was therefore prejudicial to him and cannot be harmless error.

**F. Conclusion.**

The police's coercive tactics which led to the official interview with him violated Perez's constitutional rights. His decision to submit to an interview with them was not voluntary, and thus should not have been admitted at trial. All of the statements Perez made to the police or their agent—Debra—were the product of an unconstitutional scheme by the police to make an end-run around Miranda and the Due Process rights afforded to every criminal suspect.

Despite the detectives' reading of Miranda to Perez, his waiver of those rights was involuntary. The prior conduct of the police, as discussed above, rendered Perez's waiver of his Miranda rights involuntary. Their reading of his rights and his subsequent waiver were mere incantations, and carried no real meaning under the circumstances.

The totality of the circumstances surrounding Perez's confession requires reversal of Perez's conviction and death sentence. These police tactics violated Perez's right against compelled self-incrimination and were a carefully orchestrated effort by the police in violation of his Fifth Amendment, Due Process, and Ohio Constitutional rights. This court must reverse Perez's conviction and vacate his death sentence.

## **Proposition of Law No. V**

The trial court's admission of a taped conversation between a defendant and his wife, when the wife did not testify concerning the tape, constituted impermissible hearsay and violated the defendant's right to confrontation. U.S. Const. amend. VI.

### **A. Facts.**

After law enforcement discovered that Perez's wife had knowledge of and facilitated the robbery and murder at the Do Drop Inn, the police convinced her to allow them to record her conversations with Perez. Debra Perez visited Perez, who was in the county jail on unrelated charges, on October 24, 2003 and November 12, 2003. (Tr. 1252, 1271). Each of the conversations Debra had with Perez were recorded. During her meetings with Perez, Debra informed him that the police had evidence about her gun transactions and that she was nervous about possibly being arrested. (Tr. 1260). Debra told Perez that she would kill herself if she ever had to go to jail. (Tr. 1295). Ultimately, these recorded conversations were admitted into evidence and played for the jury, over defense counsel's objection. (Tr. 59; State's Exs. 83 and 84). The tapes of the conversation between Perez and his wife were hearsay statements. The admission of those statements without providing Perez the opportunity to confront his wife regarding those matters violated Perez's right to Confrontation under the Sixth Amendment to the United States Constitution.

### **B. Law.**

The Confrontation Clause of the Sixth Amendment provides that, "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." U.S. Const. amend. VI. The United States Supreme Court has consistently declared that the role of confrontation in testing accuracy is so important that the absence of confrontation at trial calls into question the ultimate integrity of the fact-finding process. Ohio v. Roberts, 448

U.S. 56, 64 (1980), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004) (citations omitted). The importance of the hearsay right to confront was recently addressed in Crawford v. Washington, 541 U.S. 36 (2004). . In Crawford, the Court held that testimonial, out-of-court statements offered against the accused to establish the truth of the matter asserted may only be admitted when the witness is unavailable and where the defendant has had a prior opportunity to cross-examine the declarant. Id. at 36, 68. In the historical context of the Confrontation Clause, “the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” Id. at 53-54. The prior opportunity to cross-examine must have been an adequate opportunity. Id. at 57. This requirement has been interpreted as requiring “the opportunity to meaningfully test and develop by direct and cross-examination the witness’ testimony at the prior proceeding.” State v. White, No. 20324, 2005 Ohio 212, 2005 Ohio App. LEXIS 192 (2nd Dist. Jan. 21, 2005) ¶ 27, (citing Crawford).

### **C. Analysis.**

The facts in Crawford are similar to those in the present case. In Crawford, the defendant’s wife made statements to detectives implicating her husband in a murder. Crawford’s wife did not testify because of the state marital privilege. 541 U.S. at 57. Nevertheless, the State played the tape of her statements to the jury as evidence that the stabbing was not in self-defense as Crawford claimed. Id. at 40. The Court, recognizing the importance of confrontation in testing the reliability of testimony, held that it was improper to admit the taped statements of Crawford’s wife without her testimony. Id. at 68. In doing so, the Court overruled its previous decision in Roberts, 448 U.S. 56, which allowed such hearsay evidence to be admitted if there was sufficient indica of reliability. In its decision the Court made a distinction between

testimonial and nontestimonial statements, determining that where nontestimonial hearsay is an issue, courts were flexible to develop hearsay law or exemptions. Crawford, 541 U.S. at 68. Only where a testimonial statement is at issue does the Sixth Amendment demand the right to confrontation. Id.

**D. No Opportunity to Cross-Examine.**

In Perez’s case, the State sought to introduce the tape recorded statements between Perez and his wife through the testimony of Detective DeWine, the officer who made the arrangements for the recording of the statements. (Tr. 1251, 1253). Defense counsel raised an objection to the admission of the tapes arguing that it was hearsay. (Tr. 1253). The prosecutor argued that all the State needed to do was authenticate the tape. The prosecutor further noted, “we don’t intend to question Debra Perez about this tape because, as we said before, the statute arguably—that the statute says she can’t testify as to those communications.” (Tr. 1253-54). Defense counsel continued to take the position that Debra Perez had to be on the stand when they played the tape and that the statements were not admissible under a hearsay exception. (Tr. 1254). However, the court overruled defense counsel’s objections. (Tr. 1254).

It was error for the trial court to allow the State to introduce the tape recordings through Detective DeWine’s testimony rather than Debra’s. The State should have been required to introduce the tapes through Debra’s testimony so that defense counsel would have had an opportunity to cross-examine her regarding the recordings.

**E. Statement Was Testimonial.**

In order for the right to confrontation to be implicated under Crawford, the statement in question must be testimonial. Crawford, 541 U.S. at 68. The United States Supreme Court failed to articulate a test in Crawford to determine whether a statement is testimonial, but instead

stated that the term “applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” Id. This Court recently adopted an “objective witness” test for purposes of determining whether a statement is testimonial, concluding that the focus of the inquiry is whether the statement was made “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” State v. Stahl, 111 Ohio St. 3d 186, 196, 855 N.E.2d 834, 844 (2006) (citing Crawford v. Washington, 541 U.S. at 52). The Sixth Circuit Court of Appeals similarly concluded that in reaching a determination of whether a statement is testimonial or non-testimonial, the focus of the inquiry is “whether a reasonable person in the declarant’s position would anticipate his statement being used against the accused in investigation and prosecuting the crime.” United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004). The court determined that statements of a confidential informant are testimonial.

At the time the recordings were made, Debra was working with law enforcement officials and knew that that the conversations were being recorded, as arranged by Detective DeWine, when she engaged in conversation with her husband. A reasonable person in Debra’s position would anticipate that the recording she was making would be used against her husband in investigating and prosecuting a crime. Pursuant to this Court’s holding in Stahl, the recorded statements were testimonial.

**F. Debra Perez Was Not Unavailable.**

Furthermore, Debra was not unavailable to testify. Like in Crawford, Debra did not testify regarding the tapes because of the marital privilege. Nevertheless, she took the stand and testified regarding other matters in this case. In Crawford, the defendant’s wife was unavailable because she refused to testify, exercising the marital privilege. Here the State made no attempt

to show that Debra was unavailable for purposes of introducing these tapes. The proponent of the testimony bears the burden of proving unavailability. Evid. R. 804, State v. Keairns, 9 Ohio St.3d 228, 231-32, 460 N.E.2d 245, 249 (1984).

Finally, the defense had no prior opportunity to cross-examine Debra regarding the testimony on the tapes. Cross-examination is the “only indicium of reliability sufficient to satisfy constitutional demands”. Crawford, 541 U.S. at 69. Because of the improper introduction of the tapes through Detective Dewine, the defense was robbed of the opportunity to cross-examine Debra at trial, and could not effectively defend against this evidence.<sup>8</sup>

#### **G. Conclusion.**

Because the tape recorded statements were testimonial and Debra was not unavailable to testify, the trial court should have required the State to put Debra on the stand and allow defense counsel an opportunity to cross-examine her. The trial court’s admission of the tape without Debra’s testimony violated Perez’s right to Confrontation under the Sixth Amendment to the United States Constitution.

---

<sup>8</sup> To the extent that trial counsel could have cross-examined Debra as to matters outside of the scope of her direct, defense counsel was ineffective for failing to do so. See Proposition of Law No. VI.

## Proposition of Law No. VI

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

Defense counsel's performance failed to meet the prevailing standards of practice. As a result, Perez's rights as 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.

Strickland makes it clear 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. "[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 reviewed 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 Perez suffered prejudice resulting from counsel’s error. Strickland, 466 U.S. at 687. Prejudice results when this Court’s confidence in the result of Perez’s trial is undermined by counsel’s error. Id. at 694. Perez is not required to demonstrate that counsel’s error was outcome-determinative under the Strickland prejudice prong. Id. at 693. The performance of defense counsel throughout Perez’s capital trial was deficient and prejudicial.

#### **B. Ineffective Assistance Of Counsel During Voir Dire.**

The Sixth Amendment to the United States Constitution guarantees a criminal defendant a trial by an impartial jury and the right to the effective assistance of counsel during the trial process. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970); Morgan v. Illinois, 504 U.S. 719, 728 (1992). The right to effective assistance of counsel extends to the voir dire process.<sup>9</sup> Johnson v. Armontrout, 961 F.2d 748, 754-56 (8th Cir. 1992).

---

<sup>9</sup> The right to counsel attaches at the initiation of adversarial judicial proceedings by way of formal charge and continues during the trial. Kirby v. Illinois, 406 U.S. 682, 688-89 (1972). Prior to the initiation of proceedings, an individual has a Fifth Amendment right to counsel during any custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 478-79 (1966).

Voir dire is counsel's opportunity to ensure that a jury will be impartial and indifferent to the extent provided by the Sixth Amendment. Morgan, 504 U.S. at 719; see also O.R.C. § 2945.25; Ohio R. Crim. P. 24(A), (B)(9), (14). "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). Although the content of voir dire does not have to conform to a particular framework, State v. Evans, 63 Ohio St. 3d 231, 247, 586 N.E.2d 1042, 1056 (1992), counsel must cover specific subjects in order to afford the defendant a fair trial. Mu'Min v. Virginia, 500 U.S. 415, 422-23 (1991). Trying a defendant before a biased jury is akin to providing him no trial at all. It constitutes a fundamental defect in the trial mechanism itself. Counsel had a professional duty under Strickland to afford Perez an impartial jury.

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. Morgans, 504 U.S. at 729; 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 [his] 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 able to impartially follow the court's instructions and evaluate the evidence cannot be fulfilled.

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

As such, defense 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.

During questioning of prospective jurors, defense counsel failed to question numerous jurors as to whether they would harbor any bias or prejudice against the defendant as a result of the fact that the victim in this case was Caucasian. The facts of this case made it essential that such questioning occur. Several times during Perez's trial, an issue was raised regarding whether the murder victim called Perez a "nigger" before he was shot. (Tr. 1416). The prosecutor also made reference to this during his closing argument. (Tr. 1657). Evidence that the victim may have made a racial slur was known to defense counsel before trial began as the tape was part of the motion to suppress. (Mtn. Supp. Ex. 4). Because there were potential racial tensions involved in the crime and because the crime was interracial, defense counsel needed to know if such information would negatively impact Perez's jury.

"Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." Turner v. Murray, 476 U.S. 28, 35 (1986). See also State v. Smith, 89 Ohio St. 3d 323, 340, 731 N.E.2d 645, 660 (2000) (Lundberg Stratton, J. dissenting) (citing Turner, 476 U.S. at 35). The Supreme Court of the United States vacated Turner's death sentence as a result of the "risk that racial prejudice **may have** infected petitioner's capital sentencing[.]" Turner, 476 U.S. at 36 (emphasis added). The "issues of race and religion so infected this trial that the failure to voir dire the jury venire on those issues made counsel's performance so deficient that counsel were not functioning as the counsel guaranteed by the Sixth Amendment[.]" See Smith, 89 Ohio St. 3d at 341, 731 N.E.2d at 661 (Lundberg Stratton, J. dissenting).

The United States Court of Appeals for the Sixth Circuit reversed the convictions of several defendants where it was not possible to determine through voir dire if the jurors could afford the defendants the presumption of innocence during the proceedings. United States v. Blount, 479 F.2d 650, 651 (6th Cir. 1973); United States v. Hill, 738 F.2d 152, 153-55 (6th Cir. 1984). Likewise, Perez's counsel failed to ensure the fairness and impartiality of jurors in several areas.

By failing to ensure no juror would be biased against Perez based on race, defense counsel were ineffective. This error deprived Perez of his rights to a trial by a fair and impartial jury and due process, rendering counsel ineffective at both phases of Perez's capital trial. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 5, 10, 16.

### **C. Ineffective Assistance Of Counsel During Trial Phase.**

#### **C.1 Concession Of Guilt And Emphasis On Confession.**

Defense counsel's ineffective performance began during opening statements and continued until closing statements of the mitigation case. During opening statement, defense counsel informed the jury that "there [was] no serious dispute about what happened or who did it. Mr. Perez knows that in all probability, you 12 jurors will reach the second phase of this trial and you will deliberate on whether to put him to death or not. This decisions whether to kill another man will be the most difficult decision that many of you will have to make." (Tr. 787.) It was ineffective for defense counsel to admit guilt to all of the charges in the indictment. This is particularly true given the fact that there were valid issues concerning the validity of the course of conduct charge.<sup>10</sup> (See, Proposition of Law No. I). Those issues should have been raised to the jury. Instead, defense counsel conceded guilt and focused on discussing what the jury should

---

<sup>10</sup> It was also ineffective for defense counsel to concede to the trial court that evidence of the robbery at the Beverage Oasis was proper course of conduct evidence.

consider during the mitigation phase. This allowed the jury to believe from the beginning that it was appropriate to find Perez guilty of the aggravated murder count and the specifications attached to the counts.

It was also error for defense counsel to continuously emphasize Perez's taped confession. Over defense objection, the State played the videotape of the confession for the jurors during the culpability phase of the trial. (Tr. 1328-1472). The State discussed Perez's confession at length in closing arguments and characterized it as "evidence...that's as powerful as it comes.". (Tr. 1626, 1631-1639, 1657). Defense counsel, despite its objections to the admission of the confession, referred to the confession in its opening statement and repeatedly emphasized it during trial. (Tr. 787-88). In closing, defense counsel again encouraged the jury to not only recall the substance of Perez's confessions, but to watch the video again during its deliberations. (Tr. 1645, 1647, 1649-50, 1653). It is was ineffective for defense counsel to repeatedly emphasize Perez's confession when it was such damaging evidence to Perez.

## **C.2 Counsel Failed To Adequately Cross-Examine Debra Perez.**

Defense counsel failed to adequately cross-examine Debra Perez regarding her criminal conduct. During Debra's testimony she admitted to committing several criminal acts including acting as a "strawman" by purchasing guns for her husband that were used in a number of robberies, tampering with evidence by trading in the gun that was used in the murder and robbery at the Do Drop Inn, and assisting her husband with his gun wound after one of the robberies. (Tr. 1516-18, 1520). After law enforcement officials became aware of her involvement in the crimes, Debra agreed to assist in the investigation of her husband, and ultimately testified on behalf of the State. Despite her admission of criminal activities as well as

her knowledge of her husband's involvement in the robberies, Debra was never charged for her involvement in the crimes. (Tr. 1527).

Defense counsel recognized the need to cross-examine Debra. During closing argument defense counsel stated, "But when it came right down to it, and I think you could weigh what Mrs. Perez told you and you decide if you believed her or not; and she was one of the witnesses that I thought deserved to be cross-examined." (Tr. 1754). Nevertheless, defense counsel's cross-examination of Debra was wholly inadequate. During cross-examination of Debra, defense counsel questioned her about who lived at her home with her, the amount of her disability income, and the cost of rent, groceries and gas. (Tr. 1523). Defense counsel argued that these questions somehow demonstrated that Debra was a liar. (Tr. 1523-24). The bigger issue and the issue upon which defense counsel should have focused was her motive for testifying and whether she received a promise of immunity in exchange for her testimony. Although defense counsel asked her whether she knew what the word "complicity" meant and whether she was pressured by law enforcement officers, (Tr. 1526-27), defense counsel never asked whether she received an offer by the State not to be charged with her crime in exchange for her assistance and testimony against Perez.

Debra could have been charged with tampering with evidence for trading her husband's gun in for another gun and was essentially an uncharged accomplice in the robberies and murder. O.R.C. § 2923.03(A)(2). Although defense counsel recognized this during closing argument, (Tr. 1648), defense counsel never asked about why Debra would admit under oath to committing criminal acts without having an attorney present to represent her and without exercising her right to remain silent. When Debra stated that she was not concerned about what police might do. (Tr.

1527), defense counsel failed to ask the next logical question, whether there was a promise not to prosecute which gave Debra reason not to be concerned.

This information would have been important in demonstrating Debra's motives to testify on behalf of the State and would have given the jury a reason to view her testimony with the caution that a co-conspirator's testimony should be viewed. The failure of defense counsel to effectively cross-examine Debra as to a potential benefit for testifying was particularly important given the fact that when the State asked why she made the decision to cooperate with the police, she testified: "Because my sister was murdered in L.A. They still don't know who killed her; and I don't think that it's fair for anybody take anybody else's life; and the fact that if I didn't we were afraid for our lives." (Tr. 1521). Defense counsel could have exposed the fact Debra had other motivation to testify aside from the "pious" reasons she gave in her testimony. Cross-examination on this matter would have been more effective at demonstrating that Debra was a liar than questions asking her how much her disability check was.

In addition, defense counsel failed to cross-examine Debra regarding the improperly admitted hearsay taped recordings between her and Perez. Defense counsel objected to the admission of the tapes arguing that it was hearsay, and that the State had to make Debra available for cross-examination before playing the tapes. (Tr. 1252). The trial court inquired whether Debra was going to be placed on the stand. (Tr. 1254). The State informed the court that she would at which point defense counsel stated, "We're gonna cross her on that tape too." (Tr. 1254). However, once Debra was on the stand, defense counsel failed to cross-examine her regarding the tapes. Although there was a question as to whether Debra was available for cross-examination regarding the tapes since her testimony was limited to the purchase of firearms, defense counsel should have nonetheless made an attempt to question her about the tape.

Defense counsel previously recognized the importance of such cross-examination. (Tr. 1254). The failure of defense counsel to follow through with cross-examination was deficient and prejudiced Perez.

The Sixth Amendment guarantees a criminal defendant the right to the effective assistance of counsel. Strickland, 466 U.S. 668. Counsel violated this duty when he failed to cross-examine Debra Perez on information that would challenged her credibility.

### **C.3 Failure To Request Jury Instruction.**

Defense counsel also had an obligation to request an instruction from the trial court to advise the jury to view Debra's testimony with the same caution as of the testimony of an accomplice. O.R.C. § 2923.03(D). Debra was not charged for her involvement in the crimes for which Perez was indicted. This is true despite the fact that she could have been charged with any number of crimes. Although law enforcement and Debra testified that the potential of being charged was not a matter that was of concern, Debra confessed on the stand to criminal acts. Presumably, no rational person would confess in court, under oath, without knowing beforehand that there would be no future charges. If in fact Debra was not facing criminal charges because of her assistance, the jury should have been advised and instructed regarding how to view such testimony.

Debra met the statutory definition of complicity under O.R.C. § 2923.03. (See, Proposition of Law No. VIII). As such, there was a requirement that the court was required to provide a cautionary or complicity instruction to guide the jury. O.R.C. § 2923.03(D). Defense counsel recognized that Debra was a co-conspirator. (Tr. 1648). However, no complicity instruction was requested by defense counsel. It was error for defense counsel not to request

such an instruction when counsel knew that her testimony of such importance that she was one of the witnesses who “should be cross-examined.” (Tr. 1754).

**D. 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 [him] 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.

As demonstrated below, defense counsel’s behavior was not “reasonable considering all the circumstances.” Strickland, 466 U.S. at 688. Defense counsel began the opening statements of Perez’s trial by conceding that Perez was guilty of the robbery at the Do Drop Inn and the murder of Johnson. Defense counsel further informed the jury that in all probability the jury would be deliberating about whether to sentence Perez to death. (Tr. 787). Since defense counsel was aware that Perez’s trial would proceed to the mitigation phase, defense counsel had an obligation to adequately and thoroughly prepare for the mitigation phase. Presentation of mitigation evidence was the area in which defense counsel could have done Perez the most good. Glenn, 71 F.3d at 1207. Nevertheless, defense counsel presented very little mitigation during the sentencing phase. In fact, Perez’s one mitigation witness was merely five pages of transcript and comprised of one witness, Perez’s stepfather, Ray Joseph Paris.

During Mr. Paris’s testimony, defense counsel posed questions to demonstrate that Mr. Paris was a good person who was there for Perez from the time Perez was four until he was twelve years old. (Tr. 1732-34). Mr. Paris also asked the jury to spare Perez’s life. (Tr. 1736). The state’s cross-examination of Mr. Paris best demonstrates the problems with defense counsel’s questioning of Mr. Paris. During cross-examination, the prosecutor continued with the same theme as defense counsel, demonstrating that Perez’s stepfather was a good person who mentored a lot of young men in the community and watched out for Perez. (Tr. 1737-38). During the State’s closing argument, the prosecutor again pointed out the evidence presented by the defense in mitigation and how it supported the State’s argument for death. “But, in this

particular case, if we're talking about childhood, you saw Ray Paris in here and Ray Paris was set forth by the Defense.” (Tr. 1761).

Perez's father was never around and his mother was a prostitute. (Tr. 1753). During closing arguments, defense counsel discounted this mitigation evidence concerning his family background stating, “You know, his mom was a prostitute; that's not an excuse. We wanted you know some of the things about his childhood, but that's not an excuse. That didn't cause him to do what he did, and so I make no excuse.” (Tr. 1751). These statements by defense counsel were at best confusing but more likely damaging to the potential consideration of this evidence by the jury. Defense counsel's statements allowed the jury to equate mitigation with an “excuse.” There was no need for defense counsel to qualify the evidence of his mother's prostitution by stating it was not excuse. Instead, defense counsel was obligated to explain to the jury why this was mitigating evidence, why it was important to Perez's development and why it should be considered in reaching the determination regarding whether to sentence Perez to death.

Rather than focus on Perez's family background, defense counsel requested the jury to consider as mitigation evidence the fact that Perez was loyal to his wife and co-defendant and was remorseful for Johnson's death. (Tr. 1756). Defense counsel continued the theme of minimizing mitigation evidence and focusing on remorse and loyalty to the trial court. (Disposition Tr. 68). Defense counsel's reliance on loyalty and remorse to convince a jury not to sentence to death was nonsensical particularly given the fact that the United States Supreme Court has recognized that the type of evidence defense counsel chose to ignore is persuasive in a death penalty case. Wiggins v. Smith, 539 U.S. 510, 534-35 (2003).

The record demonstrates that there was mitigating evidence that went undeveloped. The jurors were not given any information to assist in understanding the dynamics within the family

or the family history of dysfunction. Instead, defense counsel was content to allow the jury to believe that Mr. Paris, the man who was in Perez's life for some of the time during the ages of four to twelve, was a good person who helped Perez have a good life.

Additionally, defense counsel was aware that Perez's competency had been questioned a number of times and that Perez was on medication for his mental health issues. During his statement to detectives, Perez informed the police that he took eight pills every night because he was bipolar and psychotic. (Tr. 1411). During the taped conversation between Perez and his wife, Perez, informed her that a competency evaluation was conducted and that the court found him competent to stand trial on charges of breaking and entering and possession of criminal tools. (Tr. 1263). The fact that a competency evaluation was conducted for a breaking and entering and possession of criminal tools case should have indicated to defense counsel that Perez was exhibiting serious mental health issues.

During Perez's waiver of his right to a jury trial, Perez's competency was once again called into question by the prosecutor when, during the court's questioning of Perez, he stated that Perez was on medication. (Jury Waiver and Motions Tr. 14). During the hearing, defense counsel stated that Perez's character appeared to be altered by the drugs he was taking. (Jury Waiver and Motions Tr. 4). Subsequently, a competency evaluation was conducted and Perez was found competent to stand trial. (Joint Exhibit 1). Nevertheless, these questions about Perez's mental state should have caused defense counsel to thoroughly investigate Perez's mental health issues and present evidence of those issues to the jury during the mitigation case. Such evidence would have been much more effective than evidence of Perez's loyalty to other criminals in convincing a jury to give a sentence of less than death.

Even the jury posed a question about Perez's mental state by asking the trial court whether Perez was on any medication. (Tr. 959). The trial court's response to the jury was that it was improper for the jury to anticipate evidence. (Tr. 959). It was reasonable for the jury to anticipate presentation of evidence regarding Perez's mental state based on the trial court's response to the question. Yet, once again defense counsel discounted this importance mitigation evidence. "[Debra] makes reference to something not being right in his head, and he doesn't use this as an excuse. He doesn't use this as a way to lessen what he did." (Tr. 1644). The failure to provide such information regarding Perez's mental health to the jury, and then inform the jury to discount such evidence, was unreasonable and ineffective. Goodwin v. Johnson, 2006 U.S. Dist. LEXIS 11915 at \*\*36-37 (N.D. Ohio March 22, 2006).

Perez 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 Eddings v. Oklahoma, 455 U.S. 104 (1982)). However, this right means very little when defense 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). The paucity of mitigation presented by counsel demonstrates that defense counsel did not take the necessary time to prepare a case sufficient to convince the jury that the aggravating circumstance did not outweigh the mitigating factors. Counsel's ineffectiveness effectively sealed Perez's fate.

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, Perez 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 circumstances does not vitiate Perez'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.

Perez'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 Perez. 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 v. Alabama, 287 U.S. 45 (1932).

**E. Failure To Object During Both Phases Of Perez's Capital Trial.**

**E.1 Failure To Object To Prosecutorial Misconduct.**

The cumulative effect of prosecutorial misconduct at both phases of this case violated Perez's right to a fair trial. However, defense counsel failed to object to much of the misconduct committed. Perez incorporates Proposition of Law No. X, here for a discussion of the facts and prejudice resulting from this error.

**E.2 Failure To Object To Improper Jury Instructions And Request Proper Jury Instructions.**

Counsel's failure to object to the trial court's improper jury instructions deprived Perez of his right to a fair trial and a reliable sentence. See Proposition of Law VIII incorporated herein. Perez therefore must be granted a new trial and sentencing hearing.

**F. Conclusion.**

The errors and omissions set forth in this proposition of law demonstrate that Perez's counsel's performance was constitutionally deficient. Perez was prejudiced by counsel's performance. The cumulative effect of the foregoing errors and omissions by defense counsel infringed Perez's Sixth Amendment right to effective assistance of counsel. See Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995) (counsel's errors assessed for cumulative effect on defendant's right to fair trial). His convictions must be reversed and his case remanded for a new trial. Alternatively, his death sentence must be vacated and his case remanded for re-sentencing. See O.R.C. § 2929.06(B).

## **Proposition of Law No. VII**

A defendant's right to a fair and impartial sentencing jury is denied when the trial court overrules a challenge for cause against a prospective juror who is biased in favor of capital punishment. U.S. Const. amend. XIV; Ohio Const. art. I, § 16.

The responses of prospective juror Ronald Dirlam during individual voir dire showed his bias in favor of capital punishment. Dirlam expressly demonstrated his inability to set aside his belief that the background of the defendant and the defendant's remorse would not make a difference in his sentencing determination. Dirlam also stated that once a purposeful killing is established, the inquiry is ended. (Tr. 280). Dirlam should have been removed from jury service because he would not consider mitigation and was predisposed to death once guilt was found. The failure to remove Dirlam infringed Kerry Perez's due process right to an impartial sentencing jury and his right to exercise peremptory challenges.

Dirlam was very honest, admitting that background of the person and remorse would not be part of his consideration. (Tr. 280). Trial counsel specifically asked if the background of the individual and remorse would be mitigating evidence. Dirlam answered that it would not be mitigating evidence: "No. Background of the person should not [be mitigating]", and "No," remorse would not make any difference. (Tr. 280). Trial counsel challenged Dirlam immediately after he agreed that once there is a "purposeful killing, that pretty much ends the inquiry [for him]." (Tr. 280).

In response to the State's questions, Dirlam indicated that he was expressing a personal opinion, but that he could follow the law. (Tr. 283). The prosecutor, therefore, did what every prosecutor does in the same situation: He asked Dirlam if he could fairly consider those factors and follow the law. (Tr. 283). Dirlam simply stated "Right" to that question. (Tr. 283).

The following is the relevant portion of the transcript of Dirlam's examination:

MR. BUTZ: When you were asked in Question 67 if you're in favor of the death penalty, you wrote: If a person is found guilty of a crime that has the death penalty, this case, they have taken other lives, then they should pay with theirs.

Tell me exactly what your thought process is. What are you telling us?

THE JUROR: Well, if they're found guilty within a reasonable doubt, you know, there's no doubt about it.

MR. BUTZ: Yeah, beyond a reasonable doubt that's it.

THE JUROR: That's pretty much how I feel that --

MR. BUTZ: Okay.

THE JUROR: -- there's no, I want to say no possibility that anybody else --

MR. BUTZ: So you're --

THE JUROR: -- did it.

MR. BUTZ: So you're convinced nobody else did it, you're convinced, would that end the inquiry?

THE JUROR: No, it depends, like I said, what the Judge --

MR. BUTZ: Okay. Here's my confusion and I'm gonna ask you to help me out. In an earlier question, when you were asked if someone purposely murders someone during the commission of another serious crime like robbery, should you automatically upon conviction, should he automatically upon conviction be sentenced to death; and you said you disagree with that.

THE JUROR: Yeah, they shouldn't automatically. All depends on circumstances.

MR. BUTZ: I guess what confuses me is you wrote, "But I don't know why I feel that way."

THE JUROR: Well, I've never been asked that before.

MR. BUTZ: So if you're selected as a juror and the Prosecutor convinces you beyond a reasonable doubt that there's been an aggravated murder and an

aggravating circumstance proved beyond a reasonable doubt, you're telling me that that doesn't end the inquiry about the penalty. Would you agree with that?

THE JUROR: Well.

MR. BUTZ: Or does it? That's kind of the bottom line. You know, if the Prosecutor proves that, is there anything else you want to hear or are we now in a situation where you're gonna vote for death just because they proved an aggravated murder with an aggravating circumstance?

THE JUROR: Well, it all depends on we would deliberate, you know, the jury, if it was proven – I don't really know. I've never been in that situation.

MR. BUTZ: That's why -- that's why it's so important that we talk about it. I'm trying to find out if there are things that would, if you were convinced there's no doubt about an aggravated murder, an aggravated circumstance, is there anything else you would want to know before you decided on the penalty?

THE JUROR: **Well, if it's proven, I mean, beyond a shadow of a doubt that they're guilty and the sentence would be death.**

MR. BUTZ: That's an option; but are you telling me that if you're convinced there's no doubt about it, then the appropriate sentence would be death no matter what else that you might hear?

THE JUROR: Oh no, it wouldn't be appropriate. It all depends on everything else.

MR. BUTZ: What else would you like to hear when deciding on death versus a life sentence. Let's assume that you're 100 percent satisfied about the crime, who did it and the circumstances surrounding the crime. Let's say that is out of the picture. What else would you want to know?

THE JUROR: Well, I guess really it's the circumstances and why and.

MR. BUTZ: Okay. What if it's been proven beyond a reasonable doubt that it's a purposeful shooting with a gun during a robbery?

THE JUROR: If it's --

MR. BUTZ: Anything else you want to know?

THE JUROR: No.

MR. BUTZ: Would you care about the Defendant's background at all? Would that make any difference to you?

THE JUROR: Well, I don't think that -- sometimes it has something to do with it; but basically, they committed the crime. It's been proven. Sometimes background, I believe, doesn't have anything to do with it.

MR. BUTZ: So you would not think that that would be something that might be mitigating?

THE JUROR: **No. Background of the person should not.**

MR. BUTZ: Okay.

THE JUROR: If they committed it, you know.

MR. BUTZ: **How about if the person demonstrated remorse after the fact. Would that make any difference to you?**

THE JUROR: **No.**

MR. BUTZ: We can't bring them back, but would it matter to you?

THE JUROR: It would matter, but I don't know whether it would change my verdict.

MR. BUTZ: **I think your inclination is that, you know, once you get to the purposeful killing, that pretty much ends the inquiry for you?**

THE JUROR: **Yeah.**

MR. BUTZ: Is that a fair summation of where we are?

THE JUROR: Yeah.

(Tr. 276-81) (emphasis added). Trial counsel challenged for cause. (Tr. 281).

The State then examined Dirlam as to his personal belief versus ability to follow the law. (Tr. 282-83). At this point Dirlam stated that he could consider those factors as instructed by the judge. (Id.).

However, Dirlam's questionnaire shows further bias that he could not follow the law. He would require a criminal defendant to prove his innocence, regardless of the law. (Question

54(d)). Dirlam also wrote that there are too many loopholes making it too hard for police and prosecutors to convict. (Question 62). These two beliefs indicate that Dirlam would be unable to follow the law as instructed by the trial court.

The prosecutor summed up the essence of how critically devoid the prosecution and the trial court were of any concern for Perez’s right to a fair and impartial jury: “I think this illustrates the danger of asking people what their personal opinion is on things rather than whether they’re able to follow the instructions of the law that the Court gives them and put aside their personal opinions.” (Tr. 284). In point of fact, the Constitution of the United States requires a great deal more than a juror’s promise to try to set aside personal beliefs on a case. Nonetheless, the prosecutor was successful because Dirlam simply said he would follow the law as instructed by the Court. As defense counsel argued, Dirlam “may have said the right words; but if you listen to what he really said, I think it’s pretty clear that he will not follow the Court’s instructions.” (*Id.*). Under the State’s perfect death qualification voir dire, the prospective juror would be asked one question and one question only—Can you follow the law? However, this one question does not uncover any hidden biases or impartiality.

The trial court overruled the challenge for cause, (tr. 284-85), and defense counsel used a peremptory challenge to excuse Dirlam from the jury. (Tr. 717-18). The trial court should have excused Dirlam for cause because he would not consider mitigating evidence. (Tr. 276-81).

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to have the issue of his guilt determined by a fair and impartial jury. *Irvin v. Dowd*, 366 U.S. 717 (1961). See also *White v. Mitchell*, 431 F.3d 517, 537 (6th Cir. 2005). There is no Sixth Amendment right, however, to have a jury determine the issue of punishment in a capital case. See e.g., Spaziano v. Florida, 468 U.S. 447, 464 (1984). Pursuant to Ohio Rev. Code Ann.

§ 2929.03(D)(2) (Anderson 2006), Ohio “has chosen...to delegate to the jury [the task of determining punishment] in the penalty phase of capital trials in addition to its [federal constitutional] duty to determine guilt or innocence of the underlying crime.” See Morgan v. Illinois, 504 U.S. 719, 726 (1992). Accordingly, the right to a fair and impartial jury in the penalty phase of a capital case is guaranteed by the Due Process Clause of the Fourteenth Amendment because State law provides for a jury’s determination of punishment. See id. at 727 (citing Turner v. Louisiana, 379 U.S. 466 (1965) (“due process alone had long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment”).

The due process right to a fair and impartial jury is violated when a juror forms an opinion on the merits of a factual issue without regard for the evidence presented. See id. at 729. At the penalty phase of a capital trial, the ultimate issue of fact for the jury is whether the defendant deserves a life sentence. Thus, the United States Supreme Court held in Morgan that the service of a juror who is automatically in favor of the death penalty in every case in which the defendant is guilty of capital murder violates the defendant’s right to an impartial sentencing jury under the Due Process Clause:

Because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empanelled and the death sentence is imposed, the state is disentitled to execute the sentence.

Id.

Here, Dirlam's responses to defense counsel's questions made clear that mitigating evidence was entirely irrelevant. Dirlam said "No. Background of the person should not [be mitigating]," and that remorse would not make any difference. (Tr. 280). He also stated that once a defendant is found guilty of a purposeful killing, the inquiry is over and death is the only appropriate sentence. (Tr. 280). This was an unambiguous expression of bias under Morgan, 504 U.S. at 729.

Challenges to biased jurors have been presented to this Court, but they are rarely given any credence. Instead of evaluating challenged jurors under the correct constitutional and statutory standards, this Court has relied upon isolated statements by jurors that they are fair and can follow the law as a means to overrule the constitutional error presented. See e.g. State v. Allen, 73 Ohio St. 3d 626, 653 N.E.2d 675 (1995) (Juror whose brother was murdered and who harbors great bitterness toward the justice system is qualified to sit on a capital jury as long as she indicates her ability to be fair); State v. White, 82 Ohio St. 3d 16, 20-21, 693 N.E.2d 772, 777 (1998) (Juror who repeatedly related concerns on being fair is qualified to sit on capital jury as long as she indicates her ability to be fair and obey the law). This ignores fundamental principles articulated by the United States Supreme Court, this Court's own century old syllabus law, and the plain language of the Ohio Revised Code.

Ohio Rev. Code Ann. § 2313.42(J) (Anderson 2006) establishes when a prospective juror should be removed for cause: when 'he discloses by his answers that he cannot be a fair and impartial juror **OR** will not follow the law as given to him by the court.' (Emphasis added). Ohio Rev. Code Ann. § 2313.43 (Anderson 2006) further states that "[t]he validity of such challenge shall be determined by the court and be sustained if the court has any doubt as to the juror's being *entirely unbiased*." (Emphasis added).

The provisions of O.R.C. § 2313.42(J) are posed in the alternative; if either factor exists, an individual is not fit to serve on a jury. The trial court relied solely upon Dirlam's agreement to obey his instructions to determine his fitness to serve; the judge made no statement regarding his assessment of his truthfulness or credibility. Throughout the voir dire, Dirlam disclosed that once an individual is convicted of a purposeful killing that death is automatic and that mitigating evidence would not make a difference, thus rendering him impartial. However genuine his promise to obey the trial court's instructions may have been, it was not sufficient to overcome the prejudice demonstrated under first prong of O.R.C. § 2313.42.

An easier analysis can take place by applying the standard of O.R.C. § 2313.43 which requires jurors to be "entirely unbiased." "Entirely" is defined as meaning "wholly; completely; totally; fully." Webster's New World Dictionary of American English, p. 453 (Third College Ed. 1988). Dirlam was not "wholly, completely, totally, or fully" unbiased. He repeatedly told the court that he would not consider the background of the individual or remorse. Only the prosecution and the trial court understood him to be entirely unbiased because Dirlam was able to tell them, in response to leading questions, that he would be fair and obey the court's instructions.

There was a fundamental misconception by the trial court that, whatever their viewpoints, individuals are fit to serve on capital juries if they can tell a trial court that they are fair minded people who will do their best to follow the court's instructions. This is not the standard to determine a potential juror's fitness to serve, and it has not been so in this State for over 100 years.

In 1885, this Court held:

A person called as a juror in a criminal case, who clearly shows himself, on his voir dire, not to be impartial between the parties, is not rendered competent by

saying that he believes himself able to render an impartial verdict, notwithstanding his opinions, *although the court may be satisfied that he would render an impartial verdict on the evidence.*

Palmer v. State, 42 Ohio St. 596, syl. 3 (1885). The Palmer principle is not arcane; the United States Supreme Court articulated the same concerns with respect to voir dire under modern death penalty schemes. In Morgan, the Court cautioned that dogmatic inquiries about a juror's ability to be fair and follow the law are inadequate to remedy jurors' bias, "*their protestations to the contrary notwithstanding.*" 504 U.S. at 735. (Emphasis added). Jurors in all truth and candor respond that they could be fair, unaware that views they hold would prevent them from doing so. The most important inquiry is not how the juror answers the leading questions "can you be fair" or "can you follow the law," but instead how the juror answers all questions concerning bias.

In Allen, this Court held that it will not disturb a trial court's ruling on a challenge for cause if the ruling is "supported by substantial evidence." 73 Ohio St. 3d at 629, 653 N.E.2d at 681. The Allen trial court noted on the record its assessment of the challenged juror's credibility, and the trial court specifically stated that the challenged juror was unequivocal in her ability to set aside her views and fully understood her responsibility. Id. No such "substantial evidence" is present regarding Dirlam. The trial court made no comment about his demeanor and articulated no reason why Dirlam's agreement to obey the court's instructions overcame his repeated statements that he would not consider the background of the individual, remorse, and that death was the only punishment for the purposeful killing. Perez's case, therefore, is distinguished from Allen because there is no evidence on the record, much less substantial evidence, to support the trial court's ruling.

Dirlam stated on several separate occasions that death was the appropriate punishment for the purposeful killing of another. Additionally, Dirlam confirmed that the background of the individual nor remorse are proper mitigation.

The Sixth Circuit has held that a biased juror who was not excused entitles a prisoner to habeas relief. See White, 431 F.3d at 537-42. In White, the transcript indicated that the juror did not believe that she could be fair because of what she heard from the media and because of a sense of duty to the community. Id. Subsequently, the prosecution and trial court only elicited statements as to whether she could follow the law. Id. Although the trial court, and affirmed by this Court, found that she was not biased, the Sixth Circuit found that the transcript reflected internally inconsistent and vacillating statements to render the juror as impartial. Id. at 542. The Sixth Circuit ruled that this Court's finding that the trial court did not abuse its discretion was contrary to or an unreasonable application of Supreme Court precedent, i.e., Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); Patton v. Yount, 467 U.S. 1025, 1036 (1984); Morgan 504 U.S. at 728-29. Id. at 537-42. See also Franklin v. Anderson, 434 F.3d 412, 427 (6th Cir. 2006) (Juror "completely misunderstood the presumption of innocence and burden of proof that she could not have made a fair assessment of the evidence of ... guilt" rendering her biased).

Defense counsel's challenge for cause was directed at Dirlam's declarations that the background of the defendant and remorse were irrelevant mitigating evidence and that a purposeful killing mandates the death penalty. (See Tr. 281-85). The trial court had a duty to excuse Dirlam for cause in light of Morgan. See State v. Johnson, 24 Ohio St. 3d 87, 91, 494 N.E.2d 1061, 1065 (1986) (trial court has duty to protect the rights of the accused).

Perez was prejudiced by this error even though Dirlam did not sit on his jury. Perez had to waste a peremptory challenge against Dirlam. (Tr. 717-18). Further, he used all of his

peremptory challenges. (Tr. 713-21) (exercising peremptory challenges to excuse prospective jurors O'Connor, Mullins, Miesse, Dirlam, Whitaker, and Perrin). This Court "has recognized that where the defense exhausts its peremptory challenges before the full jury is seated, the erroneous denial of a challenge for cause in a criminal case may be prejudicial." State v. Cornwell, 86 Ohio St. 3d 560, 564, 715 N.E.2d 1144, 1150 (1999); citing Hartnett v. State, 42 Ohio St. 568, syl. 4 (1885); State v. Tyler, 50 Ohio St. 3d 24, 30-31, 553 N.E.2d 576, 586-87 (1990); State v. Williams, 79 Ohio St. 3d 1, 8, 679 N.E.2d 646, 655 (1997). Because Perez unnecessarily wasted a peremptory challenge against Dirlam, he did not have one to use against Juror Soledad Fitzwater, who sat as a juror.

The voir dire of Fitzwater revealed the following insight into her strident views in favor of the death penalty:

By Mr. Kavanagh:

Q I'm just gonna go over some of the responses you had regarding the death penalty. I believe you mentioned that you're not opposed to the death penalty. Is that correct?

A No -- yes, that's correct.

Q And you say it should be used as a last resort. Can you tell me what kind of cases you think would be appropriate?

A Well, in my belief and my opinion, I believe that only if the person is found guilty and only if that person is definitely found guilty beyond a reasonable doubt and the facts are pointed to that person and, you know, again, all the facts have to be found and the evidence and that person's not found guilty until all the facts are gathered and it's determined that that person, individual is found guilty and it's all investigated and, you know, and make sure that that person is found guilty; and I don't know how much time it would take, but sometimes I think it would take longer. I don't know how long the system takes here, but sometimes I think it would take longer to find out if that person is really guilty.

Q Okay. Let me explain this just a little.

- A And the death penalty, I know it's up to the jury to decide hat; and *I think in my opinion that people who kill other people* and people who violently rape people and people who hurt children, molest children, in my opinion, *I believe that's who the death penalty should go to.*

(Tr. 521-22) (emphasis added).

Fitzwater strongly favored the death penalty for people who kill other people. (See *id.*) Perez was charged with purposely causing Ronald Johnson's death under O.R.C. § 2903.01(B). Furthermore, Fitzwater was a victim of being held at gun point, told to be quiet, and rape. (Questionnaire p. 6). Fitzwater was therefore biased against Perez once she found him guilty of aggravated murder.

Kerry Perez was prejudiced when the trial court failed to excuse Ronald Dirlam for cause. The erroneous ruling gave Perez "fewer peremptories than the law provides" to remove Juror Soledad Fitzwater. See *Cornwell*, 86 Ohio St. 3d at 564, 715 N.E.2d at 1150; *Hartnett*, 42 Ohio St. 568, syl. 4; *Tyler*, 50 Ohio St. 3d at 30-31, 553 N.E.2d at 586-87; *Williams*, 79 Ohio St. 3d at 8, 679 N.E.2d at 655. Accordingly, Kerry Perez's right to due process under the Fourteenth Amendment and Article I, § 16 of the Ohio Constitution was violated and "the State is disentitled to execute [his death] sentence." See *Morgan*, 504 U.S. at 729.

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

A capital defendant's rights to due process are violated when the trial court's jury instructions fail to limit the jury's use of other acts evidence and fails to provide a complicity instruction after the testimony of an accomplice. U.S. Const. amend. VIII and XIV.

### **A. Introduction.**

The trial court failed to provide the jury with proper instructions during Kerry Perez's capital trial. The failure of the trial court to instruct the jury on the use of other acts evidence, and the failure to provide a cautionary instruction regarding the testimony of Debra Perez, violated Perez's rights to due process under the Fourteenth Amendment to the United States Constitution.

### **B. Failure to give complicity charge.**

Perez's wife, Debra Perez, at trial. During her testimony, Debra admitted to committing several acts which aided Perez in committing robberies and murder. Specifically, Debra testified to purchasing and exchanging guns for Perez, trading in the gun used in the murder of Johnson, and assisting Perez with a gun wound. (Tr. 1520, 1528). Debra was aware that her husband was committing robberies and that he was involved in the murder at the Do Drop Inn. (Tr. 1223-24). Additionally, the State submitted evidence, both through testimony and exhibits, that Debra purchased and exchanged firearms. (Tr.1516-18; State's Exhibits 1-3). Debra's trial testimony, along with testimony from her son, demonstrated that she tampered with evidence and was complicit in the robberies in the Springfield area and arguably the murder at the Do Drop Inn.

Ohio's complicity statute, O.R.C. § 2923.03(A)(2), provides that:

(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

(2) Aid or abet another in committing the offense.

O.R.C. § 2923.03(A)(2). Although Debra was never charged with complicity, there was sufficient evidence through her testimony and other trial evidence, to charge her with aiding and abetting. Additionally, it could be inferred from the evidence that Debra received leniency in exchange for her assistance in the prosecution of Perez. Debra agreed to assist law enforcement officials with their investigation and testify against Perez at trial. At trial, Debra knew that she would not be charged in exchange for her cooperation. (Tr. 1526-27). Her assistance and involvement in the crimes as well as the potential “gain” for testifying made it incumbent that the trial court provide the jury with a cautionary instruction in regard to her testimony.

Common sense suggests that an accomplice has a “greater interest in lying in favor of the prosecution rather than against it[.]” Washington v. Texas, 388 U.S. 14, 22 (1967). Thinking that a criminal will not lie “to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large.” Id. at 22-23. To protect herself, a criminal suspect will all too easily offer up lies to curry the State’s favor.

While the Revised Code allows the State to present accomplice testimony at trial, it also provides protection against the potential prejudicial affect of such evidence by ensuring that juries are informed of the suspect nature of that testimony. To this end, O.R.C. § 2923.03 provides:

- (D) If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, an attempt to commit an offense, or an offense, the court, when it charges the jury shall state substantially the following:

The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion and require that it be weighed with great caution.

It is for you, as juror, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth.

O.R.C. § 2923.03(D).

The trial court failed to give the statutory instruction at Perez's trial. Although there was complicity in the present case, it was not charged in the indictment against Perez, more than likely as the result of the fact that the State was charging that Perez as the principal offender. The State had the option of charging on the principal offense or the complicity statute. State v. Grimsley, 131 Ohio App. 3d 44, 721 N.E.2d 488 (1995); State v. Dotson, 35 Ohio App. 3d 135, 520 N.E.2d 240 (1987). The fact that the State chose to proceed on the principal offense does not negate the fact that a complicity charge could have been filed.

Debra's conduct, although uncharged, met the statutory definition of complicity under O.R.C. § 2923.03. Therefore, there was a basis for and requirement that the trial court give the jury the cautionary or complicity instruction found in O.R.C. § 2923.03. The plain language of the Revised Code places the duty on the trial court to charge the jury regarding accomplice testimony. See O.R.C. § 2923.03(D) (the court...shall state...). It is the trial court's duty to ensure that the defendant's "rights are properly protected." State v. Johnson, 24 Ohio St. 3d 87, 91, 494 N.E.2d 1061, 1065 (1986). The trial court failed in its obligation to provide the instruction.

#### **B.1 Testimony Was Prejudicial To Perez.**

Debra's testimony both on the stand and through the tape of her conversations with Perez, was important to the case against Perez. Defense counsel recognized that she was one of the witnesses who needed cross-examined. (Tr. 1648-49). The State also recognized the

importance of Debra's testimony and fought all attempts by defense counsel to have Debra's testimony excluded from the trial.

The trial court had a duty to instruct the jury to view Debra's testimony with grave suspicion. The trial court abdicated that duty and resultantly prejudiced Perez's due process and fair trial rights. U.S. Const. amends. VI, XIV. This Court must reverse Perez's convictions and sentences and remand this case for a new trial.

**C. Failure to limit jury's use of other acts evidence.**

Perez was charged with multiple counts of aggravated robbery. (Dkt. 1). The State sought to introduce evidence of these aggravated robberies in order to prove the course of conduct specification attached to the aggravated murder count. (July 5, 2005, Mtn. Supp. Tr. 8-9; Tr. 775). Perez moved to sever the aggravated counts and subsequently waived his right to a jury trial as to those counts because the presentation of evidence as to the other aggravated robberies violated Ohio R. Evid. 404(B) and did not constitute evidence for purposes of the O.R.C. § 2929.04(A)(5) specification. (July 5, 2005, Mtn. Supp. Tr. 4-8; Dkt. 88, 125). The trial court overruled Perez's objection and permitted the introduction of the aggravated robberies to prove a "unique identifiable plan of criminal activity which are probative as to the identity of the Defendant and are admissible under Evid. R. 404(B)." (Dkt. 128; Tr. 766).

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), *rev'd on other grounds*, Scott v. State, 107 Ohio St. 475, 141 N.E. 19 (1923). 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-

31 (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)).

Ohio’s appellate courts consistently follow this rule. In State v. Jurek, 52 Ohio App. 3d 30, 34, 556 N.E.2d 1191, 1196 (1989), the Eighth District Court of Appeals determined that in light of the potential for unfair prejudice when introducing 404(B) evidence, a trial court should require the prosecution to **specify** those elements under the rule which the evidence was being introduced to prove. Id. (Emphasis added). Moreover, the court held that the trial court in its cautionary instruction to the jury should specify the elements under the rule which the evidence was being introduced to prove. Id.

In Lewis, the judge merely read the other acts rule to the jury. The Second District found that this was improper and properly noted that the purpose of providing a limited instruction to the jury is to provide the jury with a “legal framework within which to make their factual determination.” Lewis, 66 Ohio App. 3d at 44, 583 N.E.2d at 409. Here, the jury was left to “postulate matters of law.” This is improper “especially [for] matters as fundamentally important to a fair trial as the limited use to which ‘other acts’ testimony may be put.” Id.

Assuming arguendo that the other acts evidence admitted against Perez demonstrated one of the proper purposes under 404(B), the Court was still required to provide a limiting instruction to instruct the jury that the evidence could not be utilized to demonstrate Perez’s guilt, but could only go to demonstrate as the trial court ruled, his identity as the individual responsible for the robbery and murder at the Do Drop Inn. In the present case, the court failed to do so. Instead, the trial court listed all possible proper purposes under 404(B) instructing that, “If you find that the

evidence of other crimes or acts is true and that the Defendant committed them, then you may consider that evidence only for the purpose of deciding whether it proves the Defendant's motive, intent, purpose or plan to commit the offense charged with this trial. You thus may not use this evidence for any other purpose." (Tr. 1669). The trial court's instruction failed to inform the jury which of the enumerated purposes the evidence was being introduced to demonstrate, and left a legal issue to the determination of the jury. This was error as it invited the jury to draw its own conclusion as to how to utilize this evidence. This Court has made it clear in previous decisions that issues of fact are for the jury but issues of law are for the court. State v. Cornwell, 86 Ohio St. 3d 560, 567, 715 N.E.2d 1144, 1152 (1999); State v. Getsy, 84 Ohio St. 3d 180, 201, 702 N.E.2d 866, 887 (1998).

The trial court's failure to instruct the jury on the proper use of the prejudicial other acts evidence was improper. The trial court abdicated its duty to determine the threshold legal determination of the proper purpose of the other acts evidence to the jury. In light of the fact that the jury in the present case was not provided with adequate guidance as to how to consider the prejudicial and improper other acts evidence in this case, this court should reverse Perez's conviction and remand his case for a new trial.

### **C.1 Harmless Error.**

The State cannot demonstrate that the admission of this evidence and consideration of their improper argument were harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 26 (1967). Due to the prejudicial nature of the other acts evidence (See Proposition of Law No. II), an argument that there is no reasonable probability that the evidence affected Perez's conviction fails. State v. Lytle, 48 Ohio St. 2d 391, 358 N.E.2d 623 (1976). There is a

reasonable probability that the other acts evidence affected Perez's conviction and carried over to the jury's consideration of evidence at the penalty phase.

**D. Conclusion.**

The trial court's failure to fully advise the jury as to the proper use of the prejudicial other acts evidence and how to view an uncharged accomplice's testimony was improper.<sup>11</sup> The jury in the present case was not provided with adequate guidance as to how to consider the prejudicial and improper evidence in this case. This violated Perez's to due process and fair trial rights. U.S. Const. amends. VI, XIV. This Court must reverse Perez's conviction and sentence and remand this case for a new trial.

---

<sup>11</sup> Defense counsel was ineffective for failing to object to these issues. See Proposition of Law No. VI.

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

The failure of the trial court to merge duplicative capital specifications skews the weighing process and renders a death sentence invalid in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

### **A. Indictment and verdicts.**

On March 5-6, 2003, the grand jury for Clark County, Ohio issued an indictment against Perez containing Twenty Counts. Count One charged Perez with the aggravated murder of Ronald Johnson during the commission of a felony in violation of O.R.C. § 2903.01(B). Attached to count one were two capital specifications which rendered Perez eligible for the death penalty. The first specification charged Perez with committing the aggravated murder while committing, or attempting to commit aggravated robbery. O.R.C. § 2929.04(A)(7). The second specification charged that the offense of aggravated murder was part of a course of conduct involving the purposeful killing, or attempt to kill of two or more persons in violation of O.R.C. § 2929.04(A)(5).

Count Three charged Perez with knowing that an official proceeding or investigation was in progress, or was about to be or likely to be instituted, and concealing or removing a thing with purpose to impair its value or availability as evidence in such proceeding or investigation in violation of O.R.C. § 2921.12. Counts Two, Four, Seven, Nine, Eleven, Thirteen, Fifteen, Seventeen, and Nineteen charged Perez with violating the weapons under disability statute as defined in O.R.C. § 2923.13(A)(2). Count Five charged Perez with purposely engaging in conduct that if successful would constitute or result in the offense of murder in violation of O.R.C. §§ 2923.02; 2903.02. Attached to count five was a firearm specification. Counts Six, Eight, Ten, Twelve, Fourteen, Sixteen, Eighteen, and Twenty charged Perez with committing

aggravated robbery in violation of O.R.C. § 2911.01. Attached to each aggravated robbery count was same firearm specification.

Perez moved to sever the non-capital charges and waive his right to a jury to those counts. This motion was denied. (Dkt. 121, 128). The basis of the trial court's ruling, and as argued by the State, was that the robberies were a course of conduct. (Id.; See also 7/5/05 Mtn. Sever Tr. 8-9, Tr. 1658-59). The State was permitted to introduce evidence related to the aggravated robberies for the purpose of showing "a unique identifiable plan of criminal activity which are probative as to the identity of the Defendant..." (Dkt. 128). This Entry limited the aggravated robbery evidence only to show a course of conduct. On September 12, 2005, the jury returned its verdicts in Perez's case. As to the aggravated murder count as well as the two capital specifications attached to the murder count, the jury found Perez guilty. (Tr. 1703-04). Perez was never tried or sentenced on the non-capital counts. (See Dkt.).

The trial court instructed the jury during the mitigation phase that the State, in order to obtain the death penalty against Perez, had the burden to prove beyond a reasonable doubt that the aggravating circumstances for which the Defendant was found guilty of were sufficient to outweigh the factors in mitigation factors before imposing a death sentence. (Tr. 1769). The trial court went on to instruct the jury that it was to consider as aggravating circumstances the capital specifications which the jury found Perez guilty of in the trial phase. (Tr. 1770). Specifically, the court instructed the jury to consider:

One, the offense was committed while the Defendant was committing or attempting to commit the offense of aggravated robbery and the Defendant was the principal offender in the commission of the aggravated murder.

Two, the offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the Defendant.

(Tr. 1770).

During the mitigation phase and in its sentencing opinion, the court stated that merger was not appropriate because the two specifications represent separate and distinct aggravated circumstances. (Tr. 1712-13; Dkt. 144 at p. 2).

The trial court failed to merge the capital specifications, thus impermissibly tilting the proceedings in favor of death. Stringer v. Black, 503 U.S. 222 (1992). Perez's death sentence therefore violates the Eighth and Fourteenth Amendments to the United States Constitution.

**B. Failure to Merge Aggravating Circumstances.**

In State v. Jenkins, 15 Ohio St. 3d 164, 200, 473 N.E.2d 264, 296-97 (1984), this court concluded that:

In the penalty phase of a capital prosecution, where two or more aggravating circumstances arise from the same act or indivisible course of conduct and are thus duplicative, the duplicative aggravating circumstances will be merged for purposes of sentencing.

In Jenkins, the defendant was charged with the capital specification that the offense was committed for the purpose of escaping apprehension or detection and a capital specification that the offense was committed during the commission of an aggravated robbery. Id. at 196, 473 N.E.2d at 294. The Court determined that “the overlap or duplication occurs in view of the likelihood that **in most felony murders**, death occurs while the offense is being committed or while fleeing from the scene in order to facilitate escape or to prevent apprehension....[S]ince the specification contained with R.C. § 2929.04(A)(3) applies to many factual situations likely to arise in connection with a felony murder, unnecessary duplication occurs.” Id. (Emphasis added).

In order for a reviewing court to determine whether the failure to merge constitutes reversible error, the court must look at two factors: 1.) whether the specifications at issue arose from the same act or indivisible course of conduct and were thus duplicative; and 2.) whether the

jury's penalty phase consideration of those duplicative aggravating circumstances affected its verdict. State v. Garner, 74 Ohio St. 3d 49, 53, 656 N.E.2d 623, 630 (1995).

Although the Court in Jenkins concluded that the aggravating circumstances should have been merged into the remaining three circumstances, the Court further concluded that a capital defendant's sentence need not be set aside if the reviewing court independently determines that the remaining aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. Id. at 200, 473 N.E.2d at 296-97.

In State v. Spisak, 36 Ohio St. 3d 80, 83, 521 N.E.2d 800, 803 (1988), this Court, utilizing the Jenkins decision, further determined that a felony murder aggravating circumstance and an escaping detection aggravating circumstance are duplicative to a course of conduct aggravating circumstance since these aggravating circumstances normally arise from the same indivisible course of conduct. Id.

In applying the holding in Jenkins, this Court should conclude that the trial court, in Perez's case was obligated to merge the aggravated robbery specification with the course of conduct specification. The evidence presented at trial established that there was a string of robberies and Ronald Johnson was murdered during the course of the Do Drop Inn robbery. Furthermore, the State specifically argued that the robberies were part of the course of conduct. (Tr. 8-9, 1658-59). Since the act of murder during the commission of an aggravated robbery arose from the same indivisible course of conduct in the present case, the two specifications should have been merged for the jury's consideration.

This Court has previously recognized that a felony murder aggravating circumstance and an escaping detection aggravating circumstance can be duplicative to a course of conduct aggravating circumstance. Spisak, 36 Ohio St. 3d at 83, 521 N.E. 2d at 805. An overlap

occurred in the present case because the aggravated robberies took place, according to the State's argument, for the purpose of furthering the course of conduct. (Tr. 8-9, 1658-59). Since the aggravated robberies specification arose from the course of conduct, the two specifications should be merged.

Moreover, the State's handling of this case supports merger of the aggravated robbery specification into the course of conduct. Perez was indicted with the O.R.C. § 2929.04(A)(7) specification alleging that the offense was committed while Perez was committing or attempting to commit an aggravated robbery. Therefore, the State had to prove that capital specification before the jury could determine whether the aggravating circumstances outweigh the mitigating factors. See State v. Jones, 91 Ohio St. 3d 335, 347, 744 N.E.2d 1163, 1178 (2001) ("R.C. 2929.04(A) plainly states that all of the aggravating circumstances listed therein,...must be proven beyond a reasonable doubt."). However, there is no finding of guilt as to the underlying aggravated robberies. The State's only intention was to show a course of conduct. (Tr. 8-9, 1658-59).

The trial court, in its sentencing opinion, found that these two "specifications were not merged because they represented separate and distinct aggravated circumstances." (Dkt. 144, p. 1). This finding is clearly against the trial court's earlier ruling because it was shown that the aggravated robberies were separate and distinct. (Dkt. 121).

In sum, had the trial court properly merged the aggravating circumstances, the aggravated robbery specification would have merged into the course of conduct specification. In the end, the jury would have been permitted to consider one aggravating specification for the aggravated murder count, namely the course of conduct specification. Thus, Perez's sentence is invalid.

**C. Effect of trial court's improper instructions.**

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, 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 the 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 because of the trial court's failure to instruct the jury to merge the capital specifications. The proper instructions would have resulted in one instead of two aggravating circumstances for the jury to weigh against the mitigation.

Accurate information is crucial to a jury's comprehension of how its discretion is to be limited. See Jones v. United States, 527 U.S. 373, 406 (1999) (Ginsburg, J., dissenting), citing

Gregg v. Georgia, 428 U.S. 153 (1997). Although a jury may be perfectly “capable of understanding the issues posed in capital sentencing proceedings, they must first be properly instructed.” Mills v. Maryland, 486 U.S. 367, 377 n. 10 (1988). In the present case, the jury was not properly instructed. Failure to abide by Ohio's statutes in instructing the jury makes this sentence arbitrary because the jury's discretion was not channeled in the manner prescribed by the Eighth Amendment.

**D. Conclusion.**

The failure of the trial court to merge the aggravating circumstances led to a total breakdown of Ohio's statutory weighing process. The trial court did not guide the jury through its decision as required by the dictates of the Eighth Amendment to the United States Constitution. Furthermore, the jury was improperly charged. This charge resulted in a death verdict hopelessly weighted on the side of death; thus his sentence lacks the certainty and reliability required by the Eighth Amendment. Lockett v. Ohio, 438 U.S. 586 (1978). Because the trial court did not merge the two capital specifications and instruct the jury accordingly, the jury did not properly weigh the aggravating circumstances as required by O.R.C. § 2929.03 and the Eighth and Fourteenth Amendments. Perez's death sentence must be vacated and remanded for resentencing.

## Proposition of Law No. X

A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9 and 16 of the Ohio Constitution when a prosecutor commits acts of misconduct during the trial phase and the sentencing phase of his capital trial.

### A. Introduction.

The prosecutor engaged in egregious misconduct during both phases of Perez's capital trial. Either separately or cumulatively, the prosecutor's acts of misconduct entitle Perez to a new trial or a new penalty phase.

### B. Substantive Law of Prosecutor Misconduct.

To succeed on a claim of prosecutor misconduct, Perez must meet one of two standards. Perez must demonstrate either that the prosecutor's misconduct prejudiced a substantive right, see Donnelly v. DeChristoforo, 416 U.S. 637, 644 (1974) (citing Griffin v. California, 380 U.S. 609 (1965)) (footnote omitted); United States v. Carter, 236 F.3d 777, 785 (6th Cir. 2001), or that the prosecutor's misconduct rendered the trial fundamentally unfair. See Berger v. United States, 295 U.S. 78 (1935); Gravley v. Mills, 87 F.3d 779, 786 (6th Cir. 1996).

### C. Argument.

It is the prosecutor's duty to seek justice. Berger, 295 U.S. at 88. However, rules of evidence, rules of procedure, as well as constitutional law were thrown aside in the prosecutor's efforts to secure a conviction and death sentence against Perez.

#### C.1 Trial Phase.

##### C.1.1 Closing Argument.

The prosecutor in Perez's case made several improper comments during the closing arguments of the trial phase. While it is true that the prosecution is entitled to some degree of

latitude during closing argument, the prosecutor's arguments in this case went beyond that latitude ordinarily afforded during closing arguments. United States v. Carter, 236 F.3d 777, 784 (6th Cir. 2001); State v. Keenan, 66 Ohio St. 3d 402, 410, 613 N.E.2d 203, 209 (1993).

### **C.1.2 The Prosecutor Vouched for Police Officers.**

During closing argument, the prosecutor vouched for the performance of the police officers. The prosecutor stated “[w]hen I put evidence in before you as to what we didn’t find, that’s why, to let you know that we tried, that those officers are doing their job as well as they can possibly do it.” (Tr. 1619). He further stated “quite frankly, the police had a wonderful plan because they’ve brought evidence in to you that’s as powerful as it comes.” (Tr. 1631-32). The prosecutor’s comment told Perez’s jury that the prosecutor believed the officers did a complete and accurate investigation.

It is improper for an attorney to express his opinion as to the credibility of witnesses. State v. Williams, 79 Ohio St. 3d 1, 12, 679 N.E.2d 646, 657 (1997) (citing State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931); State v. Smith, 14 Ohio St. 3d 13, 470 N.E.2d 883 (1984)). Such commentary poses two dangers. United States v. Young, 470 U.S. 1, 18 (1985). First, “such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant’s right to be tried solely on the basis of the evidence presented to the jury.” Id. Second, “the prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence.” Id. at 18-19 (citing Berger v. United States, 295 U.S. 78, 88-89 (1935)).

The prosecutor’s comment suggested to the jury that the prosecutor believed in the officers’ investigation in this case. The danger herein was that the jury would reject its

obligation to make its own assessment of officers' investigation and credibility and accept the prosecutor's opinion that they were being truthful. When the prosecutor vouched for the officers, the jury likely resolved any doubts it had about officers' testimony in favor of the State. Resultantly, the prosecutor's comment deprived Perez of a fair trial and due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, § 16 of the Ohio Constitution.

### **C.1.3 Presentation of Irrelevant and Prejudicial Other Acts Evidence.**

The prosecution introduced irrelevant and inflammatory evidence that Perez engaged in robberies. In particular, the prosecution called Rhonda Boyd, Danny Mansfield, Art Holmes, Donald Mercer, Ricky Bruce, Rosemary Demmy, Charles Demmy, and Gina Smith to discuss the Nite Owl Tavern, 19th Hole, Sugarbakers, and the Lantern robberies. For brevity, Perez incorporates Proposition of Law No. II here for record cites and a discussion of prejudice.

The prosecutor returned to these themes in closing argument. The prosecution reminded the jury that Perez committed robberies as a course of conduct. (Tr. 1621, 1658-59). In fact, the trial court ruled prior to the mitigation phase, that the other acts evidence was not relevant to the aggravating circumstances. (Tr. 1716). If the robberies were not permitted as a course of conduct in the mitigation phase, clearly it was not permitted as evidence of a course of conduct in the guilt phase. (See Proposition of Law No. I). In the end, the trial court found this testimony and evidence to be other acts. (See Tr. 1716). This testimony about Perez's robberies was never linked to the facts and circumstances of Johnson's murder.

Absent such evidence, this testimony was irrelevant and prosecution's presentation thereof was entirely inappropriate. However, the extensive nature of this presentation likely

confused the jury into believing it was relevant, which was both misleading and prejudicial to Perez. The prosecution deliberately put on this evidence, which was extensive.

Furthermore, the prosecutor presented and argued evidence which applied only to Cecil Howard. (Tr. 921-55, 966-76, 1620-21). The testimony was irrelevant and the presentation of the evidence against Howard was entirely inappropriate. Presentation of this evidence could only confuse the jury into believing it was relevant, which was both misleading and prejudicial to Perez. The prosecution deliberately put on this irrelevant evidence.

From direct examination through closing argument, the prosecution's efforts were a "persistent *Ad hominen* attack on petitioner's character." Cook v. Bordenkircher, 602 F.2d 117, 120 (6th Cir. 1979). This evidence was irrelevant and the prosecution's actions improper.

#### **C.1.4 Improper Argument to Lessen Burden of Proof.**

The prosecutor purposely lessened the burden of proof required for course of conduct by defining course of conduct as a normal activity an individual does in his/her life. The prosecutor defined course of conduct as:

Most of you are employed or work. I mean your job is your course of conduct. If you're a mailman, you get up, you get your bag, and you put mail in the prescribed addresses' mailbox. That is a course of conduct. That's what you do. If you're a truck driver, you take a load from one place to another, you drop it off. That is your course of conduct. You do this on a regular basis. This is how you support yourself. It's a course of conduct. And that's what this Defendant does. He robs. That's his course of conduct.

Say, for instance, you think in terms of your job. Some people carry a hard hat because they need a hard hat. Some people carry hammers and nails. Some people carry books because they teach from these books or they instruct from these books. Some people wear a uniform and that identifies them as an employee too, and this is part of it. This is what he uses as part of his uniform to go to work.

(Tr. 1659). This argument is contrary to law. O.R.C. § 2929.04(A)(5) requires a course of conduct involving the purposefully killing of or attempt to kill two or more persons. By equating

course of conduct to everyday activities, the prosecutor misled the jury as to the level of proof and type of evidence required to prove a course of conduct. The prosecutor's erroneous definition was prejudicial to Perez as the course of conduct was an element that was contested by defense counsel. (Tr. 1604). The prosecutor further improperly stated that the element of intent was demonstrated by Perez's statements made after the crime which demonstrated lack of remorse. (Tr. 1628). The prosecutor clearly and purposefully misstated the evidence. This misstatement of the evidence equated a lack of remorse with intent. This was improper. Intent cannot be demonstrated by an accused's "lack of remorse" after the crime. The prosecutor's statement was improper.

The prosecution may not mislead the jury on the law. Caldwell v. Mississippi, 472 U.S. 320, 336 (1985); Berger v. United States, 295 U.S. 78, 85 (1935) (finding reversible error where prosecutor made "improper insinuations and assertions calculated to mislead the jury."); McCoy v. Court of Appeals, Dist. 1, 486 U.S. 429, 436 (1988) ("Neither paid nor appointed counsel may deliberately mislead the court with respect to either the facts or the law."). The prosecutor's argument deprived Perez of a fair trial and due process. U.S. Const. amends. VI, XIV.

### **C.2 Sentencing Phase: Improper Argument of the Aggravating Circumstances and Mischaracterization of Mitigation Evidence.**

Next, the prosecutor argued to the jurors that Perez was not remorseful. (Tr. 1762). However, during his opening statement, he told the jury that Perez did show remorse for killing Johnson. (Tr. 783). This misstatement of the evidence was improper.

In explaining the aggravating circumstances, the prosecutor inappropriately appealed to the fears and passions of the jurors. The prosecutor stated "[t]his specification, I would submit to you, is to provide as much protection as possible for that class of extremely vulnerable, easy-to-kill victims... that specification is entitled to be assigned incredible weight, incredible weight."

(Tr. 1746-47). He continued arguing that “[t]hat specification, ladies and gentlemen, and you can think about it in the jury room, you can talk about whatever purpose you think as to why that specification is extremely important for our community, for our society, for the law of the State of Ohio; but I submit to you that that specification, when an individual attempts to kill, has the opportunity to stop, and kills and goes out and kills, is entitled in your deliberations to have incredible, incredible weight attached to its as a matter for your deliberations, as a matter of policy, as a matter of the language of the specification.” (Tr. 1749). This argument went past arguing against Perez’s mitigation argument.

Next, the prosecutor argued to the jurors that Perez was not remorseful. (Tr. 1762). However, during his opening statement, he told the jury that Perez did show remorse for killing Johnson. (Tr. 783). The prosecutor further improperly equated Perez’s lack of remorse with a demonstration of the element of intent. The prosecutor clearly and purposefully misstated the evidence. Furthermore, this misstatement of the evidence purposely equated a lack of remorse with intent. This was improper.

Lastly, the prosecutor argued that Perez was “assigned to hold people at gunpoint and make the decision as to whether to kill or not to kill.” (Tr. 1747). However, there was no evidence that Cecil Howard and Perez ever had a plan during the robberies. Nor was Perez charged with prior calculation and design of killing Johnson. The prosecutor argued facts not presented at trial.

A prosecuting attorney is a servant of the law. See Berger, 295 U.S. at 88. See also Gravelly, 87 F.3d at 789 (citing Berger, 295 U.S. at 88). As such, it is the prosecutor’s duty to refrain from improper conduct. See Berger, 295 U.S. at 88. The prosecutor should not make “improper suggestions [or] insinuations.” Id. These restrictions require the prosecution to

conduct its case consistent with the requirements of the law. The prosecutor's conduct was improper and in deliberate disregard of the law.

The improper statements during sentencing closing arguments by the prosecutor denied Perez of the individualized sentencing guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution. Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (plurality opinion). The jury was obligated to weigh the aggravating circumstances against the mitigating circumstances. This type of prosecutorial misconduct is extremely prejudicial because it encourages the court to ignore the statutory framework adopted by the Ohio legislature for determining the sentence in a capital case. See Stringer v. Black, 503 U.S. 222, 232 (1992) (invalid weighing process violates Eighth Amendment). The jury should weigh "aggravating" factors versus "mitigating" circumstances. Such arbitrary infliction of capital punishment as the State asked for is unconstitutional per se. Gregg v. Georgia, 428 U.S. 153 (1976).

Death is profoundly different from any other penalty. Lockett, 438 U.S. at 605. Because death is different, "an individualized decision is essential in all capital cases". Id. For a capital sentencing scheme to be fair, it is the individual and his offense that must be considered at sentencing. Callins v. Collins, 510 U.S. 1141 (1994) (Blackmun, J., dissenting) (citing Lockett, 438 U.S. at 605).

The prosecutor's improper public policy argument and mischaracterization of the evidence deprived Perez of his right to individualized sentencing as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, § 16, 20 of the Ohio Constitution.

**D. Cumulative Effect of Prosecutorial Misconduct.**

The prosecutor's improper remarks and misconduct in Perez's case were not "slight or confined to a single instance, but...[were] pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." Berger v. United States, 295 U.S. 78, 89 (1935). This Court, when reviewing the improper misconduct must assess the conduct in the context of the entire case. Keenan, 66 Ohio St. 3d at 410, 613 N.E.2d at 209; State v. Slagle, 65 Ohio St. 3d 597, 607, 605 N.E.2d 916, 926 (1992). In doing so, this court should consider the cumulative effect of improper comments because "[e]rrors that are separately harmless may, when considered together, violate a person's right to a fair trial." State v. Freeman, 138 Ohio App. 3d 408, 420, 741 N.E.2d 566, 574 (2000). See also State v. Madrigal, 87 Ohio St. 3d 378, 397, 721 N.E.2d 52, 70 (2000). While some of the improper statements of the prosecutor individually may not warrant reversal, the cumulative effect of the misconduct demonstrates that Perez was denied a fair trial and reliable sentencing proceeding.

**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, 295 U.S. at 88). Thus, "while he may strike hard blows, he is not at liberty to strike foul ones." Id.

The State committed errors during both the trial and sentencing phases of Perez's capital trial which "cannot be ignored or overlooked." See State v. Thompson, 33 Ohio St. 3d 1, 14-15, 514 N.E.2d 407, 420 (1987). 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)). The State's misconduct during both

phases of Pérez's trial deprived him of a fair trial. The misconduct "so infected the trial with unfairness as to make the resulting conviction denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Moreover, the State's misconduct during the sentencing phase of Pérez's trial deprived him of a reliable sentence as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution, as well as Article I, §§ 9, 16, and 20 of the Ohio Constitution. Pérez's conviction and sentence must be vacated and this case remanded.

### **Proposition of Law No. XI**

When the death sentence is disproportionate to the sentences received by the co-defendant and accomplice, the death sentence must be vacated and a life sentence imposed. Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10 and 16 of the Ohio Constitution.

This Court is required to consider whether Perez's sentence is disproportionate to other cases where the death sentence has been imposed. O.R.C. § 2929.05(A). Although the deliberation is not constitutionally required, the United States Supreme Court has acknowledged that the fate of a co-defendant is a relevant circumstance for the sentencer to consider in mitigation. Pulley v. Harris, 465 U.S. 37 (1984); Parker v. Dugger, 498 U.S. 308 (1991). This Court has also weighed the fate of a codefendant in its statutory proportionality analysis. See State v. Getsy, 84 Ohio St. 3d 180, 702 N.E.2d 866 (1988). The proportionality theory was expressly relied on by the defense during the sentencing hearing of this case, and indeed, the respective fates of the co-defendant in this case. (Tr. 1646-47, 1649).

The State's theory was that Cecil Howard and Perez were a team in the aggravated robberies and course of conduct to kill or attempt to kill two or more person, i.e, Johnson and Conley. (Tr. 780, 775, 1620, 1641). To prove this fact, the State presented evidence implicating Howard to convict Perez. The State presented evidence that there were two people who attempted to rob the Beverage Oasis and shot at Conley, the owner who fired first. (Tr. 866, 890-92, 893-907, 979). Conley testified that he shot one individual in the stomach. (Tr. 898, 907). The State presented testimony that Howard had a scar on his buttocks, (tr. 911), x-ray confirmation of metal in Howard's buttocks, (tr. 925, Ex. 29), and that the scar is consistent with a gunshot wound. (Tr. 936). The State also elicited testimony that the other robberies, but not all, were committed by two men. (Tr. 997 (first Nite Owl Tavern robbery); 1017 (Sugarbakers);

1041-45, 1070 (Do Drop Inn)). The testimony also shows that the guns used by Howard and Perez were purchased and sold by Debra Perez. Debra admitted, during her testimony, to acting as a “strawman” to purchase firearms for Perez, trading in the gun used to murder Johnson,<sup>12</sup> and assisting Perez with his gunshot wound. (Tr. 1514-30). Debra was never charged for her participation in these crimes as the one who supplied the weapons to Howard and Perez. (8/17/04 Mtn. Supp. Tr. 256-57; Tr. 1516-18, 1527-29; State’s Exs. 1-3.).

A review of the Clark County Clerk of Court’s online docket shows that Howard was charged with one count of attempted murder, one count of aggravated robbery, and one count of having weapons under disability. State v. Howard, No. 03CR1002 (Clark C.P.) (Docket). These charges stemmed from his participation in the Beverage Oasis incident. Howard was found guilty on all three charges and sentenced to nine years for the attempted murder and aggravated robbery counts, four years for the weapons under disability and three years for the firearm specification. (Id.). This resulted in a total term of twenty-five years as each count was run consecutively. (Id.). Howard was never charged for his role in the Do Drop Inn robbery and killing of Johnson or the other robberies in which he was implicated.

The key to the capital scheme is to reserve the death penalty for those whose acts go beyond the legal guilt in the killing, for all murderers do not get death automatically. Woodson v. North Carolina, 428 U.S. 280 (1976). To sort out who has the moral culpability deserving of the ultimate sentence, Ohio enacted O.R.C. § 2929.04, which sets out the specific aggravating circumstances that must be met before a simple murder turns into a capital offense.

---

<sup>12</sup> Perez was indicted for concealing or removing a firearm with purpose to impair its value or availability as evidence in such proceeding or investigation in violation of O.R.C. § 2921.12. Although Debra was the actual person who took the gun and traded it in, she faced no criminal charges for her actions.

To uphold Perez's death sentence when Howard was only charged with the attempted murder of Conley, and Debra was never charged with any crimes, gives this case an air of arbitrariness and capriciousness barred by the Eighth Amendment. Others involved in this crime were culpable for the murder of Johnson. The testimony indicated that Perez and Howard were robbing bars and drive-thru for a significant period of time. (Tr. 866, 890-92, 893-907, 979). Debra purchased the guns for these robberies and exchanged the guns for new ones. (8/17/04 Mtn. Supp. Tr. 256-57; Tr 1516-18, 1520, 1527-28; Exs. 1-3). Howard was significantly involved in the shootings at the Beverage Oasis where Conley was almost killed. (Tr. 898, 907, 911, 925, 936, Ex. 29). Debra cleaned up her husband's gun wounds and sent him off for another robbery while Howard had his bullet wound treated and joined Perez in the next robbery. Johnson was murdered during a subsequent robbery. (See Tr. 1045; 1071) The moral culpability for that murder does not solely go to Perez. Howard and Debra were also morally culpable, but neither will pay with their life as Perez will. In fact, Debra does not even have a conviction for any criminal activity, and Howard was never charged for his participation in the Do Drop Inn robbery and killing of Johnson. It is simply and fundamentally unfair and disproportionate for Perez to be executed while his codefendants are not.

Unlike his lucky colleague and ex-wife, Perez was struck by the fatal bolt of lightning condemned in Furman v. Georgia, 408 U.S. 238 (1972) and for that reason his sentence should be overturned and a life sentence imposed.

## Proposition of Law No. XII

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.

### A. 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 Perez guilty on "a degree of proof below that required by the Due Process Clause." Perez's convictions and death sentence must be reversed. See id.

### B. Facts.

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

Definition of reasonable doubt is important. Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt because everything relating to human affairs is open to some 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 their own affairs.**

(Tr. 1663) (Emphasis added).

Both before and 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 outweigh 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.**

(Tr. 1722-23, 1769) (emphasis added).

The trial court's instruction, taken as whole, did not adequately convey to jurors the stringent "beyond a reasonable doubt" standard. Perez 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 Perez 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 Perez's conviction. See Sullivan v. Louisiana, 508 U.S. 275 (1993).

### **C. 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.

**D. 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.

**E. 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.” (Tr. 1723, 1769). The phrase “moral evidence” improperly shifted the focus of this jury to the subjective morality of Perez 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.” (Tr. 1769). 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 (Tr. 1769) with Victor, 511 U.S. at 13. Accordingly, the reasonable doubt instruction permitted the jury to convict Perez 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”).

#### **F. 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 Perez’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. Perez’s convictions and sentence must be reversed.<sup>13</sup>

---

<sup>13</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. XIII

Ohio's death penalty law is unconstitutional. Ohio Rev. Code Ann. §§ 2903.01, 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 Kerry Perez. 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 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:

#### A. 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 12% of Ohio's population, 97 or 49% of Ohio's death row inmates are African-American. See <https://factfinder.census.gov> visited July 21, 2006; Ohio Public Defender Commission Statistics, July 14, 2006; see also The Report of the Ohio Commission on Racial Fairness, 1999. While 4 Caucasians were sentenced to death for killing African-Americans (or an African-American, 45 African-Americans sit on Ohio's death row for killing a Caucasian. Ohio Public Defender Commission Statistics, July 14, 2006. 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 should encourage this 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, 488 (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 II, 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.

**B. 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 are 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) *rev’d on other grounds* Penry v. Johnson, 532 U.S. 782 (2001)), 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.

**C. 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.

**D. 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.

**E. 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, 462 U.S. 862. 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.

**F. 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), *vacated on other grounds* Ring v. Arizona, 536 U.S. 584 (2002); 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).

#### **G. Proportionality And Appropriateness Review.**

Ohio Revised Code §§ 2929.021 and 2929.03 require data be reported to the courts of appeals and to the Ohio Supreme Court. 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. Absent 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 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 Perez's due process, liberty interest in O.R.C. § 2929.05.

#### **H. 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, Perez's capital convictions and sentences cannot stand.

##### **H.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. City of 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).

## **H.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 U.N. 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 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).

#### **H.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 Constitution.

#### **H.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.

### **H.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.

### **H.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.

## **H.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 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 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. Under the Vienna Convention, the United States' reservations to these articles are invalid under the language of the treaty. See id. Further, the ICCPR's purpose is 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.

### **H.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) (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 2, § 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.

### **H.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.

#### **I. 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 Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution and international law. Perez's death sentence must be vacated.<sup>14</sup>

---

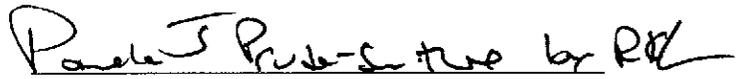
<sup>14</sup> In State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), this Court upheld this death penalty statute and this Court may, therefore, reject this claim on its merits if it disagrees with Appellant's federal constitutional arguments. State v. Poindexter, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988).

**Conclusion**

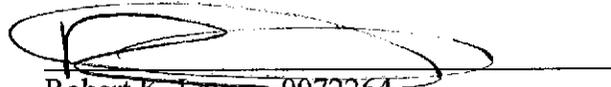
For each of the foregoing reasons, this Court must reverse Kerry Perez's convictions and remand for a new trial. Alternatively, his death sentence must be vacated and his case remanded for a new penalty phase hearing.

Respectfully submitted,

David H. Bodiker  
Ohio Public Defender

  
Pamela J. Prude-Smithers – 0062206  
Supervisor, Death Penalty Division  
Counsel of Record

  
Brie A. Friedman – 0079414  
Assistant State Public Defender

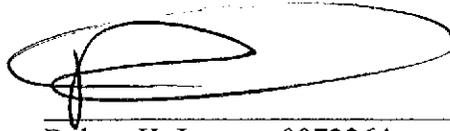
  
Robert K. Lowe – 0072264  
Assistant State Public Defender

Office of the Ohio Public Defender  
8 East Long Street, 11th Floor  
Columbus, Ohio 43215  
(614)466-5394  
(614)644-0708 (FAX)

Counsel For Appellant

**Certificate of Service**

I hereby certify that a true copy of the Merit Brief of Appellant Kerry Perez and Appendix to Merit Brief of Appellant Kerry Perez was forwarded by regular U.S. Mail to Stephen A. Schumaker, Clark County Prosecutor, 50 E. Columbia Street, Springfield, Ohio 45502 this 5th day of February, 2007.



---

Robert K. Lowe – 0072264  
Assistant State Public Defender

250569

In The Supreme Court of Ohio

State Of Ohio, :  
Appellee, :  
-Vs- : Case No. 05-2364  
Kerry Perez, : **This Is A Capital Case.**  
Appellant. :

---

On Appeal From the Court of  
Common Pleas of Clark County  
Case No. 03-CR-1010

---

**APPENDIX TO MERIT BRIEF OF APPELLANT KERRY PEREZ**

---

David H. Bodiker  
Ohio Public Defender

Pamela J. Prude-Smithers – 0062206  
Supervisor, Death Penalty Division  
Counsel of Record

Brie A. Friedman – 0079414  
Assistant State Public Defender

Robert K. Lowe – 0072264  
Assistant State Public Defender

Stephen A. Schumaker – 0014643  
Clark County Prosecutor

Clark County Prosecutor's Office  
50 E. Columbia St.  
Springfield, Ohio 45502  
(937) 328-2574  
(937) 328-2657 (FAX)

Counsel For Appellee

Office of the Ohio Public Defender  
8 East Long Street, 11th Floor  
Columbus, Ohio 43215-2998  
(614)466-5394  
(614)644-0708 (FAX)

Counsel For Appellant

IN THE SUPREME COURT OF OHIO 05-2364

STATE OF OHIO : CASE NO. \_\_\_\_\_

Plaintiff-Appellee :

NOTICE OF APPEAL

vs. :

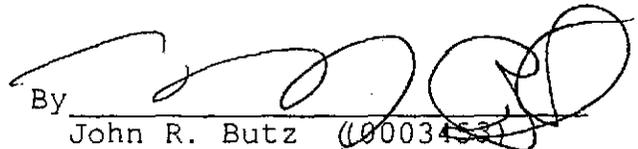
KERRY PEREZ : 03 CR 1010

Defendant-Appellant :

Appellant, Kerry Perez, through counsel, hereby gives notice of appeal to the Supreme Court of Ohio from the Judgment Entry of Conviction of the Common Pleas Court of Clark County, Ohio, filed on the 9<sup>th</sup> day of December 2005.

A copy of the Judgment Entry is attached.

COLE ACTON HARMON DUNN  
A Legal Professional Association

By 

John R. Butz (0003453)  
Attorney for Defendant-Appellant  
333 N. Limestone Street  
P.O. Box 1687  
Springfield, Ohio 45501  
Phone: (937) 322-0891

DEC 19 2006  
MAINTENANCE & REPAIRS  
SUPREME COURT

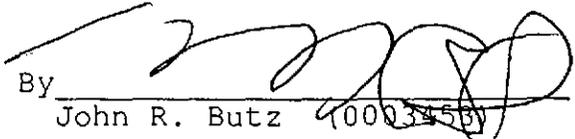
By 

Paul J. Kavanagh (0065418)  
Attorney for Defendant-Appellant  
333 N. Limestone Street  
P.O. Box 1687  
Springfield, Ohio 45501  
Phone: (937) 322-0891

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal was served upon the County Prosecutor, 50 E. Columbia Street, Springfield, OH 45502 on this 13<sup>th</sup> day of December, 2005, by regular U.S. mail.

COLE ACTON HARMON DUNN  
A Legal Professional Association

By 

John R. Butz (0003456)  
Attorney for Defendant-Appellant  
333 N. Limestone Street  
P.O. Box 1687  
Springfield, Ohio 45501  
Phone: (937) 322-0891

COURT OF COMMON PLEAS  
CLARK COUNTY, OHIO

FILED

State of Ohio

Plaintiff,

Case No. 03-CR-1010

SEP -9 PM 5:07

-vs-

Kerry Perez aka  
Kerry D. Speakes

Defendant,

**JUDGMENT ENTRY OF CONVICTION  
WARRANT FOR REMOVAL**

The defendant was indicted by the Clark County Grand Jury on December 1, 2003 on a total of 20 counts including charges of Aggravated Murder with a firearm and two aggravating circumstance specifications, Attempted Murder, Aggravated Robbery, Having Weapons under Disability, and Tampering with Evidence. The defendant filed a written waiver of his right to a speedy trial on December 15, 2003 and following numerous motions and hearings the case was set for trial on August 30, 2005. On August 24, 2005 the defendant filed a waiver of jury trial on counts two through twenty of the indictment. Pursuant to the defendant's waiver and request the Court commenced the jury trial on count one, the charge of Aggravated Murder with the firearm specification and two aggravated circumstance specifications. Count two through twenty were severed from count one to be set for a separate trial to the Court at a later date.

The trial of this matter commenced on August 30, 2005. On September 12, 2005 the jury returned verdicts of GUILTY to Count one, the charge of Aggravated Murder, GUILTY to the firearm specification, GUILTY of aggravating circumstance specification I and GUILTY and aggravating circumstance specification II. Defendant waived his right to a pre-sentence investigation and mental examination pursuant to Ohio Revised Code Section 2929.03. The Court recessed the trial until September 16, 2005 when the Court, Jury, and the parties commenced the sentencing phase of the trial. On September 16, 2005, the jury found beyond a reasonable doubt that the aggravating circumstances the defendant were found guilty of committing outweigh the factors in mitigation of

the sentence of death and unanimously returned to verdict recommending to the Court that the defendant be sentenced to death.

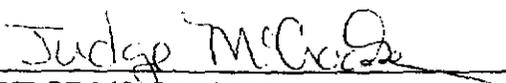
The matter came before the Court for sentencing on November 29, 2005 and the Court considered the evidence presented at trial and sentencing phase, the aggravating circumstances, the mitigating factors, and the arguments of counsel. The Court independently weighed the aggravating circumstances and the mitigating factors and hereby finds beyond a reasonable doubt that the aggravating circumstances proved in the case outweigh the mitigating factors beyond a reasonable doubt. The reasons why the Court found that the aggravating circumstances the defendant was found GUILTY of committing were sufficient to outweigh the mitigating factors are set forth in the opinion of the Court separately filed in this matter.

The Court hereby agrees with the recommendation of the jury in this matter and orders that the defendant, Kerry Perez, aka Kerry D. Speakes be sentenced to DEATH. The Court further orders that the defendant Kerry Perez aka Kerry D. Speakes be sentenced to an additional term of three (3) years as a MANDATORY term of incarceration pursuant to Ohio Revised Code Section 2929.14 (D)(1) to be served PRIOR to and CONSECUTIVE with any other term of incarceration imposed upon the defendant.

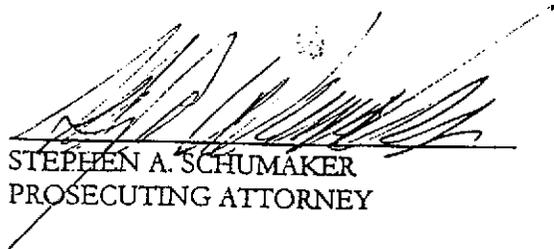
The defendant shall receive jail time credit from September 24, 2003 until conveyance to the penitentiary system.

The defendant was advised of his right to appeal.

Defendant is therefore ORDERED conveyed to the Ohio State Penitentiary, c/o Orient Correctional Facility, Orient, Ohio. Defendant is ORDERED to pay all costs of prosecution, Court appointed counsel costs and any fees permitted pursuant to Revised Code Section 2929.18(A)(4).

  
JUDGE MCCRACKEN

APPROVED:



STEPHEN A. SCHUMAKER  
PROSECUTING ATTORNEY



The second aggravating specification is:

2.) That the Defendant committed the aggravated murder as part of a course of conduct involving the purposeful killing of, or attempt to kill two or more persons by the offender.

On June 22, 2002, approximately eight months prior to the robbery of the Do Drop Inn, the Defendant, Kerry Perez, and Cecil Howard robbed the Beverage Oasis. To effect the robbery, both Perez and Howard brandished firearms. During the robbery Howard and the robbery victim, Clifford Conley, exchanged gunfire, with Howard being shot. Perez then shot at Conley several times. Conley avoided being hit by ducking behind a door. Perez and Howard fled the scene, leaving the shotgun Howard was using, behind.

### AGGRAVATED CIRCUMSTANCES

In this case, the aggravating circumstances which are to be weighed against the mitigating factors are:

1.) The offense was committed while the defendant was committing or attempting to commit the offense of aggravated robbery and the defendant was the principal offender in the commission of the aggravated robbery.

and;

2.) The offense was part of the course of conduct involving the purposeful killing of or attempt to kill two or more persons by the defendant.

The specifications were not merged because they represented separate and distinct aggravated circumstances.

At the sentencing stage of the trial the State moved that all of the evidence adduced at the trial be admitted into evidence for the sentencing stage and rested. The Court admitted all of the evidence that was relevant to the State proving the existence of the aggravating circumstances the Defendant was found guilty of committing.

## MITIGATING FACTORS

Mitigating factors are factors which, while they do not justify or excuse the crime, nevertheless, in fairness and mercy, lessen the appropriateness of a sentence of death. Mitigating factors are factors about an individual that weigh in favor of a decision that one of the life sentences is the appropriate sentence.

As requested by the Defendant and in accordance with O. R. C. Section 2929.04(B), the Court has considered all the evidence and arguments relevant to the nature and circumstances of the aggravating factors as well as the following mitigating factors:

- 1.) History, character and background of the defendant.
- 2.) His remorse.
- 3.) His willingness to step forward and take responsibility for his actions without any offer of leniency by the State.
- 4.) His assistance and co-operation with the police.
- 5.) His probability of no release from prison.
- 6.) His family history and background.
- 7.) Poor family environment.

A)(1) History and background of the defendant;

(6) Family History

(7) Poor family environment

The Court finds that Kerry Peez was 38 years old in 2003. The Defendant called one witness in mitigation, Ray Joseph Paris. Mr. Paris was married to the defendant's mother for two years and also helped raise him from ages 4 through 12. Mr. Paris was a life-long resident of Clark County, a Vietnam Veteran, a community leader who was active in coaching little-league, and a mentor to young men. Mr. Paris testified that after the defendant's mother and he were separated that she engaged in prostitution, for which she was arrested several times. She died when the Defendant was still a young man. Mr. Paris further testified that the defendant's early childhood was pretty good. In addition, Mr. Paris stated that he continued to be a friend and mentor to the Defendant even after he was no longer caring for him and that he would do anything for Kerry.

13  
03  
04  
00  
00

Although the defendant's natural parents may have set a poor example for him, Mr. Paris strove to set good examples, by being present in his life to offer the support and guidance that his parents didn't offer him. The testimony of Mr. Paris, the defendant's step-father, showed that while Kerry Perez may not have had a perfect childhood, he did have the benefit of this relationship during his early upbringing.

B)2) Remorse of the defendant;

- 3) His willingness to step forward and take responsibility for his actions without any offer of leniency.
- 4) His assistance and co-operation with the police.
- 5) His probability of no parole.

The Court has considered and weighed the above factors. The testimony at trial was that in November 2003, some eight months after the robbery of the Do Drop Inn and sixteen months after the robbery of the Beverage Oasis, Kerry Perez "stepped forward" and confessed to his actions in killing Ronald Johnson during the robbery of the Do Drop Inn and shooting at Clifford Conley while robbing the Beverage Oasis. He expressed remorse during this interview by stating: "I wish I could take it back." and "I didn't mean to hurt the guy." Later in the evening after he had confessed, he called Cecil Howard to tell him that "he didn't give him up". Perez also expressed regret that he hadn't gotten rid of the gun and he later complained about the "snitches" who led to his incarceration. Perez was not initially forthcoming about his involvement in these two crimes, because he tried to put the blame on another individual. Only when it became clear to him that the police had a case did he begin to step forward, take responsibility, and assist the police. He was not offered any deals or leniency, nor did he request any except that his wife not be charged with any of these crimes because she was not involved in them.

### FINDINGS

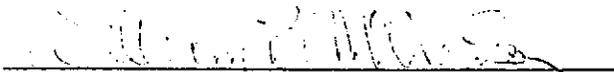
The Court has independently considered the evidence in mitigation presented by the defendant; the testimony of Ray Paris, the defendant's step-father; and the arguments of counsel during the sentencing phase of the trial. This court has also considered the evidence regarding the history, character and background of the defendant, his poor family environment; his remorse and assistance to the police.

The Court recognizes that the death penalty is the most severe penalty that can be imposed upon any person and that it should be imposed only after the most careful examination of the facts and the law and only in the most severe of crimes.

The Court has carefully and independently considered and evaluated all of the relevant evidence and testimony submitted during the trial, the testimony, other evidence and arguments of counsel to determine whether the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the mitigating factors present in the case as required by O.R.C. Section 2929.03(D)(3). The Court specifically finds that the aggravating circumstances the Defendant was found guilty of committing:

- (1) The offense was committed while the defendant was committing or attempting to commit the offense of aggravated robbery and the defendant was the principal offender in the commission of the aggravated robbery.
  
- (2) The offense was part of the course of conduct involving the purposeful killing of or attempt to kill two or more persons by the defendant.

outweigh, by proof beyond a reasonable doubt, any and all of the mitigating factors presented; and therefore the sentence of death shall be imposed.

  
JUDGE WILLIAM B. MCCRACKEN

CC:

Stephen Schumaker  
Clark County Prosecutor

Darnell Carter  
Asst. Clark County Prosecutor

John Butz  
Counsel for Defendant

Paul Kavanagh  
Counsel for Defendant

FILED  
2008 DEC -9 P 5:01

DEC 11 2008

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 § 5 RIGHT OF TRIAL BY JURY

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

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.

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 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.

OHIO REVISED CODE

TITLE 23. COURTS -- COMMON PLEAS  
CHAPTER 2313. COMMISSIONERS OF JURORS  
CHALLENGE OF JURORS

ORC Ann. 2313.42 (2006)

§ 2313.42. Causes for challenge of persons called as jurors; examination under oath

Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. A person is qualified to serve as a juror if he is an elector of the county and has been certified by the board of elections pursuant to section 2313.06 of the Revised Code. A person also is qualified to serve as a juror if he is eighteen years of age or older, is a resident of the county, would be an elector if he were registered to vote, regardless of whether he actually is registered to vote, and has been certified by the registrar of motor vehicles pursuant to section 2313.06 of the Revised Code or otherwise as having a valid and current driver's or commercial driver's license.

The following are good causes for challenge to any person called as a juror:

- (A) That he has been convicted of a crime which by law renders him disqualified to serve on a jury;
- (B) That he has an interest in the cause;
- (C) That he has an action pending between him and either party;
- (D) That he formerly was a juror in the same cause;
- (E) That he is the employer, the employee, or the spouse, parent, son, or daughter of the employer or employee, counselor, agent, steward, or attorney of either party;
- (F) That he is subpoenaed in good faith as a witness in the cause;
- (G) That he is akin by consanguinity or affinity within the fourth degree, to either party, or to the attorney of either party;
- (H) That he or his spouse, parent, son, or daughter is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him;
- (I) That he, not being a regular juror of the term, has already served as a talesman in the trial of any cause, in any court of record in the county within the preceding twelve months;
- (J) That he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court.

Each challenge listed in this section shall be considered as a principal challenge, and its validity tried by the court.

OHIO REVISED CODE

TITLE 23. COURTS -- COMMON PLEAS  
CHAPTER 2313. COMMISSIONERS OF JURORS  
CHALLENGE OF JURORS

ORC Ann. 2313.43 (2006)

§ 2313.43. Challenge of petit juror

In addition to the causes listed under section 2313.42 of the Revised Code, any petit juror may be challenged on suspicion of prejudice against or partiality for either party, or for want of a competent knowledge of the English language, or other cause that may render him at the time an unsuitable juror. The validity of such challenge shall be determined by the court and be sustained if the court has any doubt as to the juror's being entirely unbiased.

OHIO REVISED CODE

TITLE 23. COURTS -- COMMON PLEAS  
CHAPTER 2317. EVIDENCE  
COMPETENCY OF WITNESS AND EVIDENCE

ORC Ann. 2317.02 (2006)

§2317.02. Privileged communications

The following persons shall not testify in certain respects:

(A) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily testifies or is deemed by section 2151.421 [2151.42.1] of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply concerning a communication between a client who has since died and the deceased client's attorney if the communication is relevant to a dispute between parties who claim through that deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased client when the deceased client executed a document that is the basis of the dispute or whether the deceased client was a victim of fraud, undue influence, or duress when the deceased client executed a document that is the basis of the dispute.

(B) (1) A physician or a dentist concerning a communication made to the physician or dentist by a patient in that relation or the physician's or dentist's advice to a patient, except as otherwise provided in this division, division (B)(2), and division (B)(3) of this section, and except that, if the patient is deemed by section 2151.421 [2151.42.1] of the Revised Code to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply, and a physician or dentist may testify or may be compelled to testify, in any of the following circumstances:

(a) In any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under Chapter 4123. of the Revised Code, under any of the following circumstances:

(i) If the patient or the guardian or other legal representative of the patient gives express consent;

(ii) If the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent;

(iii) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.113 [2305.11.3] of the Revised Code, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

(b) In any civil action concerning court-ordered treatment or services received by a patient, if the court-ordered treatment or services were ordered as part of a case plan journalized under section 2151.412 [2151.41.2] of the Revised Code or the court-ordered treatment or services are necessary or relevant to dependency, neglect, or abuse or temporary or permanent custody proceedings under Chapter 2151. of the Revised Code.

(c) In any criminal action concerning any test or the results of any test that determines the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in the patient's

whole blood, blood serum or plasma, breath, urine, or other bodily substance at any time relevant to the criminal offense in question.

(d) In any criminal action against a physician or dentist. In such an action, the testimonial privilege established under this division does not prohibit the admission into evidence, in accordance with the Rules of Evidence, of a patient's medical or dental records or other communications between a patient and the physician or dentist that are related to the action and obtained by subpoena, search warrant, or other lawful means. A court that permits or compels a physician or dentist to testify in such an action or permits the introduction into evidence of patient records or other communications in such an action shall require that appropriate measures be taken to ensure that the confidentiality of any patient named or otherwise identified in the records is maintained. Measures to ensure confidentiality that may be taken by the court include sealing its records or deleting specific information from its records.

(e) (i) If the communication was between a patient who has since died and the deceased patient's physician or dentist, the communication is relevant to a dispute between parties who claim through that deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased patient when the deceased patient executed a document that is the basis of the dispute or whether the deceased patient was a victim of fraud, undue influence, or duress when the deceased patient executed a document that is the basis of the dispute.

(ii) If neither the spouse of a patient nor the executor or administrator of that patient's estate gives consent under division (B)(1)(a)(ii) of this section, testimony or the disclosure of the patient's medical records by a physician, dentist, or other health care provider under division (B)(1)(e)(i) of this section is a permitted use or disclosure of protected health information, as defined in 45 C.F.R. 160.103, and an authorization or opportunity to be heard shall not be required.

(iii) Division (B)(1)(e)(i) of this section does not require a mental health professional to disclose psychotherapy notes, as defined in 45 C.F.R. 164.501.

(iv) An interested person who objects to testimony or disclosure under division (B)(1)(e)(i) of this section may seek a protective order pursuant to

Civil Rule 26.

(v) A person to whom protected health information is disclosed under division (B)(1)(e)(i) of this section shall not use or disclose the protected health information for any purpose other than the litigation or proceeding for which the information was requested and shall return the protected health information to the covered entity or destroy the protected health information, including all copies made, at the conclusion of the litigation or proceeding.

(2) (a) If any law enforcement officer submits a written statement to a health care provider that states that an official criminal investigation has begun regarding a specified person or that a criminal action or proceeding has been commenced against a specified person, that requests the provider to supply to the officer copies of any records the provider possesses that pertain to any test or the results of any test administered to the specified person to determine the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in the person's whole blood, blood serum or plasma, breath, or urine at any time relevant to the criminal offense in question, and that conforms to section 2317.022 [2317.02.2] of the Revised Code, the provider, except to the extent specifically prohibited by any law of this state or of the United States, shall supply to the officer a copy of any of the requested records the provider possesses. If the health care provider does not possess any of the requested records, the provider shall give the officer a written statement that indicates that the provider does not possess any of the requested records.

(b) If a health care provider possesses any records of the type described in division (B)(2)(a) of this section regarding the person in question at any time relevant to the criminal offense in question, in lieu of personally testifying as to the results of the test in question, the custodian of the records may submit a certified copy of the records, and, upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of Evidence. Division (A) of section 2317.422 [2317.42.2] of the Revised Code does not apply to any certified copy of records submitted in accordance with this division. Nothing in this division shall be construed to limit the right of any party to call as a witness the person who administered the test to which the records pertain, the person under whose supervision the test was administered, the custodian of the records, the person

who made the records, or the person under whose supervision the records were made.

(3) (a) If the testimonial privilege described in division (B)(1) of this section does not apply as provided in division (B)(1)(a)(iii) of this section, a physician or dentist may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the physician or dentist by the patient in question in that relation, or the physician's or dentist's advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in the medical claim, dental claim, chiropractic claim, or optometric claim, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code.

(b) If the testimonial privilege described in division (B)(1) of this section does not apply to a physician or dentist as provided in division (B)(1)(c) of this section, the physician or dentist, in lieu of personally testifying as to the results of the test in question, may submit a certified copy of those results, and, upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of Evidence. Division (A) of section 2317.422 [2317.42.2] of the Revised Code does not apply to any certified copy of results submitted in accordance with this division. Nothing in this division shall be construed to limit the right of any party to call as a witness the person who administered the test in question, the person under whose supervision the test was administered, the custodian of the results of the test, the person who compiled the results, or the person under whose supervision the results were compiled.

(4) The testimonial privilege described in division (B)(1) of this section is not waived when a communication is made by a physician to a pharmacist or when there is communication between a patient and a pharmacist in furtherance of the physician-patient relation.

(5) (a) As used in divisions (B)(1) to (4) of this section, "communication" means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician or dentist to diagnose, treat, prescribe, or act for a patient. A "communication" may include, but is not limited to, any medical or dental, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray,

photograph, financial statement, diagnosis, or prognosis.

(b) As used in division (B)(2) of this section, "health care provider" means a hospital, ambulatory care facility, long-term care facility, pharmacy, emergency facility, or health care practitioner.

(c) As used in division (B)(5)(b) of this section:

(i) "Ambulatory care facility" means a facility that provides medical, diagnostic, or surgical treatment to patients who do not require hospitalization, including a dialysis center, ambulatory surgical facility, cardiac catheterization facility, diagnostic imaging center, extracorporeal shock wave lithotripsy center, home health agency, inpatient hospice, birthing center, radiation therapy center, emergency facility, and an urgent care center. "Ambulatory health care facility" does not include the private office of a physician or dentist, whether the office is for an individual or group practice.

(ii) "Emergency facility" means a hospital emergency department or any other facility that provides emergency medical services.

(iii) "Health care practitioner" has the same meaning as in section 4769.01 of the Revised Code.

(iv) "Hospital" has the same meaning as in section 3727.01 of the Revised Code.

(v) "Long-term care facility" means a nursing home, residential care facility, or home for the aging, as those terms are defined in section 3721.01 of the Revised Code; an adult care facility, as defined in section 3722.01 of the Revised Code; a nursing facility or intermediate care facility for the mentally retarded, as those terms are defined in section 5111.20 of the Revised Code; a facility or portion of a facility certified as a skilled nursing facility under Title XVIII [18] of the "Social Security Act," 49 Stat. 286 (1965), 42 U.S.C.A. 1395, as amended.

(vi) "Pharmacy" has the same meaning as in section 4729.01 of the Revised Code.

(d) As used in divisions (B)(1) and (B)(2) of this section, "drug of abuse" has the same meaning as in section 4506.01 of the Revised Code.

(6) Divisions (B)(1), (2), (3), (4), and (5) of this section apply to doctors of medicine, doctors of osteopathic medicine, doctors of podiatry, and dentists.

(7) Nothing in divisions (B)(1) to (6) of this section affects, or shall be construed as affecting, the immunity from civil liability conferred by section 307.628 [307.62.8] of the Revised Code or the immunity from civil liability conferred by section 2305.33 of the Revised Code upon physicians who report an employee's use of a drug of abuse, or a condition of an employee other than one involving the use of a drug of abuse, to the employer of the employee in accordance with division (B) of that section. As used in division (B)(7) of this section, "employee," "employer," and "physician" have the same meanings as in section 2305.33 of the Revised Code.

(C) (1) A cleric, when the cleric remains accountable to the authority of that cleric's church, denomination, or sect, concerning a confession made, or any information confidentially communicated, to the cleric for a religious counseling purpose in the cleric's professional character. The cleric may testify by express consent of the person making the communication, except when the disclosure of the information is in violation of a sacred trust and except that, if the person voluntarily testifies or is deemed by division (A)(4)(c) of section 2151.421 [2151.42.1] of the Revised Code to have waived any testimonial privilege under this division, the cleric may be compelled to testify on the same subject except when disclosure of the information is in violation of a sacred trust.

(2) As used in division (C) of this section:

(a) "Cleric" means a member of the clergy, rabbi, priest, Christian science practitioner, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect.

(b) "Sacred trust" means a confession or confidential communication made to a cleric in the cleric's ecclesiastical capacity in the course of discipline enjoined by the church to which the cleric belongs, including, but not limited to, the Catholic Church, if both of the following apply:

(i) The confession or confidential communication was made directly to the cleric.

(ii) The confession or confidential communication was made in the manner and context that places the cleric specifically and strictly under a level of confidentiality that is considered inviolate by canon law or church doctrine.

(D) Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and such rule is the same if the marital relation has ceased to exist;

(E) A person who assigns a claim or interest, concerning any matter in respect to which the person would not, if a party, be permitted to testify;

(F) A person who, if a party, would be restricted under section 2317.03 of the Revised Code, when the property or thing is sold or transferred by an executor, administrator, guardian, trustee, heir, devisee, or legatee, shall be restricted in the same manner in any action or proceeding concerning the property or thing.

(G) (1) A school guidance counselor who holds a valid educator license from the state board of education as provided for in section 3319.22 of the Revised Code, a person licensed under Chapter 4757. of the Revised Code as a professional clinical counselor, professional counselor, social worker, independent social worker, marriage and family therapist or independent marriage and family therapist, or registered under Chapter 4757. of the Revised Code as a social work assistant concerning a confidential communication received from a client in that relation or the person's advice to a client unless any of the following applies:

(a) The communication or advice indicates clear and present danger to the client or other persons. For the purposes of this division, cases in which there are indications of present or past child abuse or neglect of the client constitute a clear and present danger.

(b) The client gives express consent to the testimony.

(c) If the client is deceased, the surviving spouse or the executor or administrator of the estate of the deceased client gives express consent.

(d) The client voluntarily testifies, in which case the school guidance counselor or person licensed or registered under Chapter 4757. of the Revised Code may be compelled to testify on the same subject.

(e) The court in camera determines that the information communicated by the client is not

germane to the counselor-client, marriage and family therapist-client, or social worker-client relationship.

(f) A court, in an action brought against a school, its administration, or any of its personnel by the client, rules after an in-camera inspection that the testimony of the school guidance counselor is relevant to that action.

(g) The testimony is sought in a civil action and concerns court-ordered treatment or services received by a patient as part of a case plan journalized under section 2151.412 [2151.41.2] of the Revised Code or the court-ordered treatment or services are necessary or relevant to dependency, neglect, or abuse or temporary or permanent custody proceedings under Chapter 2151. of the Revised Code.

(2) Nothing in division (G)(1) of this section shall relieve a school guidance counselor or a person licensed or registered under Chapter 4757. of the Revised Code from the requirement to report information concerning child abuse or neglect under section 2151.421 [2151.42.1] of the Revised Code.

(H) A mediator acting under a mediation order issued under division (A) of section 3109.052 [3109.05.2] of the Revised Code or otherwise issued in any proceeding for divorce, dissolution, legal separation, annulment, or the allocation of parental rights and responsibilities for the care of children, in any action or proceeding, other than a criminal, delinquency, child abuse, child neglect, or dependent child action or proceeding, that is brought by or against either parent who takes part in mediation in accordance with the order and that pertains to the mediation process, to any information discussed or presented in the mediation process, to the allocation of parental rights and responsibilities for the care of the parents' children, or to the awarding of parenting time rights in relation to their children;

(I) A communications assistant, acting within the scope of the communication assistant's authority, when providing telecommunications relay service pursuant to section 4931.35 of the Revised Code or Title II of the "Communications Act of 1934," 104 Stat. 366 (1990), 47 U.S.C. 225, concerning a communication made through a telecommunications relay service. Nothing in this section shall limit the obligation of a communications assistant to divulge information or testify when mandated by federal law or regulation or pursuant to subpoena in a criminal proceeding.

Nothing in this section shall limit any immunity or

privilege granted under federal law or regulation.

(J) (1) A chiropractor in a civil proceeding concerning a communication made to the chiropractor by a patient in that relation or the chiropractor's advice to a patient, except as otherwise provided in this division. The testimonial privilege established under this division does not apply, and a chiropractor may testify or may be compelled to testify, in any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under Chapter 4123. of the Revised Code, under any of the following circumstances:

(a) If the patient or the guardian or other legal representative of the patient gives express consent.

(b) If the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent.

(c) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.113 [2305.11.3] of the Revised Code, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

(2) If the testimonial privilege described in division (J)(1) of this section does not apply as provided in division (J)(1)(c) of this section, a chiropractor may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the chiropractor by the patient in question in that relation, or the chiropractor's advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in the medical claim, dental claim, chiropractic claim, or optometric claim, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code.

(3) The testimonial privilege established under this division does not apply, and a chiropractor may testify or be compelled to testify, in any criminal action or administrative proceeding.

(4) As used in this division, "communication" means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a chiropractor to diagnose, treat, or act for a patient. A communication may include, but is not limited to,

any chiropractic, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis.

(K) (1) Except as provided under division (K)(2) of this section, a critical incident stress management team member concerning a communication received from an individual who receives crisis response services from the team member, or the team member's advice to the individual, during a debriefing session.

(2) The testimonial privilege established under division (K)(1) of this section does not apply if any of the following are true:

(a) The communication or advice indicates clear and present danger to the individual who receives crisis response services or to other persons. For purposes of this division, cases in which there are indications of present or past child abuse or neglect of the individual constitute a clear and present danger.

(b) The individual who received crisis response services gives express consent to the testimony.

(c) If the individual who received crisis response services is deceased, the surviving spouse or the executor or administrator of the estate of the deceased individual gives express consent.

(d) The individual who received crisis response services voluntarily testifies, in which case the team member may be compelled to testify on the same subject.

(e) The court in camera determines that the information communicated by the individual who received crisis response services is not germane to the relationship between the individual and the team member.

(f) The communication or advice pertains or is related to any criminal act.

(3) As used in division (K) of this section:

(a) "Crisis response services" means consultation, risk assessment, referral, and on-site crisis intervention services provided by a critical incident stress management team to individuals affected by crisis or disaster.

(b) "Critical incident stress management team

member" or "team member" means an individual specially trained to provide crisis response services as a member of an organized community or local crisis response team that holds membership in the Ohio critical incident stress management network.

(c) "Debriefing session" means a session at which crisis response services are rendered by a critical incident stress management team member during or after a crisis or disaster.

(L) (1) Subject to division (L)(2) of this section and except as provided in division (L)(3) of this section, an employee assistance professional, concerning a communication made to the employee assistance professional by a client in the employee assistance professional's official capacity as an employee assistance professional.

(2) Division (L)(1) of this section applies to an employee assistance professional who meets either or both of the following requirements:

(a) Is certified by the employee assistance certification commission to engage in the employee assistance profession;

(b) Has education, training, and experience in all of the following:

(i) Providing workplace-based services designed to address employer and employee productivity issues;

(ii) Providing assistance to employees and employees' dependents in identifying and finding the means to resolve personal problems that affect the employees or the employees' performance;

(iii) Identifying and resolving productivity problems associated with an employee's concerns about any of the following matters: health, marriage, family, finances, substance abuse or other addiction, workplace, law, and emotional issues;

(iv) Selecting and evaluating available community resources;

(v) Making appropriate referrals;

(vi) Local and national employee assistance agreements;

(vii) Client confidentiality.

(3) Division (L)(1) of this section does not apply

to any of the following:

(a) A criminal action or proceeding involving an offense under sections 2903.01 to 2903.06 of the Revised Code if the employee assistance professional's disclosure or testimony relates directly to the facts or immediate circumstances of the offense;

(b) A communication made by a client to an employee assistance professional that reveals the contemplation or commission of a crime or serious, harmful act;

(c) A communication that is made by a client who is an unemancipated minor or an adult adjudicated to be incompetent and indicates that the client was the victim of a crime or abuse;

(d) A civil proceeding to determine an individual's mental competency or a criminal action in which a plea of not guilty by reason of insanity is entered;

(e) A civil or criminal malpractice action brought against the employee assistance professional;

(f) When the employee assistance professional has the express consent of the client or, if the client is deceased or disabled, the client's legal representative;

(g) When the testimonial privilege otherwise provided by division (L)(1) of this section is abrogated under law.

OHIO REVISED CODE  
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.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING  
ROBBERY

ORC Ann. 2911.01 (2006)

§ 2911.01. Aggravated robbery

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
- (2) Have a dangerous ordnance on or about the offender's person or under the offender's control;
- (3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

- (1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;
- (2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

(D) 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) "Law enforcement officer" has the same meaning as in section 2901.01 of the Revised Code and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2921. OFFENSES AGAINST JUSTICE AND PUBLIC ADMINISTRATION  
PERJURY

ORC Ann. 2921.12 (2006)

§ 2921.12. Tampering with evidence

(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;

(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.

(B) Whoever violates this section is guilty of tampering with evidence, a felony of the third degree.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2923. CONSPIRACY, ATTEMPT, AND COMPLICITY; WEAPONS CONTROL; CORRUPT  
ACTIVITY  
CONSPIRACY, ATTEMPT, AND COMPLICITY

ORC Ann. 2923.02 (2006)

§ 2923.02. Attempt

(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the attempt was either factually or legally impossible under the attendant circumstances, if that offense could have been committed had the attendant circumstances been as the actor believed them to be.

(C) No person who is convicted of committing a specific offense, of complicity in the commission of an offense, or of conspiracy to commit an offense shall be convicted of an attempt to commit the same offense in violation of this section.

(D) It is an affirmative defense to a charge under this section that the actor abandoned the actor's effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of the actor's criminal purpose.

(E) (1) Whoever violates this section is guilty of an attempt to commit an offense. An attempt to commit aggravated murder, murder, or an offense for which the maximum penalty is imprisonment for life is a felony of the first degree. An attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses of the controlled substance involved in the drug abuse offense is an offense of the same degree as the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt. An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. In the case of an attempt to commit an offense other than a violation of Chapter 3734. of the Revised Code that is not specifically classified, an attempt is a misdemeanor of the first degree if the offense attempted is a felony, and a misdemeanor of the fourth degree if the offense attempted is a misdemeanor. In the case of an attempt to commit a violation of any provision of Chapter 3734. of the Revised Code, other than section 3734.18 of the Revised Code, that relates to hazardous wastes, an attempt is a felony punishable by a fine of not more than twenty-five thousand dollars or imprisonment for not more than eighteen months, or both. An attempt to commit a minor misdemeanor, or to engage in conspiracy, is not an offense under this section.

(2) If a person is convicted of or pleads guilty to attempted rape and also is convicted of or pleads guilty to a specification of the type described in section 2941.1418 [2941.14.18], 2941.1419 [2941.14.19], or 2941.1420 [2941.14.20] of the Revised Code, the offender shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code.

(F) As used in this section, "drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2923. CONSPIRACY, ATTEMPT, AND COMPLICITY; WEAPONS CONTROL; CORRUPT  
ACTIVITY  
CONSPIRACY, ATTEMPT, AND COMPLICITY

ORC Ann. 2923.03 (2006)

§ 2923.03. Complicity

(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

- (1) Solicit or procure another to commit the offense;
- (2) Aid or abet another in committing the offense;
- (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;
- (4) Cause an innocent or irresponsible person to commit the offense.

(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of section 2923.02 of the Revised Code.

(D) If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, an attempt to commit an offense, or an offense, the court, when it charges the jury, shall state substantially the following:

"The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.

It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."

(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense..

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2923. CONSPIRACY, ATTEMPT, AND COMPLICITY; WEAPONS CONTROL; CORRUPT  
ACTIVITY  
WEAPONS CONTROL

ORC Ann. 2923.13 (2006)

§ 2923.13. Having weapons while under disability

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

- (1) The person is a fugitive from justice.
- (2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.
- (3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.
- (4) The person is drug dependent, in danger of drug dependence, or a chronic alcoholic.
- (5) The person is under adjudication of mental incompetence, has been adjudicated as a mental defective, has been committed to a mental institution, has been found by a court to be a mentally ill person subject to hospitalization by court order, or is an involuntary patient other than one who is a patient only for purposes of observation. As used in this division, "mentally ill person subject to hospitalization by court order" and "patient" have the same meanings as in section 5122.01 of the Revised Code.

(B) Whoever violates this section is guilty of having weapons while under disability, a felony of the third degree.

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.

OHIO REVISED CODE

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.

OHIO REVISED CODE

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.

OHIO REVISED CODE

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.

OHIO REVISED CODE

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.

OHIO REVISED CODE

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.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2929. PENALTIES AND SENTENCING  
PENALTIES FOR MURDER

ORC Ann. 2929.06 (2006)

§ 2929.06. Resentencing after sentence of death or life imprisonment without parole is set aside, nullified, or vacated

(A) If a sentence of death imposed upon an offender is set aside, nullified, or vacated because 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, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by section 2929.05 of the Revised Code, is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, is set aside, nullified, or vacated pursuant to division (C) of section 2929.05 of the Revised Code, or is set aside, nullified, or vacated because a court has determined that the offender is mentally retarded under standards set forth in decisions of the supreme court of this state or the United States supreme court, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall impose upon the offender a sentence of life imprisonment that is determined as specified in this division. The sentences of life imprisonment that are available at the hearing, and from which the court shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of section 2929.03 or under section 2909.24 of the Revised Code at the time the offender committed the offense for which the sentence of death was imposed. Nothing in this division regarding the resentencing of an offender shall affect the operation of section 2971.03 of the Revised Code.

(B) Whenever any court of this state or any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender because of error that occurred in the sentencing phase of the trial and if division (A) of this section does not apply, the trial

court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing. If the offender was tried by a panel of three judges, that panel or, if necessary, a new panel of three judges shall conduct the hearing. At the hearing, the court shall follow the procedure set forth in division (D) of section 2929.03 of the Revised Code in determining whether to impose upon the offender a sentence of death or a sentence of life imprisonment. If, pursuant to that procedure, the court determines that it will impose a sentence of life imprisonment, the sentences of life imprisonment that are available at the hearing, and from which the court shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of section 2929.03 or under section 2909.24 of the Revised Code at the time the offender committed the offense for which the sentence of death was imposed.

(C) If a sentence of life imprisonment without parole imposed upon an offender pursuant to section 2929.021 [2929.02.1] or 2929.03 of the Revised Code is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of life imprisonment without parole that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, the trial court that sentenced the offender shall conduct a hearing to resentence the offender to life imprisonment with parole eligibility after serving twenty-five full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(D) Nothing in this section limits or restricts the rights of the state to appeal any order setting aside, nullifying, or vacating a conviction or sentence of death, when an appeal of that nature otherwise would be available.

(E) This section, as amended by H.B. 184 of the 125th General Assembly, shall apply to all offenders who have been sentenced to death for an aggravated

murder that was committed on or after October 19, 1981, or for terrorism that was committed on or after May 15, 2002. This section, as amended by H.B. 184 of the 125th general assembly, shall apply equally to all such offenders sentenced to death prior to, on, or after the effective date of that act, including offenders who, on the effective date of that act, are challenging their sentence of death and offenders whose sentence of death has been set aside, nullified, or vacated by any court of this state or any federal court but who, as of the effective date of that act, have not yet been resentenced.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2945. TRIAL  
JURY TRIAL

ORC Ann. 2945.25 (2006)

§ 2945.25. Causes of challenging of jurors

A person called as a juror in a criminal case may be challenged for the following causes:

- (A) That he was a member of the grand jury that found the indictment in the case;
- (B) That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial;
- (C) In the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard.
- (D) That he is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted, or to the defendant;
- (E) That he served on a petit jury drawn in the same cause against the same defendant, and that [petit]\* jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside;
- (F) That he served as a juror in a civil case brought against the defendant for the same act;
- (G) That he has been subpoenaed in good faith as a witness in the case;
- (H) That he is a chronic alcoholic, or drug dependent person;
- (I) That he has been convicted of a crime that by law disqualifies him from serving on a jury;
- (J) That he has an action pending between him and the state or the defendant;
- (K) That he or his spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him;
- (L) That he is the person alleged to be injured or attempted to be injured by the offense charged, or is the person on whose complaint the prosecution was instituted, or the defendant;
- (M) That he is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney of any person included in division (L) of this section;
- (N) That English is not his native language, and his knowledge of English is insufficient to permit him to understand the facts and law in the case;
- (O) That he otherwise is unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in this section shall be determined by the court.

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.

OHIO REVISED CODE

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.

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. 24 (2006)

### Rule 24. TRIAL JURORS

(A) *Brief introduction of case.* --To assist prospective jurors in understanding the general nature of the case, the court, in consultation with the parties, may give jurors a brief introduction to the case.

(B) *Examination of prospective jurors.* --Any person called as a prospective juror for the trial of any cause shall be examined under oath or upon affirmation as to the prospective juror's qualifications. The court may permit the attorney for the defendant, or the defendant if appearing *pro se*, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry. Nothing in this rule shall limit the court's discretion, with timely notice to the parties at anytime prior to trial, to allow the examination of all prospective jurors in the array prior to any challenges for cause or peremptory challenges.

(C) *Challenge for cause.* --A person called as a juror may be challenged for the following causes:

(1) That the juror has been convicted of a crime which by law renders the juror disqualified to serve on a jury.

(2) That the juror is a chronic alcoholic, or drug dependent person.

(3) That the juror was a member of the grand jury that found the indictment in the case.

(4) That the juror served on a petit jury drawn in the same cause against the same defendant, and the petit jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside.

(5) That the juror served as a juror in a civil case brought against the defendant for the same act.

(6) That the juror has an action pending between him or her and the State of Ohio or the defendant.

(7) That the juror or the juror's spouse is a party to another action then pending in any court in which an

attorney in the cause then on trial is an attorney, either for or against the juror.

(8) That the juror has been subpoenaed in good faith as a witness in the case.

(9) That the juror is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

(10) That the juror is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted; or to the defendant.

(11) That the juror is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant.

(12) That the juror is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney, of any person included in division (B)(11) of this rule.

(13) That English is not the juror's native language, and the juror's knowledge of English is insufficient to permit the juror to understand the facts and the law in the case.

(14) That the juror is otherwise unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in division (B) of this rule shall be determined by the court.

(D) *Peremptory challenges.* --In addition to challenges provided in division (C) of this rule, if there is one defendant, each party peremptorily may challenge three prospective jurors in misdemeanor cases, four prospective jurors in felony cases other than capital cases, and six prospective jurors in

capital cases. If there is more than one defendant, each defendant peremptorily may challenge the same number of prospective jurors as if the defendant was the sole defendant.

In any case where there are multiple defendants, the prosecuting attorney peremptorily may challenge a number of prospective jurors equal to the total peremptory challenges allowed all defendants. In case of the consolidation of any indictments, informations, or complaints for trial, the consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information, or complaint.

(E) *Manner of exercising peremptory challenges.* -- Peremptory challenges may be exercised after the minimum number of jurors allowed by the Rules of Criminal Procedure has been passed for cause and seated on the panel. Peremptory challenges shall be exercised alternately, with the first challenge exercised by the state. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge, but does not constitute a waiver of any subsequent challenge. However, if all parties, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused and another prospective juror shall be called who shall take the place of the prospective juror excused and be sworn and examined as other prospective jurors. The other party, if that party has peremptory challenges remaining, shall be entitled to challenge any prospective juror then seated on the panel.

(F) *Challenge to array.* --The prosecuting attorney or the attorney for the defendant may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with law. A challenge to the array shall be made before the examination of the jurors pursuant to division (A) of this rule and shall be tried by the court.

No array of petit jurors shall be set aside, nor shall any verdict in any case be set aside because the jury commissioners have returned such jury or any juror in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return.

(G) *Alternate jurors.*

(1) *Non-capital cases* --The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors. Except in capital cases, an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternative jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by this rule may not be used against an alternate juror.

(2) *Capital cases* --The procedure designated in division (F)(1) of this rule shall be the same in capital cases, except that any alternate juror shall continue to serve if more than one deliberation is required. If an alternate juror replaces a regular juror after a guilty verdict, the court shall instruct the alternate juror that the juror is bound by that verdict. No alternate juror shall be substituted during any deliberation. Any alternate juror shall be discharged after the trial jury retires to consider the penalty.

(H) *Control of juries*

(1) *Before submission of case to jury.* --Before submission of a case to the jury, the court, upon its own motion or the motion of a party, may restrict the separation of jurors or may sequester the jury.

(2) *After submission of case to jury.*

(a) *Misdemeanor cases.* --After submission of a misdemeanor case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors.

(b) *Non-capital felony cases.* --After submission of a non-capital felony case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors during any period of court adjournment or may require the jury to remain under the supervision of an officer of the court.

(c) *Capital cases.* --After submission of a capital case to the jury, the jury shall remain under the supervision of an officer of the court until a verdict is rendered or the jury is discharged by the court.

(3) *Separation in emergency.* --Where the jury is sequestered or after a capital case is submitted to the jury, the court may, in an emergency and upon giving cautionary instructions, allow temporary separation of jurors.

(4) *Duties of supervising officer.* --Where jurors are required to remain under the supervision of an officer of the court, the court shall make arrangements for their care, maintenance and comfort.

When the jury is in the care of an officer of the court and until the jury is discharged by the court, the officer may inquire whether the jury has reached a verdict, but shall not:

(a) Communicate any matter concerning jury conduct to anyone except the judge or;

(b) Communicate with the jurors or permit communications with jurors, except as allowed by court order.

(I) *Taking of notes by jurors.* --The court, after providing appropriate cautionary instructions, may permit jurors who wish to do so to take notes during a trial. If the court permits the taking of notes, notes taken by a juror may be carried into deliberations by that juror. The court shall require that all juror notes be collected and destroyed promptly after the jury renders a verdict.

(J) *Juror questions to witnesses.* --The court may permit jurors to propose questions for the court to ask of the witnesses. If the court permits jurors to propose questions, the court shall use procedures that minimize the risk of prejudice, including all of the following:

(1) Require jurors to propose any questions to the court in writing;

(2) Retain a copy of each proposed question for the record;

(3) Instruct the jurors that they shall not display or discuss a proposed question with other jurors;

(4) Before reading a question to a witness, provide

counsel with an opportunity to object to each question on the record and outside the hearing of the jury;

(5) Read the question, either as proposed or rephrased, to the witness;

(6) Permit counsel to reexamine the witness regarding a matter addressed by a juror question;

(7) If a question proposed by a juror is not asked, instruct the jurors that they should not draw any adverse inference from the court's refusal to ask any question proposed by a juror.

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. 601 (2006)

Rule 601. GENERAL RULE OF COMPETENCY

Every person is competent to be a witness except:

(A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

(B) A spouse testifying against the other spouse charged with a crime except when either of the following applies:

- (1) A crime against the testifying spouse or a child of either spouse is charged;
- (2) The testifying spouse elects to testify.

(C) An officer, while on duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.

(D) A person giving expert testimony on the issue of liability in any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person by a physician or podiatrist, unless the person testifying is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state, and unless the person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school. This division shall not prohibit other medical professionals who otherwise are competent to testify under these rules from giving expert testimony on the appropriate standard of care in their own profession in any claim asserted in any civil action against a physician, podiatrist, medical professional, or hospital arising out of the diagnosis, care, or treatment of any person.

(E) As otherwise provided in these rules.

OHIO RULES OF EVIDENCE

ARTICLE VIII. HEARSAY

Ohio Evid. R. 804 (2006)

Rule 804. HEARSAY EXCEPTIONS;  
DECLARANT UNAVAILABLE

(A) *Definition of unavailability.* --"Unavailability as a witness" includes any of the following situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of the declarant's statement;

(4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity;

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(B) *Hearsay exceptions.* --The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct,

cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability.

(2) *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

(3) *Statement against interest.* A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthfulness of the statement.

(4) *Statement against personal or family history.* A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or (b) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *Statement by a deceased or incompetent person.* The statement was made by a decedent or a mentally incompetent person, where all of the following apply:

(a) the estate or personal representative of the decedent's estate or the guardian or trustee of the incompetent person is a party;

(b) the statement was made before the death or the development of the incompetency;

(c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent or incompetent person.

(6) Forfeiture by wrongdoing. A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.