

**In the Supreme Court of Ohio**

State of Ohio, :  
Appellee, : Case No. 06-1126  
-vs- :  
Jason Dean, : **This is a death penalty case**  
Appellant. :

---

ON APPEAL FROM THE COURT OF  
APPEALS OF CLARK COUNTY, CASE NO. 05-CR-348

---

**APPENDIX TO MERIT BRIEF OF APPELLANT JASON DEAN**

---

STEPHEN SHUMAKER - 0014643  
Clark County Prosecuting Attorney

DARNELL CARTER - 0020316  
Assistant Prosecuting Attorney

DAVID WILSON - 0073767  
Assistant Prosecuting Attorney

Clark County Prosecutor's Office  
50 East Columbia Street  
Springfield, Ohio 45502  
(937) 328-2574

COUNSEL FOR APPELLEE

DAVID H. BODIKER  
Ohio Public Defender

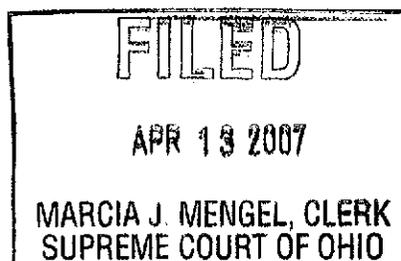
JOSEPH E. WILHELM - 0055407  
Chief Counsel, Death Penalty Division  
Counsel of Record

KATHRYN L. SANDFORD - 0063985  
Assistant State Public Defender

JENNIFER A. PRILLO - 0073744  
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



# D O C K E T S H E E T

Jul 6, 2006  
11:58 am

Clark County  
Springfield, Ohio

Page 1

D O C K E T S H E E T for 05CR0348  
STATE OF OHIO vs. JASON B DEAN

Date Filed: 05/02/05

Style: STATE VS JASON B DEAN

Judge : 001

Action : INDICTMENT

Judge Douglas M. Rastatter

Judge

Plaintiff 1  
Pty 1 STATE OF OHIO

Attorney  
CARTER, DARNELL E  
50 E COLUMBIA STREET  
SPRINGFIELD, OH 45501

Defendant 1  
Pty 2 DEAN, JASON B  
C/O CLARK COUNTY JAIL  
SPRINGFIELD OH

Attorney  
BUTZ, JOHN R  
333 NORTH LIMESTONE ST.  
SPRINGFIELD, OHIO 45503

|          |          |                            |
|----------|----------|----------------------------|
| COUNT(S) | 16 CTS   |                            |
| CHARGE:  | 2903.02  | MURDER                     |
| CHARGE:  | 2923.02  | ATTEMPT                    |
| CHARGE:  | 2903.02  | MURDER                     |
| CHARGE:  | 2923.02  | ATTEMPT                    |
| CHARGE:  | 2911.01  | AGGRAVATED ROBBERY         |
| CHARGE:  | 2923.13  | HAV WEAPONS UNDER DISABILI |
| CHARGE:  | 2923.161 | IMPROP DISCHARG FIREARM    |
| CHARGE:  | 2923.161 | IMPROP DISCHARG FIREARM    |
| CHARGE:  | 2903.02  | MURDER                     |
| CHARGE:  | 2923.02  | ATTEMPT                    |
| CHARGE:  | 2903.02  | MURDER                     |
| CHARGE:  | 2923.02  | ATTEMPT                    |
| CHARGE:  | 2903.02  | MURDER                     |
| CHARGE:  | 2923.02  | ATTEMPT                    |
| CHARGE:  | 2903.02  | MURDER                     |
| CHARGE:  | 2923.02  | ATTEMPT                    |
| CHARGE:  | 2923.13  | HAV WEAPONS UNDER DISABILI |
| CHARGE:  | 2903.01  | AGGRAVATED MURDER          |
| CHARGE:  | 2923.03  | COMPLICITY                 |
| CHARGE:  | 2903.01  | AGGRAVATED MURDER          |
| CHARGE:  | 2923.03  | COMPLICITY                 |
| CHARGE:  | 2911.01  | AGGRAVATED ROBBERY         |
| CHARGE:  | 2923.13  | HAV WEAPONS UNDER DISABILI |
| CHARGE:  | 2923.13  | HAV WEAPONS UNDER DISABILI |

Actions

Date Description

05/02/05

INDICTMENT FILED AGAINST:  
JASON B DEAN FOR THE CHARGE OF ATTEMP MURDER W/FIREARM SPEC

(6/CTS); AGG ROBBERY W/FIREARM SPEC (2/CTS); HAVING WEAPONS U/DISABILITY W/FIREARM SPEC (4/CTS); IMPROPERLY DISCHARGING A FIREARM AT OR INTO A HABITATION W/FIREARM SPEC (2/CTS); & COMPLICITY TO AGGRAGAVTED MURDER W/SPECS (2/CTS) FILED.

REQUEST FILED AND WARRANT TO ARREST WITH CERT COPY OF INDICTMENT ISSUED SHERIFF OF CLARK COUNTY, OHIO FOR THE ARREST OF THE DEFT

05/09/05 ORDER  
ORDERED---DEFT. ARRAIGNED---READING OF INDICTMENT WAIVED---  
DEFT. PLEADS NOT GUILTY TO SAID INDICTMENT---BOND FIXED AT  
HELD WITHOUT BOND.

05/09/05 ORDER  
ENTRY OF APPOINTMENT---DEFT IS IN INDIGENT CIRCUMSTANCES &  
UNABLE TO EMPLOY COUNSEL---COURT APPTS RICHARD MAYHALL AS  
LEAD COUNSEL FOR DEFT FOR TRIAL PURPOSES---COURT APPTS ATTY  
JOHN BUTZ AS CO-COUNSEL FOR DEFT FOR TRIAL PURPOSES.

05/09/05 MISC  
NOTIFICATION OF FILING INDICTMENT TO SUPREME COURT OF OHIO.

05/10/05  
WARRANT TO ARREST RETURNED ENDORSED AS FOLLOWS:  
SHERIFF'S RETURN I ARRESTED  
JASON DEAN 5/3/05  
GENE A KELLY/SHERIFF

05/10/05 FILING  
STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO  
FILED.

05/10/05 FILING  
DEFENDENTS DEMAND FOR DISCOVERY FILED.

05/12/05 ORDER  
ENTRY---ORDER THAT DEFT COOPERATE W/EFFORTS TO MONITOR &  
TREAT HIS DIABETIC CONDITION.

05/12/05 MISC  
FINANCIAL DISCLOSURE/AFFIDAVIT OF INDIGENCY FILED.

05/18/05 MISC  
MOTION OF DEFT FOR DEFENSE COUNSEL TO RETAIN A PSYCHOLOGIST  
WITH MEMORANDUM FILED.

05/18/05 MISC  
MOTION OF DEFT FOR ORDER ALLOWING DR JEFFREY SMALLDON, KIM  
AUSTIN AND ANTHONY BENTLEY TO HAVE CONTACT VISTSITS WITH  
DEFT IN THE CLARK COUNTY JAIL WITH MEMORANDUM FILED.

05/26/05 ORDER  
ENTRY---ORDERED THAT JEFFREY SMALLDON, KIMBERLY AUSTIN &  
ANTHONY BENTLEY ARE GRANTED CONTACT VISITS WITH THE DEFT IN  
THE CLARK COUNTY JAIL UPON PRESENTATION OF A CERTIFIED COPY  
OF THIS ENTRY & ORDER & PROPER IDENTIFICATION..

05/26/05 ORDER  
ENTRY---ORDERED THAT DEFENSE COUNSEL IF GRANTED THE  
AUTHORITY TO RETAIN THE SERVICES OF PSYCHOLOGIST JEFFREY  
SMALLDON PHD MITIGATION SPECIALIST/KIMBERLY AUSTIN & ANTHONY  
BENTLEY INVESTIGATOR TO ASSIST---FEES FOR THESE EXPERT  
WITNESSES SHALL BE PAID BY CLARK COUNTY OH

06/08/05 MISC  
NOTICE RECEIVED BY SUPREME COURT ON 5/12/05.

06/16/05

06/30/05 MISC  
SCHEDULED FOR 07/07/05 AT 9:00 AM - CRIMINAL JURY TRIAL

06/30/05 MISC  
DEFT'S WAIVER OF TIME FILED.

06/30/05 MISC

06/30/05 MOTION OF DEFT FOR TRANSCRIPT W/MEMORANDUM FILED. MISC

06/30/05 MOTION OF DEFT FOR CONTINUANCE W/MEMORANDUM FILED. FILING

06/30/05 STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO FILED.

07/11/05 ORDER  
ENTRY---ORDERED THAT THE COURT REPORTER FOR JUVENILE DIV PREPARE A TRANSCRIPT OF THE BIND OVER HEARING HELD BY THE JUVENILE COURT IN THE MATTER OF JOSHUA L WADE CASE NO 05JUV685 & 05JUV686---A COPY OF TRANSCRIPT SHALL BE PROVIDED TO STATE OF OH STEPHEN A SCHUMAKER & 2ND COPY TO COUNSEL FOR DEFT RICHARD E MAYHALL.

07/25/05 ORDER  
ENTRY---ORDERED THAT THE CRIMINAL JURY TRIAL NOW SCHEDULED FOR 7/7/05 IS VACATED & TO BE REASSIGNED.

08/09/05 MISC  
DEFT'S MOTION TO RETAIN EXPERT IN CRIMINAL FORENSICS WITH MEMORANDUM FILED.

08/19/05 ORDER  
ENTRY---THIS CASE IS ASSIGNED TO THE DOCKET OF JUDGE DOUGLAS M RASTATTER FOR ALL FUTURE PROCEEDINGS.

08/22/05

09/01/05 SCHEDULED FOR 08/26/05 AT 2:00 PM - CRIMINAL PRETRIAL ORDER  
ENTRY---SUPPLEMENT TO ARRAIGNMENT ENTRY---PLEA OF NOT GUILTY ON ALL CHARGES OF THE INDICTMENT AND DEFT HELD WITHOUT BOND

09/01/05 ORDER  
ENTRY---MOTION OF DEFT TO RETAIN A BALLISTICS EXPERT IS OVERRULED.

09/01/05 ORDER  
ENTRY---SUPPLEMENT COURTS 05/10/05 APPOINTMENT ENTRY--- COURT APPOINTS JOHN R BUTZ AS LEAD COUNSEL AND THE COURT REAFFIRMS APPOINTMENT OF MR MAYHALL AS CO-COUNSEL FOR DEFT

09/01/05 ORDER  
ENTRY AND ORDER---ROBERT CRATES PERMITTED CONTACT VISITS WITH THE DEFT IN CLARK COUNTY JAIL AS SET FORTH IN ENTRY.

09/01/05 ORDER  
NOTICE TO OHIO SUPREME COURT---OF DEATH PENALTY CASE.

09/28/05 ORDER  
ENTRY---DEFTS MOTION FOR DISCOVERY IS SUSTAINED---COURT ORDERS THE STATE OF OH TO FURNISH THE DEFENSE WITH A BILL OF PARTICULARS INCLUDING BUT NOT LIMITED TO THE DATES, TIMES LOCATIONS & PARTICULARS OF ALLEGED OFFENSES CONTINUED IN THE INDICTMENT.

10/05/05 ORDER  
ENTRY---NUNC PRO TUNC ENTRY & ORDER---THIS ENTRY IS TO CORRECT THE NAME OF THE MITIGATION SPECIALIST AUTHORIZED BY THIS COURT ON 9/1/05 TO BE ENGAGED BY THE DEFENSE---ORDERED THAT JAMES CRATES BE PERMITTED CONTACT VISITS W/DEFT IN THE CLARK COUNTY JAIL.

10/24/05 ISSUED CERT COPY TO BAILIFF

10/25/05 SCHEDULED FOR 11/04/05 AT 1:30 PM - CRIMINAL PRETRIAL ORDER  
ENTRY---SHERIFF OF CLARK COUNTY ORDERED TO CONVEY DEFT JASON B DEAN FROM C.R.C. ORIENT, OH TO THE CLARK COUNTY

JAIL ON 11/3/05 SO HE IS AVAILABLE FO A CRIMINAL PRE-TRIAL  
ON 11/4/05 AT 1:30 PM---DEFT MAY BE RETURNED TO C.R.C.  
AT THE CONCLUSION OF THE PRE-TRIAL HEARING.

WARRANT TO REMOVE W/CERT COPY OF ORDER ISSUED SHERIFF CLARK  
COUNTY OH

|          |   |        |
|----------|---|--------|
| 11/09/05 |   | RETURN |
|          | WARRANT FOR REMOVAL RETURNED ENDORSED AS FOLLOWS: SHERIFF'S<br>RETURN - I CONVEYED:<br>JASON B DEAN 11/3/05   |        |
| 11/15/05 |   | ORDER  |
|          | ENTRY---DEFT REITERATED HIS WILLINGNESS TO WAIVE HIS RIGHT<br>TO A SPEEDY TRIAL & CONSENTED TO THE CASE BEING SCHEDULED<br>FOR TRIAL ON 4/3/06 AT 9:00 AM   |        |
| 11/17/05 |   | ORDER  |
|          | ENTRY---ORDERED THAT ANTHONY BENTLEY SHALL BE ENTITLED TO<br>CONTACT VISITS W/DEFT JASON DEAN AT LEBANON CORR FACILITY OR<br>AT SUCH OTHER CORRECTIONAL FACILITY OPERATED BY THE STATE<br>OF OHIO WHERE HE MAY BE INCARCERATED. |        |
| 11/17/05 |   | ORDER  |
|          | ENTRY---ORDERED THAT JEFFREY SMALL, PHD SHALL BE ENTITLED<br>TO CONTACT VISITS W/DEFT JASON DEAN AT LEBANON CORR FACILITY<br>OR AT SUCH OTHER CORRECTIONAL FACILITY OPERATED BY THE<br>STATE OF OH                              |        |
| 11/17/05 |   | ORDER  |
|          | ENTRY---ORDERED THAT JAMES CRATES SHALL BE ENTITLED TO<br>CONTACT VISITS W/DEFT JASON DEAN AT LEBANON CORR FACILITY<br>OR AT SUCH OTHER CORRECTIONAL FACILITY OPERATED BY THE<br>STATE.   |        |
| 11/18/05 |   | FILING |
|          | STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO<br>FILED.   |        |
| 03/01/06 |   | ORDER  |
|          | ENTRY---THIS CASE TO PROCEED WITH SCHEDULE AS SET FORTH IN<br>ENTRY WITH FINAL TRIAL DATE OF 05/08/6 AT 9:00 AM.  |        |
| 03/07/06 |   | MISC   |
|          | DEFT'S MOTION FOR DISCLOSURE OF EXCULPATORY EVIDENCE<br>TOGETHER WITH MEMORANDUM IN SUPPORT FILED   |        |
| 03/07/06 |   | MISC   |
|          | DEFT'S MOTION TO DISMISS DUE TO CONSTITUTIONAL INFIRMITIES<br>EVIDENT IN THE SELECTION OF THE GRAND JURORS AND/OR THE<br>APPOINTMENT OF THE GRAND JUROR FOREPERSON TOGETHER WITH<br>MEMORANDUM IN SUPPORT FILED                 |        |
| 03/07/06 |   | MISC   |
|          | DEFT'S MOTION TO REDUCE BIAS IN THE ANNUAL JURY LIST<br>TOGETHER WITH MEMORANDUM IN SUPPORT FILED   |        |
| 03/07/06 |   | MISC   |
|          | DEFT'S MOTION FOR SPECIAL PROECDURES TO INSULATE THE<br>VENIRE AND THE EMPANELLED JURY TOGETHER WITH MEMORANDUM IN<br>SUPPORT FILED   |        |
| 03/07/06 |   | MISC   |
|          | DEFT'S MOTION TO SUBMIT A JURY QUESTIONNAIRE TOGETHER WITH<br>MEMORANDUM IN SUPPORT FILED   |        |
| 03/07/06 |   | MISC   |
|          | DEFT'S MOTION TO PERMIT ACCUSED TO APPEAR IN CIVILIAN<br>CLOTHING AT ALL PROCEEDINGS TOGETHER WITH MEMORANDUM IN<br>SUPPORT AND ATTACHMENTS FILED   |        |
| 03/07/06 |   | MISC   |
|          | DEFT'S MOTION TO COMPEL DISCLOSURE OF THE PROSECUTING   |        |

ATTORNEY'S JURY SELECTION DATA TOGETHER WITH MEMORANDUM IN  
SUPPORT FILED

03/07/06 MISC  
DEFT'S MOTION TO DISCLOSE NAMES OF GRAND JURY WITNESSES  
TOGETHER WITH MEMORANDUM IN SUPPORT FILED

03/07/06 MISC  
DEFT'S MOTION TO TRANSCRIBE THE GRAND JURY PROCEEDINGS  
PRIOR TO TRIAL TOGETHER WITH MEMORANDUM IN SUPPORT FILED

03/07/06 MISC  
DEFT'S MOTION FOR A PRE-TRIAL COPY OF THE TRANSCRIPT OF THE  
GRAND JURY PROCEEDINGS TOGETHER WITH MEMORANDUM IN SUPPORT  
FILED

03/07/06 MISC  
DEFT'S MOTION TO ALLOW THE DEFENSE TO ARGUE LAST AT THE  
MITIGATION PHASE TOGETHER WITH MEMORANDUM IN SUPPORT FILED

03/07/06 MISC  
DEFT'S MOTION FOR A CHANGE OF VENUE TOGETHER WITH MOTION  
IN SUPPORT FILED

03/07/06 MISC  
DEFT'S MOTION FOR DISCLOSURE OF REBUTTAL WITNESS TOGETHER  
WITH MEMORANDUM IN SUPPORT FILED

03/07/06 MISC  
DEFT'S MOTION TO COMPEL LAW ENFORCEMENT OFFICIALS TO TURN  
OVER AND ADVISE THE PROSECUTING ATTORNEY OF ALL INFORMATION  
ACQUIRED DURING THE COURSE OF INVESTIGATION TOGETHER  
WITH MEMORANDUM IN SUPPORT FILED

03/07/06 MISC  
DEFT'S MOTION TO COMPEL DISCLOSURE OF AGGRAVATING FACTORS  
AND INFORMATION RELATING TO MITIGATING FACTORS TOGETHER  
WITH MEMORANDUM IN SUPPORT FILED

03/07/06 MISC  
DEFT'S MOTION FOR AN ORDER DIRECTING THAT A COMPLETE COPY  
OF THE PROSECUTOR'S FILED BE MADE AND TURNED OVER TO THE  
COURT FOR REVIEW AND TO BE SEALED FOR APPELLATE REVIEW, IF  
NECESSARY TOGETHER WITH MEMORANDUM FILED

03/07/06 MISC  
DEFT'S MOTION TO PROPERLY PRESERVE AND CATALOG ALL PHYSICAL  
EVIDENCE TOGETHER WITH MEMORANDUM IN SUPPORT FILED

03/07/06 MISC  
DEFT'S MOTION TO EXTEND TIME FOR FILING PRE-TRIAL MOTIONS  
TOGETHER WITH MEMORANDUM IN SUPPORT FILED

03/07/06 MISC  
DEFT'S MOTION FOR CLOSURE OF PRE-TRIAL HEARINGS TOGETHER  
WITH MEMORANDUM IN SUPPORT FILED

03/07/06 MISC  
DEFT'S MOTION TO ALLOW DEFENSE COUNSEL TO THOROUGHLY EXAMINE  
VENIREPERSONS DURING VOIR DIRE TOGETHER WITH MEMORANDUM IN  
SUPPORT FILED

03/07/06 MISC  
DEFT'S MOTION FOR SEQUESTRATION OF JURORS FOR DURATION OF  
TRIAL TOGETHER WITH MEMORANDUM IN SUPPORT FILED

03/07/06 MISC  
DEFT'S MOTION FOR SECOND VOIR DIRE OF JURY IN BETWEEN THE  
CULPABILITY AND MITIGATION PHASES IN THE EVENT THAT THIS  
CASE PROCEEDS TO A MITIGATION PHASE TOGETHER WITH MEMORANDUM  
IN SUPPORT FILED

03/07/06 MISC  
DEFT'S MOTION TO AVOID COERCIVE PRACTICES DURING MITIGATION  
PHASE DELIBERATIONS TOGETHER WITH MEMORANDUM IN SUPPORT  
FILED

|          |   |      |
|----------|---|------|
| 03/07/06 | DEFT'S MOTION TO REQUIRE THE JURORS TO ANSWER INTERROGATORIES REGARDING THE MANNER IN WHICH THEY WEIGH THE AGGRAVATING CIRCUMSTANCES AND THE MITIGATING FACTORS TOGETHER WITH MEMORANDUM IN SUPPORT FILED                       | MISC |
| 03/07/06 | DEFT'S MOTION FOR RELIEF FORM PAYMENT OF FEES RELATED TO THE ISSUANCE OF DEFENSE SUBPOENAS TOGETHER WITH MEMORANDUM IN SUPPORT FILED  | MISC |
| 03/07/06 | DEFT'S MOTION TO HAVE REASONS FOR DEFENSE OBJECTIONS AND REASONS FOR OVERRULING DEFENSE OBJECTIONS PLACED ON THE RECORD TOGETHER WITH MEMORANDUM IN SUPPORT FILED   | MISC |
| 03/07/06 | DEFT'S MOTION TO APPEAR AT ALL PROCEEDINGS WITHOUT RESTRAINTS TOGETHER WITH MEMORANDUM IN SUPPORT FILED   | MISC |
| 03/07/06 | DEFT'S MOTION TO RESTRAIN CERTAIN PARTIES FROM DISCUSSING THE CASE WITH ACCUSED TOGETHER WITH MEMORANDUM IN SUPPORT FILED   | MISC |
| 03/07/06 | DEFT'S MOTION FOR DAILY TRANSCRIPTS TOGETHER WITH MEMORANDUM SUPPORT FILED  | MISC |
| 03/07/06 | DEFT'S MOTION REQUESTING RULINGS ON ALL MOTIONS NO LATER THAN THE COMMENCEMENT OF VOIR DIRE TOGETHER WITH MEMORANDUM IN SUPPORT FILED   | MISC |
| 03/07/06 | DEFT'S MOTION FOR ALL MOTIONS TO BE HEARD ON THE RECORD TOGETHER WITH MEMORANDUM IN SUPPORT FILED   | MISC |
| 03/07/06 | DEFT'S MOTION FOR DISCLOSURE OF IMPEACHING INFORMATION TOGETHER WITH MEMORANDUM IN SUPPORT FILED  | MISC |
| 03/07/06 | DEFT'S REQUEST FOR NOTICE OF STATE'S EVIDENCE PURSUANT TO OHIO R. CRIM.P.12(D)(2) TOGETHER WITH MEMORANDUM IN SUPPORT FILED   | MISC |
| 03/07/06 | DEFT'S MOTION FOR COMPREHENSIVE VOIR DIRE TOGETHER WITH MEMORANDUM IN SUPPORT FILED   | MISC |
| 03/07/06 | DEFT'S MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE ON DEATH PENALTY,PUBLICITY, AND OTHER ISSUES TOGETHER WITH MEMORANDUM IN SUPPORT FILED   | MISC |
| 03/07/06 | DEFT'S MOTION FOR ALTERNATING INDIVIDUAL VOIR DIRE TOGETHER WITH MEMORANDUM IN SUPPORT FILED  | MISC |
| 03/07/06 | DEFT'S MOTION TO HAVE THE COURT FILLW THE OHIO REV. CODE 2945.55 STANDARD FOR "DEATH QUALIFICATION" OF VENIRE PERSONS TOGETHER WITH MEMORANDUM IN SUPPORT FILED   | MISC |
| 03/07/06 | DEFT'S MOTION TO EXCLUDE VENIREPERSONS WHO CANNOT FAIRLY CONSIDER MITIGATING EVIDENCE AND/OR WHO WOULD AUTOMATICALLY VOTE FOR DEATH UPON A FINDING OF GUILTY IN THE CULPABILITY PHASE TOGETHER WITH MEMORANDUM IN SUPPORT FILED | MISC |
| 03/07/06 | DEFT'S MOTION FOR TWELVE PEREMPTORY CHALLENGES TOGETHER WITH MEMORANDUM IN SUPPORT FILED  | MISC |
| 03/07/06 |   | MISC |

DEFT'S MOTION TO PROHIBIT THE STATE'S USE OF PREMEPTORY CHALLENGES TO EXCLUDE VENIRE PERSONS WITH CONCERNS ABOUT IMPOSING THE DEATH PENALTY TOGETHER WITH MEMORANDUM IN SUPPORT FILED

03/07/06 MISC  
DEFT'S MOTION TO REQUIRE THE PROSECUTOR TO STATE REASONS FOR EXCERISING PREMEPTORY CHALLENGES TOGETHER WITH MEMORANDUM IN SUPPORT FILED

03/28/06 ORDER  
ORDER---SHERIFF TO REMOVE DEFT FROM LEBANON CORRECTIONAL INSTITUTION TO CLARK COUNTY JAIL ON 03/29/06 TO BE AVAILABLE FOR MOTION HEARING ON 03/30/06 AT 1:30 PM---DEFT TO BE RETURNED TO SAME ON 03/30/06.

03/30/06 MISC  
WARRANT FOR REMOVAL WITH CERT COPY OF ORDER ISSUED SHERIFF STATE'S RESPONSE TO DEFT'S REQUEST FOR NOTICE OF STATE'S EVIDENCE FILED

03/30/06 MISC  
STATE'S RESPONSE TO DEFT'S MOTION FOR DISCLOSURE OF IMPEACHING INFORMATION FILED

03/30/06 MISC  
STATE'S MEMORANDUM CONTRA DEFT'S MOTION FOR AN ORDER DIRECTING THAT A COMPLETE COPY OF THE PROSECUTING ATTORNEY'S FILE BE MADE, TURNED OVER TO THE COURT FOR REVIEW AND SEALED FOR APPELLATE REVIEW FILED

03/30/06 MISC  
STATE'S MEMORANDUM CONTRA DEFT'S MOTION TO CHANGE VENUE FILED

03/30/06 MISC  
STATE'S MEMORANDUM IN OPPOSITION TO DEFT'S MOTION TO ALLOW THE DEFENSE TO ARGUE LAST AT THE MITIGATION PHASE FILED

03/30/06 MISC  
STATE'S RESPONSE TO DEFT'S MOTION TO PROPERLY PRESERVE AND CATALOG ALL PHYSICAL EVIDENCE FILED

03/30/06 MISC  
STATE'S MEMORANDUM CONTRA DEFT'S MOTIO TO EXTEND TIME TO FILE MOTIONS FILED

03/30/06 MISC  
STATE'S RESPONSE IN OPPOSITION TO DEFT'S MOTION TO TRANSCRIBE GRAND JURY PROCEEDINGS PRIOR TO TRIAL FILED

03/30/06 MISC  
STATE'S MEMORANDUM IN OPPOSITION TO DEFT'S MOTION FOR CLOSURE OF PRETRIAL HEARINGS AND TO BAR TELEVISION CAMERAS FROM THE COURTROOM FILED

03/30/06 MISC  
STATE'S MEMORANDUM CONTRA DEFT'S MOTION TO DISCLOSE NAMES OF GRAND JURY WITNESSES FILED

03/30/06 MISC  
STATE'S RESPONSE TO DEFT'S MOTION TO COMPEL DISCLOSURE OF THE PROSECUTING ATTORNEY'S JURY SELECTION DATA FILED

03/30/06 MISC  
STATE'S RESPONSE TO DEFT'S MOTION FOR ALL MOTIONS TO BE HEARD ON THE RECORD FILED

03/30/06 MISC  
STATE'S MEMORANDUM IN OPPOSITION TO DEFT'S MOTION TO DISMISS DUE TO CONSTITUTIONAL INFIRMITIES EVIDENT IN THE SELECTION OF THE GRAND JURORS AND/OR APPOINTMENT OF THE GRAND JUROR FOREPESON FILED

03/30/06 MISC

MITIGATION PHASES IN THE EVENT THAT THIS CASE PROCEEDS TO  
A MITIGATION PHSE

STATE'S RESPONSE TO DEFT'S MOTION FOR DISCLOSURE OF REBUTTAL  
WITNESSES FILED

STATE'S RESPONSE TO DEFT'S MOTION TO COMPEL DISCLOSURE OF  
AGGRAVATING FACTORS AND INFORMATION RELATING TO MITIGATING  
FACTORS FILED

STATE'S RESPONSE TO DEFT'S MOTION TO COMPEL LAW ENFORCEMENT  
OFFICIALS TO TURN OVER AND ADVISE THE PROSECUTING ATTORNEY  
OF ALL INFORMATION ACQUIRED DURING THE COURSE OF  
INVESTIGATION FILED

03/30/06 FILING  
STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO  
FILED.

03/30/06 MISC  
STATE'S RESPONSE TO DEFT'S MOTION FOR A PRE-TRIAL COPY OF  
THE TRANSCRIPT OF THE GRANTD JURY PROCEEDINGS FILED.

03/31/06 MISC  
STATE'S MOTION FOR HANDWRITTING SAMPLE TOGETHER WITH  
MEMORANDUM FILED

04/03/06 ORDER  
ENTRY---DEFTS MOTION FOR ALTERNATING VOIR DIRE IS OVERRULED  
---DEFTS MOTION FOR DAILY TRANSCRIPTS IS OVERRULED---MOTION  
OF DEFT TO APPEAR WITHOUT RESTRAINTS OR SHACKLES IS  
OVERRULED---MOTION OF DEFT TO COMPEL DEATH PENALTY DATA IS  
OVERRULED---DEFTS MOTION TO PROHIBIT REFERENCE TO THE FIRST  
PHASE AS THE GUILTY PHASE IS OVERRULED---DEFTS MOTION TO  
COMPEL LAW ENFORCEMENT TO TURN OVER ALL INFORMATION ACQUIRED  
DURING INVESTIGATION IS OVERRULED---DEFTS MOTION TO HAVE  
OBJECTIONS AND REASONS FOR OVERRULING SAME ON THE RECORD IS  
OVERRULED---MOTION OF DEFT FOR COMPLETE COPY OF PROSECUTORS  
FILE TO BE SEALED FOR APPELLATE REVIEW IS OVERRULED---DEFTS  
MOTION TO DISMISS THE DEATH PENALTY ON STATE CONSTITUTIONAL  
GROUNDS IS OVERRULED---DEFTS MOTION TO DISMISS THE DEATH  
PENALTY ON FEDERAL CONSTITUTIONAL GROUNDS IS OVERRULED---  
MOTION OF DEFT TO PROHIBIT THE USE OF PEREMPTORY CHALLENGES  
TO EXCLUDE JURORS WHO EXPRESS CONCERNS ABOUT THE DEATH  
PENALTY IS OVERRULED---MOTION OF DEFT TO COMPEL DISCLOSURE  
OF THE PROSECUTING ATTORNEYS JURY SELECTION DATA IS  
OVERRULED---DEFTS MOTION TO ALLOW THE DEFENSE TO ARGUE LAST  
AT THE MITIGATION PHASE IS OVERRULED---DEFTS MOTION FOR  
12 PEREMPTROY CHALLENGES IS OVERRULED---DEFTS MOTION TO  
PERMIT THE DEFT TO APPEAR IN CIVILIAN CLOTHING AT ALL  
PROCEEDINGS IS SUSTAINED IN PART AND OVERRULED IN PART---  
DEFTS MOTION FOR DISCLOSURE OF IMPEACHING INFORMATION IS  
SUSTAINED---MOTION OF DEFT TO DISMISS DUE TO CONSTITUTIONAL  
INFIRMITIES EVIDENT IN THE SELECTION OF THE GRAND JURORS AND  
OR THE APPOINTMENT OF THE GRAND JURY FOREPERSON IS OVERRULED  
---MOTION OF DDEFT FOR ALL MOTIONS TO BE HEARD ON THE RECORD  
IS SUSTAINED---MOTION OF DEFT FOR CLOSURE OF PRETRIAL  
HEARINGS IS OVERRULED---MOTION OF DEFT TO SUBMIT AN  
EXTENSIVE WRITTEN QUESTIONNAIRE TO EACH JUROR IS OVERRULED---  
-MOTION OF DEFT FOR INDIVIDUAL SEQUESTERED VOIR DIRE IS  
SUSTAINED IN PART AND OVERRULED IN PART---MOTION OF DEFT TO  
REQUEST RULINGS ON ALL MOTIONS NO LATER THAN THE  
COMMENCEMENT OF VOIR DIRE IS SUSTAINED IN PARTY AND OVER-  
RULED IN PART---MOTION OF DEFT TO EXTEND TIME FOR FILING

A-9

PRE-TRIAL MOTIONS IS SUSTAINED---MOTION OF DEFT FOR SPECIAL PROCEDURES TO INSULATE THE VENIRE AND THE EMPANELLED JURY IS SUSTAINED IN PART AND OVERRULED IN PART---MOTION OF DEFT TO PROPERLY PRESERVE AND CATALOG ALL PHYSICAL EVIDENCE IS OVERRULED---MOTION OF DEFT FOR DISCLOSURE OF EXCULPATORY EVIDENCE IS SUSTAINED---MOTION OF DEFT FOR A PRE-TRIAL COPY OF GRAND JURY TRANSCRIPTS AND TO DISCLOSE NAMES OF GRAND JURY WITNESSES ARE OVERRULED BUT MOTION TO TRANSCRIBE GRAND JURY TESTIMONY PRIOR TO TRIAL IS SUSTAINED---GRAND JURY TRANSCRIPTS TO BE PREPARED PRIOR TO TRIAL AND SUBMITTED TO THE COURT UNDER SEAL AND SEAL NOT TO BE BROKEN UNLESS COURT ORDER SO---MOTION OF DEFT FOR COMPREHENSIVE VOIR DIRE IS SUSTAINED---MOTION OF DEFT FOR NOTICE OF STATES EVIDENCE IS SUSTAINED---MOTION OF DEFT TO EXCLUDE VENIREPERSONS WHO CANNOT FAIRLY CONSIDER MITIGATING EVIDENCE AND OR WHO WOULD AUTOMATICALLY VOTE FOR DEATH UPON A FINDING OF GUILT IN THE TRIAL PHASE IS SUSTAINED---MOTION OF DEFT TO HAV ETHE COURT FOLLOW SECTION 2945.25(C) OF THE OHIO REVISED CODE FOR DEATH QUALIFICATION OF PROSPECTIVE JURORS IS SUSTAINED IN PART AND OVERRULED IN PART---MOTION OF DEFT TO REDUCE BIAS IN THE ANNUAL JURY LIST IS OVERRULED---MOTION OF DEFT FOR DISCLOSURE OF REBUTTAL WITNESSES IS SUSTAINED---MOTION OF DEFT FOR SECOND VOIR DIRE OF THE JURY IN BETWEEN THE TRIAL PHASE AND THE SENTENCING PHASE IS OVERRULED---DEFTS MOTION FOR SEQUESTRATION OF JURORS FOR THE DURATION OF THE TRIAL IS OVERRULED---DEFTS MOTION TO REQUIRED THE JURORS TO ANSWER INTERROGATORIES REGARDING THE MANNER IN WHICH THEY WEIGH THE AGGRAVATING CIRCUMSTANCES AND THE MITIGATING FACTORS IS OVERRULED---MOTION OF DEFT TO COMPEL DISCLOSURE OF AGGRAVATING FACTORS AND INFORMATION RELATING TO MITIGATING FACTORS IS OVERRULED.

04/04/06 ORDER  
ENTRY---CLARK COUNTY JUVENILE COURT - JUVENILE PROBATION DEPT TO RELEASE TO COUNSEL FOR DEFT ALL RECORDS THAT MAY RELATE TO DEFT.

04/04/06 ORDER  
ORDER---THE OHIO DEPT OF YOUTH SERVICES TO RELEASE TO COUNSEL FOR DEFT ALL RECORDS THAT RELATE TO JASON B DEAN---THIS ORDER TO SERVE AS RELEASE.

04/04/06 ORDER  
ENTRY---OHIO DEPARTMENT OF REHABILITATION AND CORRECTION TO RELEASE ALL RECORDS TO COUNSEL FOR DEFT---THIS ORDER TO SERVE AS RELEASE.

04/04/06 ORDER  
ENTRY---SHERIFF TO RELEASE TO COUNSEL FOR DEFT ALL DOCUMENTS GENERATED BY YOUR AGENCY---THIS ORDER TO SERVE AS THE RELEASE.

04/04/06 RETURN  
WARRANT FOR REMOVAL RETURNED ENDORSED AS FOLLOWS: SHERIFFS RETURN I EXECUTED THE SAME BY CONVEYING THE PERSON NAMED TO THE PLACE DESIGNATED MARCH 30, 2006

04/10/06 ORDER  
ORDER---SHERIFF TO REMOVE DEFT FROM LEBANON CORRECTIONAL TO CLARK COUNTY JAIL ON 04/11/06 TO BE AVAILABLE TO MEET WITH ATTORNEYS---DEFT TO REMAIN IN CLARK COUNTY JAIL UNTIL COMPLETION OF JURY TRIAL SET FOR 05/08/06.

04/12/06 RETURN  
WARRANT FOR REMOVAL WITH CERT COPY OF ORDER ISSUED SHERIFF  
WARRANT FOR REMOVAL RETURNED ENDORSED AS FOLLOWS: SHERIFFS

RETURN: I EXECUTED THE SAME BY CONVEYING JASON B. DEAN TO THE PLACE DESIGNATED 4/11/06

04/12/06 MISC  
DEFT'S MOTION TO SUPRESS TOGETHER WITH MEMORANDUM IN SUPPORT FILED

04/12/06 MISC  
DEFT'S MOTION TO SUPPRESS OUT OF COURT IDENTIFICATION TOGETHER WITH MEMORANDUM IN SUPPORT FILED

04/14/06 MISC  
MOTION OF DEFT TO RECONSIDER THE DECISION DENYING REQUEST FOR INDEPENDENT BALLISTICS EXPERT WITH MEMORANDUM FILED.

04/17/06 MISC  
STATE'S REQUEST FOR CERTIFICATE TO SECURE ATTENDANCE OF OUT-OF-STATE WITNESS FILED.

04/18/06 MISC  
STATE'S WITNESS LIST FILED

04/20/06 MISC  
CERTIFICATION THAT DISCLOSURE OF WITNESS'S ADDRESS MAY SUBJECT WITNESS TO PHYSICAL HARM OR COERCION FILED

04/21/06 MISC  
NOTICE OF HEARING FILED

04/21/06 MOTON HEARING SET FOR APRIL 24,2006 @ 2:00 P.M.

04/21/06 ORDER  
ENTRY---ON MOTION OF DEFT FOR RECONSIDERATION FOR BALLISTICS EXPERT AT STATES EXPENSE IS SUSTAINED---MOTION OF STATE FOR DEFT TO SUBMIT TO HANDWRITING SAMPLE IS SUSTAINED--- JURORS WITH NUMBERS SET FORTH IN ENTRY ARE EXCUSED WITHOUT OBJECTION---JURORS SET FOR IN ENTRY SPECIFICALLY WER NOT EXCUSED BY THE COURT DESPITE REQUEST TO BE EXCUSED.

04/24/06 ORDER  
ENTRY---DEFT WAIVED RIGHT TO CO COUNSEL PRESENT---STATE MAKE WITNESS KABOOS AVAILABLE AT CLARK COUNTY COMMON PLEAS COURTHOUSE THE WEEK OF 05/08/06 FOR DEFENSE TO INTERVIEW WITH NO ORDER TO MAKE ANY STATMENT ONLY AT HER DISCRETION--- OTHER ISSUES AS TO BALLISTICS/AVOIDING POTENTIAL CHAIN OF CUSTODY ISSUES AT TRIAL/TRIAL PROCEDURE AND OTHER ISSUES AS TO WITNESSES AND TESTIMONY AND IMPEACHMENT OF WITNESS SET FORTH IN ENTRY---SUPPRESSION HEARINGS TO BE SET NO SOONER THAN 05/08/06 AND TAKE PLACE AROUND JURY SELECTION.

04/25/06 ORDER  
ENTRY---DEFENSE COUNSEL IS GRANTED TO RETAIN SERVICES OF FIREARMS EXAMINER JOHN R NIXON TO ASSIST IN REPRESENTATION OF DEFT AND FEES TO BE PAID BY CLARK CO OHIO AND NOT TO EXCEED \$3000 WITHOUT PRIOR APPROVAL.

04/25/06 FILING  
STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO FILED.

04/27/06 ORDER  
ENTRY---DEFTS MOTION/PROPOSED ENTRY ALLOWING SMALLDON TO INCUR FEES UP TO \$15,000.00 IS OVERRULED.

04/27/06 ORDER  
ENTRY---JUDITH PIERCE TO RELEASE TO RICHARD E MAYHALL COUNSEL FOR DEFT THE 40 CALIBER HI-POINT PISTOL WHICH IS INCLUDED IN EXHIBITS IN HER POSSESSION FOR PURPOSE OF OBTAINING FIREARM EXAMINATION.

04/28/06 MISC  
STATE'S DISCLOSURE FILED

05/02/06 MISC  
STATE'S DISCLOSURE FILED

|          |  |         |
|----------|--|---------|
| 05/02/06 |  | POSTING |
|          | BILL OF PARTICULARS FILED  |         |
| 05/02/06 |  | MISC    |
|          | STATE'S DISCLOSURE FILED.  |         |
| 05/03/06 |  | MISC    |
|          | STATE'S DISCLOSURE FILED   |         |
| 05/03/06 |  | MISC    |
|          | DEFT'S MOTION TO SUPRESS TOGETHER WITH MEMORANDUM IN SUPPORT FILED   |         |
| 05/03/06 |  | MISC    |
|          | DEFT'S MOTION IN LIMINE TOGETHER WITH MEMORANDUM IN SUPPORT FILED  |         |
| 05/03/06 |  | MISC    |
|          | DEFT'S MOTION TO DISQUALIFY TOGETHER WITH MEMORANDUM IN SUPPORT FILED  |         |
| 05/04/06 |  | ORDER   |
|          | ENTRY---SHERIFF TO REMOVE ANDRE PERSOLL FROM NOBLE CORRECTIONAL INSTITUTION NO LATER THAN 05/07/06 TO APPEAR ON 05/08/06 AS A WITNESS AND UPON COMPLETION OF PROCEEDINGS TO RE-CONVEY PERSON BACK TO SAME.   |         |
|          | WARRANT FOR REMOVAL WITH CERT COPY OF ENTRY ISSUED SHERIFF   |         |
| 05/04/06 |  | MISC    |
|          | DEFT'S MOTION TO COMPEL DISCOVERY TOGETHER WITH MEMORANDUM IN SUPPORT FILED  |         |
| 05/04/06 |  | MISC    |
|          | STATE'S MOTION FOR JURY VIEW FILED   |         |
| 05/04/06 |  | FILING  |
|          | STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO FILED.   |         |
| 05/05/06 |  | POSTING |
|          | ORDER TO SUMMONS JURORS ISSUED SHERIFF CLARK COUNTY OHIO   |         |
| 05/05/06 |  | FILING  |
|          | CLERK'S COST BILL FOR CALLING OF JURY \$25.00, FILED.  |         |
| 05/05/06 |  | ORDER   |
|          | ENTRY---STATE TO INFORM DEFENSE COUNSEL AS TO WHEN THEY WILL BE MARKING EXHIBITS SO THAT DEFENSE COUNSEL MAY BE PRESENT IF THEY DESIRE---JURORS SPECIFIED IN ENTRY TO BE EXCUSED---STATE TO IMMEDIATELY DISCLOSE TO DEFENSE THE FULL TERMS OF ANY NEGOTIATED PLEA AGREEMENT THAT IS REACHED WITH JOSHUA WADE THAT WOULD INVOLVE WADES TESTIMONY AT DEANS TRIAL---COURT TO RECONSIDER RULING ON JURY QUESTIONNAIRE---PARTIES RECEIVED FIRST DRAFT OF JURY INSTRUCTIONS FOR TRIAL. |         |
| 05/05/06 |  | ORDER   |
|          | ENTRY---MOTION OF DEFT FOR THIS COURT TO DISQUALIFY ITSELF FROM PRESIDING OVER THIS CASE IS OVERRULED.   |         |
| 05/05/06 |  | ORDER   |
|          | ENTRY---COURT TO ALLOW THE PARTIES TO COOPERATE IN DRAFTING AN ADDITIONAL ONE PAGE QUESTIONNAIRE ON THE ISSUES OF CAPITAL PUNISHMENT AND PRE-TRIAL PUBLICITY---COURT HAS PREPARED A ONE PAGE QUESTIONNAIRE TO BE USED AND IS ATTACHED TO STANDARD QUESTIONNAIRE.   |         |
| 05/05/06 |  | ORDER   |
|          | ENTRY---THIS CASE IS ASSIGNED TO JUDGE RICHARD P CAREY SITTING BY APPOINTMENT FOR PURPOSE TO PRESIDE OVER HEARING ON DEFTS MOTION TO SUPPRESS EVIDENCE.  |         |
| 05/08/06 |  | ORDER   |
|          | DECISION AND ENTRY---AFFIDAVIT AFORDED JUDGE RASTATTER SUFFICIENT PROBABLE CAUSE TO JUSTIFY ISSUING THE SEARCH WARRANT OF THE MOTOR VEHICLE AND OF 415 E LIBERTY ST---   |         |

DEFTS MOTION TO SUPPRESS IS DENIED.

05/09/06 POSTING  
ORDER TO SUMMONS JURORS ISSUED SHERIFF CLARK COUNTY OHIO

05/09/06 FILING  
CLERK'S COST BILL FOR CALLING OF JURY \$25.00, FILED.

05/09/06 POSTING  
ORDER TO SUMMONS JURORS ISSUED SHERIFF CLARK COUNTY OHIO

05/09/06 FILING  
CLERK'S COST BILL FOR CALLING OF JURY \$25.00, FILED.

05/09/06 MISC  
SHERIFF'S FEES FOR CALLING 41 JURORS @ \$3.00 EACH = \$123.00

05/09/06 FILING  
STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO  
FILED.

05/09/06 FILING  
STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO  
FILED.

05/10/06 MISC  
SHERIFF'S FEES FOR CALLING 17 JURORS @ 3.00 EACH = \$51.00

05/10/06 FILING  
STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO  
FILED.

05/11/06 MISC  
AFFIDAVIT OF RICHARD E. MAYHALL ESQ AND JOHN R. BUTZ ESQ  
IN SUPPORT OF APPLICATION FOR DISQUALIFICATION FROM THE  
SUPREME COURT (06AP042) FILED

05/12/06 MISC  
DEFT'S MOTION FOR AN ORDER AUTHORIZING DEFT TO RETAIN  
HAROLD F. RODIN TO ASSIST IN THE PRESENTATION OF DEFT'S CASE  
TOGETHER WITH MEMORANDUM AND EXHIBIT "A" FILED

05/12/06 MISC  
DEFT'S MOTION TO RECONSIDER TOGETHER WITH MEMORANDUM  
AND ATTACHMENT FILED

05/12/06 ORDER  
ORDERED---DEFTS MOTION FOR COURT TO RECONSIDER ORDER  
DENYING ADDITIONAL FUNDS FOR JEFFREY SMALLDON PH.D ID  
SUSTAINED---THE COURT HEREBY APPROVES AN ADDITIONAL SUM OF  
\$5,000.00 FOR A TOTLA OF \$12,500.00---DEFTS MOTION FOR  
ORDER RETAINING HAROLD F RODIN TO ASSIST IN THE  
PRESENTATION OF DEFTS CASE IS SUSTAINED---THE COURT  
APPROVES THE SUM UP TO \$3,500.00 FOR MR RODINS SERVICES

05/12/06 ORDER  
ORDERED--- THE COURT FINDS THE DEFT WOULD NOT BE  
PREJUDICED UPON THE JURYS VIEWING OF THE VIDEOTAPE

05/12/06 MISC  
STATE'S DISCLOSURE FILED

05/12/06 FILING  
STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO  
FILED.

05/15/06 MISC  
ATTORNEY RICHARD E. MAYHALL AND JOHN R. BUTZ MOTION TO WITH  
DRAW AS COUNSEL OF RECORD FOR DEFT TOGETHER WITH MEMORANDUM  
AND ATTACHMENTS FILED

05/15/06 ORDER  
ORDERED---SUPREME COURT RULING---THE AFFIDAVIT OF  
DISQUALIFICATION IS DENIED---THE CASE MAY PROCEED BEFORE  
JUDGE RASTATTER

05/17/06 MISC  
SHERIFF FEE'S FOR CALLING 40 JURORS @ \$3.00 EACH EQUALS  
\$120.00

|          |   |        |
|----------|---|--------|
| 05/17/06 | ORDERED---DEFTS MOTION TO SUPPRESS PRETRIAL PHOTO ARRAY IDENTIFICATIONS OF DEFT IS HEREBY OVERRULED   | ORDER  |
| 05/17/06 | STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO FILED.  | FILING |
| 05/17/06 | STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO FILED.  | FILING |
| 05/17/06 | STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO FILED.  | FILING |
| 05/17/06 | STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO FILED.  | FILING |
| 05/17/06 | STATE'S DISCLOSURE FILED  | MISC   |
| 05/19/06 | STATE'S DISCLOSURE FILED  |        |
| 05/19/06 | WARRANT FOR REMOVAL RETURNED ENDORSED AS FOLLOWS: SHERIFFS RETURN I EXECUTED THE SAME BY CONVEYING ANDRE PIERSOLL TO PLACE DESIGNATED 5/6/06  | RETURN |
| 05/19/06 | STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO FILED.  | FILING |
| 05/19/06 | STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO FILED.  | FILING |
| 05/22/06 | STATE'S DISCLOSURE FILED  | MISC   |
| 05/22/06 | ENTRY---SHERIFF TO REMOVE TERRY SMITH FROM LEBANON CORRECTIONAL INSITUATION/LEBANON, OHIO NO LATER THAN 05/22/06 TO APPEAR AS A WITNESS IN COURT ON THIS CASE ON 05/23/06 AND UPON COMPLETION TO RE-CONVEY PERSON TO SAME.                    | ORDER  |
| 05/22/06 | WARRANT FOR REMOVAL WITH CERT COPY OF ENTRY ISSUED SHERIFF ENTRY---SHERIFF TO REMOVE JASON MANNS FROM WARREN CORRECTIONAL INSITUATION NO LATER THAN 05/23/06 TO APPEAR AS A WITNESS ON 05/23/06 AND UPON COMPLETION TO RETURN PERSON TO SAME. | ORDER  |
| 05/22/06 | WARRANT FOR REMOVAL WITH CERT COPY OF ENTRY ISSUED SHERIFF DEFT'S THIRD REQUESTED JURY INSTRUCTION FILED  | MISC   |
| 05/22/06 | DEFT'S SECOND REQUESTED JURY INSTRUCTION FILED  |        |
| 05/22/06 | DEFT'S REQUEST FOR PROCESS SERVER TOGETHER WITH MEMORANDUM IN SUPPORT FILED   | MISC   |
| 05/22/06 | ENTRY---UPON REQUEST OF ASST PROS ATTY---SHERIFF OF CLARK CO SHALL CONVEY TERRY SMITH FROM THE LEBANON CORR INST TO CLARK CO JAIL NO LATER THAN 5/22/06   | ORDER  |
| 05/23/06 | ORDER---PLTFS MOTION TO APPOINT PROCESS SERVER IS GRANTED--- ANTHONY BENTLEY OR AGENT OF BUCKEYE LEGAL INVESTIGATIONS APPOINTED AS PROCESS SERVICE IN THE ABOVE CAPTION CASE.   | ORDER  |

05/23/06 MISC  
STATE'S MOTION FOR CURATIVE INSTRUCTION FILED

05/24/06 FILING  
STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO  
FILED.

05/24/06 FILING  
STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO  
FILED.

05/24/06 FILING  
STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO  
FILED.

05/25/06 MISC  
STATE'S REQUEST FOR JURY INSTRUCTION ON TRANSFERRED INTENT  
FILED

05/25/06 RETURN  
WARRANT FOR REMOVAL RETURNED ENDORSED AS FOLLOWS: SHERIFFS  
RETURN I CONVEYED JASON MANNS TO THE PLACE DESIGNATED ON  
05/22/06. GENE A KELLY/SHERIFF

05/25/06 RETURN  
WARRANT FOR REMOVAL RETURNED ENDORSED AS FOLLOWS: SHERIFFS  
RETURN I CONVEYED TERRY SMITH TO THE PLACE DESIGNATED ON  
05/22/06. GENE A KELLY/SHERIFF

05/26/06 FILING  
STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO  
FILED.

05/26/06 ORDER  
CT 1 VERDICT - JURY FIND DEFT GUILTY OF ATTEMPTED MURDER OF  
ANDRE PIERSOL---WE FIND THE DEFT DID HAVE A FIREARM.

CT 2 VERDICT - JURY FIND DEFT GUILTY OF ATTEMPTED MURDER OF  
YOLANDA LYLES ---WE FIND THE DEFT DID HAVE A FIREARM.

CT 3 VERDICT - JURY FIND DEFT GULTY OF AGGRAVATED ROBBERY -  
WE FIND THE DEFT DID HAVE A FIREARM.

CT 4 VERDICT - JURY FIND DEFT GULTY OF HAVING WEAPONS UNDER  
DISABILITY.

CT 5 VERDICT - WE THE JURY FIND DEFT GUILTY OF IMPROPERLY  
DISCHARGING FIREARM INTO HABITATION---WE FIND DEFT DID HAVE  
A FIREARM.

CT 6 VERDICT - WE THE JURY FIND DEFT GULTY OF IMPROPERLY  
DICHARGING FIREARM INTO HABITATION---WE FIND DEFT DID HAVE  
FIREARM.

CT 7 VERDICT - WE THE JURY FIND DEFT GUILTY OF ATTEMPTED  
MURDER OF SHANTA CHILTON---WE FIND THE DEFT DID HAVE FIREARM

CT 8 VERDICT - WE THE JURY FIND THE DEFT GUILTY OF ATTEMPTED  
MURDER OF HASSAN CHILTON---WE FIND THE DEFT DID HAVE A  
FIREARM.

CT 9 VERDICT - WE THE JURY FIND THE DEFT GUILTY OF ATTEMPTED  
MURDER OF SHANI APPLIN---WE FIND THAT THE DEFT DID HAVE A  
FIREARM.

CT 10 VERDICT - WE THE JURY FIND DEFT GUILTY OF ATTEMPTED  
MURDER OF JAEADA APPLIN---WE FIND THE DEFT DID HAVE A

FIREARM.

CT 11 VERDICT - WE THE JURY FIND THE DEFT GUILTY OF HAVING WEAPONS UNDER DISABILITY.

CT 12 VERDICT - WE THE JURY FIND THE DEFT GUILTY OF AGGRAVATED MURDER OF TITUS ARNOLD ---WE FIND THE DEFT DID HAVE A FIREARM---WE FIND THE DEFT DID COMMIT AGGRAVATED MURDER OF TITUS ARNOLD.

CT 13 VERDICT - WE THE JURY FIND THE DEFT GUILTY OF AGGRAVATED MURDER OF TITUS ARNOLD---WE DID FIND DEFT DID HAVE A FIREARM---WE FIND THE DEFT DID COMMIT THE AGGRAVATED MURDER OF TITUS ARNOLD

CT 14 VERDICT - WE THE JURY FIND THE DEFT GUILTY OF AGGRAVATED ROBBERY---WE FIND THAT THE DEFT DID HAVE A FIREARM.

CT 15 VERDICT - WE THE JURY FIND THE DEFT GUILTY OF HAVING WEAPONS UNDER DISABILITY.

CT 16 VERDICT - WE THE JURY FIND THE DEFT GUILTY OF HAVING WEAPONS UNDER DISABILITY.

|          |  |        |
|----------|--|--------|
| 05/26/06 |  | ORDER  |
|          | ORDER---JURY WAS SERVED LUNCH FROM MIKE & ROSYS THE SUM OF \$274.16 FOR LUNCH IS ORDERED TO BE PAID FORTHWITH.   |        |
| 05/30/06 |  | ORDER  |
|          | VERDICT FOR #4---WE THE JURY FIND THAT THE AGGRAVATING CIRCUMSTANCES THAT DEFT WAS FOUND GUILTY OF COMMITTING DO OUTWEIGH THE MITIGATING FACTORS AND WE UNANIMOUSLY FIND THAT SENTENCE OF DEATH SHOULD BE IMPOSED UPON DEFT.   |        |
| 05/30/06 |  | FILING |
|          | STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO FILED.   |        |
| 06/01/06 |  | MISC   |
|          | ATTORNEY RICHARD E. MAYHALL MOTION FOR PAYMENT OF EXPENSES TOGETHER WITH MEMORANDUM IN SUPPORT AND EXHIBIT A FILED   |        |
| 06/02/06 |  | ORDER  |
|          | ENTRY---DEFT HAVING BEEN CONVICTED BY JURY OF ALL 16 COUNTS OF THE INDICTMENT---SENTENCES ARE TO RUN CONSECUTIVELY FOR A TOTAL OF 146 YEARS IN OHIO STATE PENITENTIARY---DEFT IS SENTENCED TO DEATH AND TO BE CARRIED OUT FORTHWITH---DEFT ADVISED OF APPEAL RIGHTS. |        |
|          | COPY SERVED BY CERT MAIL ON SUPREME COURT OF OHIO  |        |
| 06/05/06 |  | ORDER  |
|          | ENTRY---TREASURER OF CLARK COUNTY, OHIO TO MAKE PAYMENT TO JAMES F CRATES FOR MITIGATION SERVICES IN THE SUM OF \$5,399.33 FORTHWITH.  |        |
| 06/06/06 |  | FILING |
|          | CERTIFIED MAIL RECEIPT RETURNED SIGNED FOR:<br>SUPREME COURT OF OHIO - /S/AM 06/05/06  |        |
| 06/06/06 |  | ORDER  |
|          | ORDER---AMOUNT OF \$60.30 TO BE PAID TO RONDA BLANTON FORTHWITH FOR LUNCH FOR JURY SHE PAID FOR.   |        |
| 06/07/06 |  | FILING |
|          | STENOGRAPHER'S BILL FOR \$25.00 TO BE PAID TO CLARK CO., OHIO FILED.   |        |
| 06/09/06 |  | MISC   |

06/09/06 INVOICE FOR BALANCE DUE ON REQUEST FOR TRANSCRIPT FILED ORDER  
 ORDER---OHIO PUBLIC DEFENDER IS APPOINTED TO REPRESENT THE  
 DEFT ON APPEAL AND ALL POST CONVICTION REMEDIES---DEFT BE  
 PROVIDED COMPLETE TRANSCRIPT OF PROCEEDINGS AT CLARK COUNTYS  
 EXPENSE.

06/09/06 DEFT'S MOTION FOR APPOINTEMENT OF COUNSEL AND REQUEST FOR MISC  
 TRANSCRIPT OF PROCEEDINGS FILED

06/13/06 DEFT'S MOTION FOR PAYMENT OF EXPENSES TOGETHER WITH MISC  
 MEMORANDUM IN SUPPORT AND ATTACHMENT FILED

06/13/06 ENTRY---EACH MR MAYHALL AND MR BUTZ TO BE FINED \$2,000.00 ORDER  
 TO BE DEDUCTED FROM THEIR COURT-APPOINTED ATTORNEY FEES IN  
 THIS CASE.

06/13/06 ENTRY---DEFT CONVICTED OF 16 COUNTS OF THE INDICTMENT--- ORDER  
 SENTENCES TO RUN CONSECUTIVELY FOR A TOTAL OF 146 YEARS IN  
 THE OHIO STATE PENITENTIARY---ON COUNT 13 AGGRAVATED MURDER  
 OF TITUS ARNOLD WITH FIREARM SPECIFICATION AND TWO CAPITAL  
 SPECIFICATIONS AND BY RECOMMENDATION OF THE JURY THE COURT  
 ORDERS THAT DEFT BE SENTENCED TO DEATH---DEFT TO RECEIVE  
 JAIL TIME CREDIT---DEFT TO BE CONVEYED TO OHIO STATE  
 PENITENTIARY/ORIENT, OHIO---DEFT TO PAY COSTS AND FEES.

06/14/06 ENTRY---TREASURER OF CLARK COUNTY, OHIO TO MAKE PAYMENT TO ORDER  
 ATHENA RESEARCH & CONSULTING LLC FOR EXPERT TESTIMONY ON  
 FIREARMS PROVIDED BY JOHN NIXON IN THE SUM OF \$2880.00  
 FORTHWITH.

06/14/06 DEFT'S MOTION FOR PAYMENT OF EXPENSES TOGETHER WITH MISC  
 MEMORANDUM IN SUPPORT AND EXHIBIT "A" FILED

06/14/06 NOTICE OF APPEAL IN THE SUPREME COURT OF OHIO FILED. MISC  
 ORDER TO CERTIFY RECORD IN DEATH PENALTY CASE FILED.  
 CERTIFICATION IN THE SUPREME COURT OF OHIO FILED.

06/15/06 ENTRY---TREASURER OF CLARK COUNTY, OHIO TO PAY ANTHONY ORDER  
 BENTLEY OF BUCKEYE LEGAL INVESTIGATIONS FOR SERVICES  
 PROVIDED IN THE AMOUNT OF \$1941.10 FORTHWITH.

06/15/06 NOTICE OF APPEAL FILED (06CA0061) MISC  
 CRIMINAL DOCKET STATEMENT FILED  
 REQUEST FOR TRANSCRIPT FILED  
 PRAECIPE FOR TRANSMISSION OF RECORD FILED

06/15/06 WARRANT TO CONVEY TO OHIO STATE PENITENTIARY RETURNED CR  
 ENDORSED AS FOLLOWS:: SHERIFF'S RETURN I CONVEYED "PAPERS  
 ONLY" TO BUREAU OF SENTENCE COMPUTATION

06/30/06 GENE A KELLY, SHERIFF  
 NOTICE OF APPEAL FILED (06CA0063) MISC

IN THE COMMON PLEAS COURT OF CLARK COUNTY, OHIO

|               |           |                        |
|---------------|-----------|------------------------|
| STATE OF OHIO | *         | CASE NUMBER: 05-CR-348 |
| PLAINTIFF,    | *         |                        |
| vs.           | *         |                        |
| JASON DEAN    | *         | ENTRY                  |
| DEFENDANT.    | *         |                        |
|               | * * * * * |                        |

2006 MAR 7 3 18:24  
 FILED

The defendant, represented by John R. Butz and Richard E. Mayhall, appeared in court on this date for oral arguments on several defense motions filed. The State of Ohio was represented by Prosecuting Attorney Stephen A. Schumaker and Assistant Prosecuting Attorney D. Andrew Wilson. The Court reviewed the written motions along with the responses filed by the State, and the Court gave each side the opportunity to supplement those documents with oral arguments. Upon due and deliberate consideration of all the above, the Court hereby renders the following rulings.

I

This matter is before the Court on the defendant's motion for **ALTERNATING VOIR DIRE** which was filed on March 7, 2006.

Sections 2945.03 and 2945.10 of the Ohio Revised Code make it clear that, unless trial procedures are specified by rule or statute, the trial court may conduct the trial according to its sound discretion.

The Court has considered the defense motion but prefers to conduct the voir dire process in the traditional format with the State proceeding first at all times. The rationale for the Court's ruling is (1) the State should proceed first at all times because it, not the defendant, bears the burden of proof, and (2) fairness does not require alternating voir dire. State v. Joseph, 1993 Ohio App. Lexis 6334, Third Appellate District (1993).

Accordingly, the defendant's motion for **ALTERNATING VOIR DIRE** is **OVERRULED**.

II

This matter is before the Court on the defendant's motion for **DAILY TRANSCRIPTS** which was filed on March 7, 2006.

The United States Supreme Court has held that "the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or

appeal when those tools are available for a price to other prisoners. While the outer limits of that principle are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal.” Britt v. North Carolina, 404 U.S. 226 (1971).

Britt does not require, however, that a capital defendant be provided with transcripts of each day’s testimony as the trial proceeds. State v. Treesh, 90 Ohio St.3d 460 (2001)(citing United States v. Sliker, 751 F.2d 477 (2<sup>nd</sup> Cir. 1984)). “Common experience informs us that it is entirely practicable to present an effective defense in a criminal case without daily copy, however convenient daily copy undoubtedly is.” Id. (quoting Sliker). The constitution does not require that indigent defendants be furnished with every possible legal tool “no matter how speculative its value, and no matter how devoid of assistance it may be, merely because a person of unlimited means might choose to waste his resources.” Id. (quoting United States v. MacCollom, 426 U.S. 317 (1976)).

Based upon Treesh, Sliker, and MacCollom, the defendant’s motion for **DAILY TRANSCRIPTS** is **OVERRULED**.

### III

This matter is before the Court on the defendant’s motion to **APPEAR WITHOUT RESTRAINTS OR SHACKLES** which was filed on March 7, 2006.

“No one should be tried while shackled, absent unusual circumstances.” State v. Adams, 103 Ohio St.3d 508 (2004)(quoting State v. Kidder, 32 Ohio St.3d 279 (1987)). “However, shackling is left to the trial court’s sound discretion.” Id. (quoting State v. Richey, 64 Ohio St.3d 353 (1992)). Courts have upheld restraints in trials of defendants with a documented history of violence or escape attempts. See Kennedy v. Cardwell, 487 F.2d 101 (6<sup>th</sup> Circuit 1973). Ohio courts have even allowed the use of electronic stun belts when specifically justified. See State v. Filiaggi, 86 Ohio St.3d 230 (1999) and Adams, supra.

In 1993, the defendant herein, Jason B. Dean, was convicted of robbery, an aggravated felony of the second degree, where he was sentenced to four to fifteen years in the Ohio State Penitentiary (Clark County, Ohio Common Pleas Court Case Number 93-CR-53). In 2005, while being detained in the Clark County Jail on capital murder charges, the defendant attempted to escape. As a result of that escape attempt, the defendant was convicted on September 21, 2005 of attempted escape, a felony of the third degree, and vandalism, a felony of the fifth degree, and sentenced to 6 years in the Ohio State Penitentiary (Clark County, Ohio Common Pleas Court Case Number 05-CR-772).

Because the defendant herein has both a documented history of violence and a recent escape attempt, his motion to **APPEAR WITHOUT RESTRAINTS OR SHACKLES** is **OVERRULED**.

IV

This matter is before the Court on the defendant's motion to **COMPEL DEATH PENALTY DATA** which was filed on March 7, 2006.

Section 2929.021 of the Ohio Revised Code requires clerks to provide notice to the Ohio Supreme Court anytime a capital indictment is filed in their court. Clerks are also mandated by this section to provide notice to the Ohio Supreme Court of the disposition of capital cases. Therefore, the death penalty data that the defendant is seeking is a matter of public record and is accessible to the defense and the State equally. Accordingly, the defendant's motion to **COMPEL DEATH PENALTY DATA** is **OVERRULED**.

V

This matter is before the Court on the defendant's motion to **PROHIBIT REFERENCE TO THE FIRST PHASE AS THE GUILT PHASE** which was filed on March 7, 2006.

"The first phase of a bifurcated capital case may be referred to as the 'guilt phase' as a convenient abbreviation, rather than using awkward terms such as the 'guilt or innocence phase' or 'determination of guilt or innocence phase.'" State v. Mason, 82 Ohio St.3d 144 (1998). A defendant's complaint that the term "guilt phase" is prejudicial to him lacks merit where the trial court repeatedly instructs the jury that the defendant is presumed innocent and the State bears the burden of proving his guilt beyond a reasonable doubt. See State v. Bryan, 101 Ohio St.3d 272 (2004).

Accordingly, the defendant's motion to **PROHIBIT REFERENCE TO THE FIRST PHASE AS THE GUILT PHASE** is **OVERRULED**. However, the Court will instruct the jury that the defendant is presumed innocent, that the State bears the burden of proving his guilt beyond a reasonable doubt, and that this particular case might not proceed to a second phase.

VI

This matter is before the Court on the defendant's motion to **COMPEL LAW ENFORCEMENT TO TURN OVER ALL INFORMATION ACQUIRED DURING INVESTIGATION** which was filed on March 7, 2006.

Criminal discovery is governed by Criminal Rule 16 within the confines of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and neither compels the prosecutor or police to provide a totally open file to the defense. State v. Smith, 1998 Ohio App. Lexis 409 (1998).

Accordingly, the defendant's motion to **COMPEL LAW ENFORCEMENT TO TURN OVER ALL INFORMATION ACQUIRED DURING INVESTIGATION** is OVERRULED.

VII

This matter is before the Court on the defendant's motion to **HAVE OBJECTIONS AND REASONS FOR OVERRULING SAME ON THE RECORD** which was filed on March 7, 2006.

Criminal Rule 51 eliminates such a need and this Court is not required to state specifically its reason for ruling on any particular objection. Criminal Rule 51 states, "An exception, at any stage or step of the case or matter, is unnecessary to lay a foundation for review, whenever a matter has been called to the attention of the court by objection, motion, or otherwise, and the court has ruled thereon."

Accordingly, the defendant's motion to **HAVE OBJECTIONS AND REASONS FOR OVERRULING SAME ON THE RECORD** is OVERRULED.

VIII

This matter is before the Court on the defendant's motion to **FOR COMPLETE COPY OF PROSECUTOR'S FILE TO BE SEALED FOR APPELLATE REVIEW** which was filed on March 7, 2006.

A Court is not obligated to conduct a general Brady search of the prosecutor's file in camera. State v. Chinn, 1991 Ohio App. Lexis 6497 (1991)(citing U.S. v. Holmes, 722 F.2d 37 (1983)). It is not an abuse of discretion for a trial court to overrule an overly broad request that the prosecutor's entire file be inspected. Id.

Accordingly, the defendant's motion to **FOR COMPLETE COPY OF PROSECUTOR'S FILE TO BE SEALED FOR APPELLATE REVIEW** is OVERRULED.

IX

This matter is before the Court on the defendant's motion to **DISMISS THE DEATH PENALTY ON STATE CONSTITUTIONAL GROUNDS** which was filed on March 7, 2006.

The Ohio Supreme Court has routinely affirmed the constitutionality of Ohio's capital-sentencing scheme. See State v. Clemons, 82 Ohio St. 3d at 454 (1998), State v. Evans, 63 Ohio St.3d 231 (1992), State v. Smith, 61 Ohio St.3d 284 (1991), State v. Lott, 51 Ohio St.3d 160 (1990), State v. Jenkins, 15 Ohio St.3d 164 (1984), and State v. Smith, 80 Ohio St.3d 89 (1997).

Specifically, the Ohio Supreme Court held, in Jenkins, that “Ohio’s statutory framework for imposition of capital punishment, as adopted by the General Assembly effective October 19, 1981, . . . does not violate the Eighth and Fourteenth Amendments to the United States Constitution or any provision of the Ohio Constitution.”

Accordingly, the defendant’s motion to **DISMISS THE DEATH PENALTY ON STATE CONSTITUTIONAL GROUNDS** is OVERRULED.

X

This matter is before the Court on the defendant’s motion to **DISMISS THE DEATH PENALTY ON FEDERAL CONSTITUTIONAL GROUNDS** which was filed on March 7, 2006.

The Ohio Supreme Court held, in State v. Jenkins, 15 Ohio St.3d 164 (1984), that “Ohio’s statutory framework for imposition of capital punishment, as adopted by the General Assembly effective October 19, 1981, . . . does not violate the Eighth and Fourteenth Amendments to the United States Constitution or any provision of the Ohio Constitution.”

Accordingly, the defendant’s motion to **DISMISS THE DEATH PENALTY ON FEDERAL CONSTITUTIONAL GROUNDS** is OVERRULED.

XI

This matter is before the Court on the defendant’s motion to **REQUIRE PROSECUTOR TO STATE REASONS FOR EXERCISING PEREMPTORY CHALLENGES** which was filed on March 7, 2006.

Section 2945.21(A)(2) of the Ohio Revised Code states that “in capital cases in which there is only one defendant, each party, in addition to the challenges for cause authorized by law, may peremptorily challenge twelve of the jurors.”

“The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court’s control.” Swain v. Alabama, 380 U.S. 202 (1965). See also State v. Esparza, 39 Ohio St.3d 8 (1988). “It must be exercised with full freedom, or it fails at its purpose.” Lewis v. United States, 146 U.S. 370 (1892).

There is an exception, however, to the “full freedom” privilege attorneys enjoy when exercising peremptory challenges. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids the use of peremptory challenges to purposely exclude “any identifiable group in the community which may be the subject of prejudice.” Swain supra. Therefore, the State cannot exercise a peremptory challenge to purposely exclude a prospective juror based on race. Batson v. Kentucky, 476 U.S. 79

(1986). Nor can the State exercise a peremptory challenge to purposely exclude a prospective juror based on gender. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994).

Accordingly, where a peremptory challenge of a minority prospective juror is alleged by the defense to be discriminatory, this Court will require the State to articulate legitimate race-neutral or gender-neutral reasons supporting the removal. See State v. Singfield, 1994 Ohio App. Lexis 336, Ninth Appellate District (1994). However, the State will not be required, under any other circumstances, to articulate its reason for exercising a peremptory challenge.

## XII

This matter is before the Court on the defendant's motion to **PROHIBIT THE USE OF PEREMPTORY CHALLENGES TO EXCLUDE JURORS WHO EXPRESS CONCERNS ABOUT THE DEATH PENALTY** which was filed on March 7, 2006.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids the use of peremptory challenges to purposely exclude "any identifiable group in the community which may be the subject of prejudice." Swain supra. Therefore, the State cannot exercise a peremptory challenge to purposely exclude a prospective juror based on race. Batson v. Kentucky, 476 U.S. 79 (1986). Nor can the State exercise a peremptory challenge to purposely exclude a prospective juror based on gender. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994).

Accordingly, the defendant's motion to **PROHIBIT THE USE OF PEREMPTORY CHALLENGES TO EXCLUDE JURORS WHO EXPRESS CONCERNS ABOUT THE DEATH PENALTY** is **OVERRULED**.

## XIII

This matter is before the Court on the defendant's motion to **COMPEL DISCLOSURE OF THE PROSECUTING ATTORNEY'S JURY SELECTION DATA** which was filed on March 7, 2006.

A motion to require the prosecuting attorney to disclose jury selection data was properly overruled where no authority existed to support the defendant's position that such must be disclosed, and where there was no evidence that the prosecution possessed any special jury selection data not available to defense counsel. State v. DePew, 1987 Ohio App. Lexis 7724 (1987).

In the case sub judice, the State will not be furnished with any special jury selection data that is unavailable to the defendant.

Accordingly, the defendant's motion to **COMPEL DISCLOSURE OF THE PROSECUTING ATTORNEY'S JURY SELECTION DATA** is **OVERRULED**.

XIV

This matter is before the Court on the defendant's motion to **ALLOW THE DEFENSE TO ARGUE LAST AT THE MITIGATION PHASE** which was filed on March 7, 2006.

Section 2945.10(F) of the Ohio Revised Code provides: "When the evidence is concluded, unless the case is submitted without argument, the counsel for the State shall commence, the defendant or his counsel follow, and the counsel for the State conclude the argument to the jury."

Section 2929.03(D) of the Ohio Revised Code provides that in a capital case, the State has the burden of proving beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors.

Although the defendant has the burden of production at the sentencing phase of a capital trial, the State still bears the burden of persuasion.

In State v. Rogers, 17 Ohio St. 3d 174 (1985), the Ohio Supreme Court held that the State has the right to open and close arguments to the jury during the sentencing phase because the State bears the burden of proving that the aggravating circumstances outweigh the mitigating factors. See also State v. Landrum, 53 Ohio St.3d 107 (1990).

Accordingly, the defendant's motion to **ALLOW THE DEFENSE TO ARGUE LAST AT THE MITIGATION PHASE** is **OVERRULED**.

XV

This matter is before the Court on the defendant's motion **FOR TWELVE (12) PEREMPTORY CHALLENGES** which was filed on March 7, 2006.

Criminal Rule 24(C) provides that "if there is one defendant [as here], each party peremptorily may challenge . . . six jurors in capital cases." Claims for challenges in excess of those provided in the rule have been raised and rejected in State v. Mills, 62 Ohio St. 3d 357 (1992) and in State v. Greer, 39 Ohio St. 3d 236 (1988).

Accordingly, the defendant's motion **FOR TWELVE (12) PEREMPTORY CHALLENGES** is **OVERRULED**.

This matter is before the Court on the defendant's motion **TO PERMIT THE DEFENDANT TO APPEAR IN CIVILIAN CLOTHING AT ALL PROCEEDINGS** which was filed on March 7, 2006.

The Court in State v. Heckler, 1994 Ohio App. LEXIS 3248 (1994), stated as follows:

The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience. The potential effects of presenting an accused before the jury in prison attire need not, however, be measured in the abstract. Courts have, with few exceptions, determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system. This is a recognition that the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play. Id.

In the case sub judice, the Court finds that the defendant should appear in civilian clothing at all times he is exposed to the jury and **IT IS SO ORDERED**. This practice should preserve the defendant's presumption of innocence, a basic component of his fundamental right to a fair trial. However, the Court is not persuaded that this same practice is necessary for pre-trial hearings.

In furtherance of the Court's Order herein, the defendant shall comply with the accepted standards regarding civilian clothing at trial. The defendant must make arrangements, each day, to have his clothing present before the commencement of trial. See State v. Koelling, 1995 Ohio App. Lexis 1056 (1995). The Court will not delay proceedings if the defendant does not timely comply with these standards. Defendant's own failure to make these arrangements, or failure of the contacted person to procure the clothing in a timely manner, cannot be held against the State. Id. If a defendant fails to request financial assistance from the Court, it is presumed that he is able to procure his desired clothing. Id.

Accordingly, the defendant's motion **TO PERMIT THE DEFENDANT TO APPEAR IN CIVILIAN CLOTHING AT ALL PROCEEDINGS** is SUSTAINED in part and OVERRULED in part.

#### XVII

This matter is before the Court on the defendant's motion **FOR DISCLOSURE OF IMPEACHING INFORMATION** which was filed on March 7, 2006.

The State has a continuing duty to disclose all evidence which is available to it pursuant to Criminal Rule 16(B)(1)(a)-(g). Nothing in this rule specifically requires the State to disclose impeaching information.

However, the State has a continuing duty, pursuant to Criminal Rule 16(B)(1)(f), to disclose all evidence known to it, or which may become known to it, that is favorable to the defendant. Suppression by the prosecution of evidence that is favorable to the accused and "material either to guilt or to punishment" is a violation of due process. Brady v. Maryland, 373 U.S. 83 (1963). Evidence suppressed by the prosecution is material within the meaning of Brady only if there exists a "reasonable probability" that the result of the trial would have been different had the evidence been disclosed to the defense. Kyles v. Whitley, 514 U.S. 419 (1995)(quoting United States v. Bagley, 473 U.S. 667 (1985)). As the United States Supreme Court has stressed, "the adjective ['reasonable'] is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id.

The failure to disclose impeachment evidence raises concern over a Brady violation, but only if the suppressed evidence is "material". State v. Reynolds, 2002 Ohio App. Lexis 82 (2002).

Accordingly, the defendant's motion **FOR DISCLOSURE OF IMPEACHING INFORMATION** is SUSTAINED to the extent that the State is ordered to comply with Criminal Rule 16(B)(1)(f), Brady, and Kyles.

#### XVIII

This matter is before the Court on the defendant's motion **TO DISMISS DUE TO CONSTITUTIONAL INFIRMITIES EVIDENT IN THE SELECTION OF THE GRAND JURORS AND/OR THE APPOINTMENT OF THE GRAND JURY FOREPERSON** which was filed on March 7, 2006.

"In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such person in the

community; and (3) that this under-representation is due to systematic exclusion of the group in the jury selection process." Duren v. Missouri, 439 U.S. 357 (1979).

The defendant has failed to allege any facts, pursuant to Duren, which would warrant the Court to find, or even suspect, that the Clark County Grand Jury in this case was biased or improperly selected.

As an alternative to dismissal, the defendant has requested an evidentiary hearing on this motion.

"Grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy." State v. Greer, 66 Ohio St.2d 139 (1981)(citing State v. Patterson, 28 Ohio St.2d 181 (1971)). The trial court, in its discretion, determines whether the defendant has shown a particularized need for the production of grand jury proceedings. Greer at 148.

The defendant has failed to demonstrate a particularized need for an examination of the grand jury proceedings as required by Greer.

Accordingly, the defendant's motion **TO DISMISS DUE TO CONSTITUTIONAL INFIRMITIES EVIDENT IN THE SELECTION OF THE GRAND JURORS AND/OR THE APPOINTMENT OF THE GRAND JURY FOREPERSON** is OVERRULED.

## XIX

This matter is before the Court on the defendant's motion **TO RESTRAIN CERTAIN PARTIES FROM DISCUSSING THE CASE WITH THE ACCUSED** which was filed on March 7, 2006.

The Court finds, pursuant to counsel's written motion, that the defendant has unambiguously invoked his right to remain silent. In Michigan v. Mosley, 423 U.S. 96 (1975), the Supreme Court held that a defendant's decision to invoke his Miranda right to remain silent must be "scrupulously honored" if the coercive pressures of the custodial setting are to be counteracted by the warnings that Miranda requires. However, the Court made it clear that Miranda does not impose a "blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances," Id.

Accordingly, all State agents are hereby ORDERED to "scrupulously honor" the defendant's decision to remain silent. This Order does not restrain State agents from interrogating the defendant, in the absence of defense counsel, if the defendant initiates conversation with them, then knowingly, voluntarily, and intelligently waives his rights, and proceeds to make a voluntary statement.

Under no circumstances, however, shall the Prosecuting Attorney or Assistant Prosecuting Attorney communicate, or cause another to communicate, with the defendant in the absence of defense counsel, as that practice would violate DR 7-104 of the Code of Professional Responsibility.

XX

This matter is before the Court on the defendant's motion **FOR ALL MOTIONS TO BE HEARD ON THE RECORD** which was filed on March 7, 2006.

The Court concurs with the defendant that a case of this magnitude requires that all motions and legal proceedings be heard on the record with the defendant present. Accordingly, the defendant's motion **FOR ALL MOTIONS TO BE HEARD ON THE RECORD** is **SUSTAINED**.

XXI

This matter is before the Court on the defendant's motion **FOR CLOSURE OF PRETRIAL HEARINGS** which was filed on March 7, 2006.

C.P. Sup. R. 11 provides, in pertinent part, that "the judge presiding at the trial or hearing shall permit the broadcasting or recording by electronic means and the taking of photographs in court proceedings open to the public as provided in 3(A)(7) of the Code of Judicial Conduct. . . ." Canon 3(A)(7) of the Code of Judicial Conduct provides that "a trial judge or appellate court should permit . . . the broadcasting, televising, recording, and taking of photographs in the courtroom by news media during sessions of the court, including recesses between sessions. . . ."

The Ohio Supreme Court construed C.P. Sup. R. 11 and Canon 3(A)(7) in State, ex rel. Grinnell Communications Corp., v. Love, 62 Ohio St. 2d 399 (1980), and held that broadcasting is permitted in the courtroom if the court determines that it would not distract participants, impair the dignity of the proceedings, or otherwise materially interfere with the achievement of a fair trial or hearing. See also State v. Rogers, 17 Ohio St.3d 174 (1985).

In Chandler v. Florida, 449 U.S. 560 (1981), the United States Supreme Court interpreted a canon of judicial conduct, similar to Canon 3(A)(7), promulgated by the Florida Supreme Court and held that "the Constitution does not prohibit a state from experimenting with a program [such as is] authorized by [Florida's] revised Canon 3A(7)." The court also stated that "an absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter . . . [T]he appropriate safeguard against such [juror] prejudice is the defendant's right to

demonstrate that the media's coverage of his case - be it printed or broadcast - compromised the ability of the particular jury that heard the case to adjudicate fairly."

The Ohio Supreme Court held that the lawmakers of Ohio instituted a system by which a balance is struck between the public's right to know what goes on in a public courtroom, and a defendant's right to a fair and impartial trial, and, so long as procedures are complied with, the media's presence at a criminal trial will not violate due process. State v. Rogers, 17 Ohio St.3d 174 (1985).

Accordingly, the defendant's motion **FOR CLOSURE OF PRETRIAL HEARINGS** is **OVERRULED**.

XXII

This matter is before the Court on the defendant's motion **TO SUBMIT AN EXTENSIVE WRITTEN QUESTIONNAIRE TO EACH JUROR** which was filed on March 7, 2006.

In all criminal cases in the Clark County Common Pleas Court, prospective jurors complete a standard written juror questionnaire. In addition to this standard questionnaire, the Court will allow the parties to cooperate in drafting an additional one-page questionnaire on the issues of capital punishment and pre-trial publicity.

Accordingly, the defendant's motion **TO SUBMIT AN EXTENSIVE WRITTEN QUESTIONNAIRE TO EACH JUROR** is **OVERRULED**.

XXIII

This matter is before the Court on the defendant's motion for **INDIVIDUAL SEQUESTERED VOIR DIRE** which was filed on March 7, 2006.

"There is no requirement that voir dire in a capital case must be conducted in sequestration." State v. Fears, 86 Ohio St.3d 329 (1999). The trial judge has the discretion to determine "whether a voir dire in a capital case should be conducted in sequestration." State v. Brown, 38 Ohio St. 3d 305 (1988).

The Court will allow individual, sequestered voir dire, but only for pretrial publicity and death qualification issues. Accordingly, the defendant's motion for **INDIVIDUAL SEQUESTERED VOIR DIRE** is **SUSTAINED** in part and **OVERRULED** in part.

XXIV

This matter is before the Court on the defendant's motion requesting **RULINGS ON ALL MOTIONS NO LATER THAN THE COMMENCEMENT OF VOIR DIRE** which was filed on March 7, 2006.

Criminal Rule 12(F) provides in pertinent part that "a motion made pursuant to divisions (C)(1) to (C)(5) of this rule shall be determined before trial. Any other motion made pursuant to division (C) of this rule shall be determined before trial whenever possible."

The Court will comply with Criminal Rule 12 and particularly Criminal Rule 12(F). All pre-trial motions made pursuant to divisions (C)(1) to (C)(5) of Criminal Rule 12 will be ruled upon prior to trial. All other pre-trial motions will be ruled upon prior to trial whenever possible. The Court does, however, reserve the right to defer ruling on particular pre-trial motions where a proper, fair, and just ruling hinges upon the parties first developing certain facts at trial.

Accordingly, the defendant's motion requesting **RULINGS ON ALL MOTIONS NO LATER THAN THE COMMENCEMENT OF VOIR DIRE** is **SUSTAINED** in part and **OVERRULED** in part.

XXV

This matter is before the Court on the defendant's motion to **EXTEND TIME FOR FILING PRE-TRIAL MOTIONS** which was filed on March 7, 2006.

Criminal Rule 12(D) provides that "all pre-trial motions . . . shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pre-trial motions."

In the interest of justice, the Court will allow pre-trial motions to be filed up to, and including, May 5, 2006. Of course, this extension applies to both the defense and the State of Ohio.

Accordingly, the defendant's motion to **EXTEND TIME FOR FILING PRE-TRIAL MOTIONS** is **SUSTAINED**.

XXVI

This matter is before the Court on the defendant's motion **FOR SPECIAL PROCEDURES TO INSULATE THE VENIRE AND THE EMPANELLED JURY** which was filed on March 7, 2006.

The jury selection process in a criminal case is always a sensitive matter, especially in a capital case. References to the defendant's name or to the nature of the case by court personnel, prior to the Court doing so formally and accompanied by appropriate instructions, could prompt prospective jurors to read about the case in the newspaper, to converse with friends and family about the case and/or the death penalty, and to formulate opinions about the case. Accordingly, **IT IS HEREBY ORDERED** that the summons served upon prospective jurors not contain any reference to the defendant's

name or to the nature of the case. IT IS FURTHER ORDERED that court personnel make no reference to the defendant's name or to the nature of the case in the presence of prospective jurors.

The defendant has also moved the Court to issue an Order prohibiting the publication of the names, addresses, and telephone numbers of the prospective jurors and empanelled jurors.

In Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), the United States Supreme Court espoused the view that justification for a restraint on the press must be evidenced by: "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."

The Nebraska test must be supported by evidence, not speculation. As the Ohio Supreme Court stated in State, ex rel. Dayton Newspapers, v. Phillips, 46 Ohio St. 2d 457 (1976), "there is no reason for a trial court to . . . [conclude] that there will be prejudicial publicity . . . and to presume that such publicity will create a . . . threat to the administration of justice . . ." The Ohio Supreme Court also stated, in State, ex rel. Beacon Journal Publishing Co. v. Kainrad, 46 Ohio St.2d 349 (1976), that "an order not to publish cannot be considered unless the circumstances are imperative, and it appears clearly in the record that a defendant's right to a fair trial will be jeopardized and that there is no other resource within the power of the court to protect that right or minimize the danger of it."

The defendant herein has failed to clearly show how his right to a fair trial will be impaired by publication, and his motion for an Order prohibiting the same is OVERRULED.

Accordingly, the defendant's motion **FOR SPECIAL PROCEDURES TO INSULATE THE VENIRE AND THE EMPANELLED JURY** is SUSTAINED in part and OVERRULED in part.

## XXVII

This matter is before the Court on the defendant's motion **TO PROPERLY PRESERVE AND CATALOG ALL PHYSICAL EVIDENCE** which was filed on March 7, 2006.

"Whatever duty the Constitution imposes on the states to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." California v. Trombetta, 467 U.S. 479 (1984). The United States Supreme Court has also held that destruction of evidence by law enforcement officials results in a due process violation only when (1) the destruction was in bad faith, and (2) the police must have known the exculpatory value of the evidence before it was destroyed. Arizona v. Youngblood, 488 U.S. 51 (1988).

The defendant has the right, pursuant to Criminal Rule 16(B)(1)(c) and (d), to inspect, copy and/or photograph all physical evidence, reports of physical examinations, reports of mental examinations, and reports of scientific tests or experiments in the State's possession. However, the Court will impose upon the State no further duty to preserve and catalog all physical evidence other than that which has been established in Trombetta and Youngblood.

Accordingly, the defendant's motion **TO PROPERLY PRESERVE AND CATALOG ALL PHYSICAL EVIDENCE** is OVERRULED.

### XXVIII

This matter is before the Court on the defendant's motion **FOR DISCLOSURE OF EXCULPATORY EVIDENCE** which was filed on March 7, 2006.

The State, not the Court, bears the duty to examine documents and other evidence for potential Brady material. State v. Lawson, 64 Ohio St.3d 336 (1992). Accordingly, the Court orders the State of Ohio to examine the evidence and to disclose, forthwith, to the defense any and all Brady material in its possession or of which it has knowledge. Said material includes more than just exculpatory evidence/material but any other evidence/material favorable to the defense.

Accordingly, the defendant's motion **FOR DISCLOSURE OF EXCULPATORY EVIDENCE** is SUSTAINED.

### XXIX

This matter is before the Court on the defendant's motions (1) **FOR A PRE-TRIAL COPY OF GRAND JURY TRANSCRIPTS**, (2) **TO DISCLOSE NAMES OF GRAND JURY WITNESSES**, and (3) **TO TRANSCRIBE GRAND JURY TESTIMONY PRIOR TO TRIAL** which were filed on March 7, 2006.

In State v. Greer, 66 Ohio St.2d 139 (1981), paragraph two of the syllabus, the Ohio Supreme Court stated that an accused is not entitled to see grand jury transcripts unless the ends of justice require it and he shows that "a particularized need for disclosure exists which outweighs the need for secrecy." See also State v. Webb, 70 Ohio St.3d 325 (1994). Such a need exists "when the circumstances reveal a probability that the failure to provide the grand jury testimony will deny the defendant a fair trial." State v. Davis, 38 Ohio St.3d 361 (1988)(quoting State v. Sellards, 17 Ohio St.3d 169 (1985)). The determination as to whether there exists a particularized need for grand jury testimony is a matter within the trial court's discretion. Greer, supra.

The Court finds, at this time, that the defendant has not shown a particularized need for disclosure of grand jury testimony which outweighs the need for secrecy. However, it is possible that the defendant may demonstrate such a need for grand jury testimony at a later time.

Accordingly, the defendant's motion **FOR A PRE-TRIAL COPY OF GRAND JURY TRANSCRIPTS** and motion **TO DISCLOSE NAMES OF GRAND JURY WITNESSES** are hereby **OVERRULED**. However, the defendant's motion **TO TRANSCRIBE GRAND JURY TESTIMONY PRIOR TO TRIAL** is **SUSTAINED**. Grand jury transcripts shall be prepared prior to trial and submitted to the Court under seal. That seal shall not be broken unless it is done pursuant to further order of this Court.

XXX

This matter is before the Court on the defendant's motion **FOR COMPREHENSIVE VOIR DIRE** which was filed on March 7, 2006.

In general, the purpose of voir dire of a prospective juror is to determine whether he or she has both the statutory qualification of a juror and is free from bias or prejudice for or against either party. Pavilonis v. Valentine, 120 Ohio St.154 (1929). Criminal Rule 24(A) permits the court discretion in determining the method of voir dire and provides in pertinent part that "the court may permit the attorney for the defendant . . . and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination." Generally, "the scope of the examination of prospective jurors is within the discretion of the trial court and the judgment will only be reversed upon a showing that the trial court abused its discretion in restricting the scope of voir dire." State v. Jenkins, 15 Ohio St.3d 164 (1984).

Consistent with this Court's other rulings, individual sequestered voir dire will be limited to pretrial publicity and death qualification issues. During general voir dire, the Court will allow a comprehensive voir dire of prospective jurors so long as it is rationally related to the determination of whether a prospective juror is statutorily qualified and is free from bias or prejudice for or against either party. The Court will exercise its discretion on this issue with the understanding that "sufficient latitude must be afforded in the voir dire of prospective jurors in a capital case." Jenkins, supra.

Accordingly, the defendant's motion **FOR COMPREHENSIVE VOIR DIRE** is **SUSTAINED**.

XXXI

This matter is before the Court on the defendant's motion **FOR NOTICE OF STATE'S EVIDENCE** which was filed on March 7, 2006.

Criminal Rule 12(E)(2) provides in pertinent part that ". . . the defendant, in order to raise objections prior to trial . . ., may request notice of the prosecuting attorney's intention to use evidence in chief at trial, which evidence the defendant is entitled to discover under Crim. R. 16."

Accordingly, the defendant's motion **FOR NOTICE OF STATE'S EVIDENCE** is **SUSTAINED**.

XXXII

This matter is before the Court on the defendant's motion **TO EXCLUDE VENIREPERSONS WHO CANNOT FAIRLY CONSIDER MITIGATING EVIDENCE AND/OR WHO WOULD AUTOMATICALLY VOTE FOR DEATH UPON A FINDING OF GUILT IN THE TRIAL PHASE** which was filed on March 7, 2006.

In the event this case proceeds to the penalty phase, the Court will instruct the jurors, pursuant to Section 2929.04(B) of the Ohio Revised Code, that they 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 other potential mitigating factors enumerated in Section 2929.04(B)(1)-(7). If a prospective juror "unequivocally states that under no circumstances will he follow the instructions of [the Court] and consider fairly the imposition of a sentence of death in [this case]," the Court will excuse that prospective juror for cause pursuant to Section 2945.25(C) of the Ohio Revised Code.

Accordingly, the defendant's motion **TO EXCLUDE VENIREPERSONS WHO CANNOT FAIRLY CONSIDER MITIGATING EVIDENCE AND/OR WHO WOULD AUTOMATICALLY VOTE FOR DEATH UPON A FINDING OF GUILT IN THE TRIAL PHASE** is **SUSTAINED**.

XXXIII

This matter is before the Court on the defendant's motion **TO HAVE THE COURT FOLLOW SECTION 2945.25(C) OF THE OHIO REVISED CODE FOR DEATH QUALIFICATION OF PROSPECTIVE JURORS** which was filed on March 7, 2006.

Ohio Revised Code Section 2945.25(C) provides in pertinent part that a person called as a juror in a capital case may be challenged if "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."

Certainly, and consistent with this Court's other rulings, if a prospective juror "unequivocally states that under no circumstances will he follow the instructions of [the Court] and consider fairly the imposition of a sentence of death in [this case]," the Court will excuse that prospective juror for cause pursuant to Section 2945.25(C) of the Ohio Revised Code. However, the Court reserves the discretion to excuse for cause a prospective juror whose views about capital punishment "would prevent or substantially

impair the performance of his duties as a juror in accordance with his instructions and his oath." See Wainwright v. Witt, 469 U.S. 412 (1985).

Accordingly, the defendant's motion **TO HAVE THE COURT FOLLOW SECTION 2945.25(C) OF THE OHIO REVISED CODE FOR DEATH QUALIFICATION OF PROSPECTIVE JURORS** is SUSTAINED in part and OVERRULED in part.

XXXIV

This matter is before the Court on the defendant's motion **TO REDUCE BIAS IN THE ANNUAL JURY LIST** which was filed on March 7, 2006.

Section 2313.08(B) of the Ohio Revised Code provides two options for jury commissioners in selecting the annual jury list. That section provides in pertinent part that, ". . . for the annual jury list, the commissioners may select all names . . . from the list of electors certified by the board of elections . . . or may select all names . . . from the list of qualified driver licensees certified by the registrar of motor vehicles . . . and from the list of electors certified by the board of elections . . . ."

The jury commissioners in Clark County, Ohio have chosen option number one-selecting all names from the list of electors certified by the board of elections. The use of voter registration lists as the source of prospective jurors is constitutional. State v. Johnson, 31 Ohio St.2d 106 (1972); State v. Lewis, 75 Ohio App.3d 689 (1991).

Accordingly, the defendant's motion **TO REDUCE BIAS IN THE ANNUAL JURY LIST** is OVERRULED.

XXXV

This matter is before the Court on the defendant's motion **FOR DISCLOSURE OF REBUTTAL WITNESSES** which was filed on March 7, 2006.

The criteria for determining whether the State should provide the names of rebuttal witnesses is whether the State reasonably should have anticipated that it was likely to call the witness whether during its case-in-chief or in rebuttal. State v. Lorraine, 66 Ohio St.3d 414 (1993); State v. Howard, 56 Ohio St.2d 328 (1978).

Accordingly, the defendant's motion **FOR DISCLOSURE OF REBUTTAL WITNESSES** is SUSTAINED, but only to the extent that the State is to comply with the standard set forth in Lorraine and Howard.

XXXVIII

This matter is before the Court on the defendant's motion **TO REQUIRE THE JURORS TO ANSWER INTERROGATORIES REGARDING THE MANNER IN WHICH THEY WEIGH THE AGGRAVATING CIRCUMSTANCES AND THE MITIGATING FACTORS** which was filed on March 7, 2006.

Neither the Ohio Rules of Criminal Procedure nor the Ohio Rules of Evidence makes any provision for submission of special interrogatories. Furthermore, Ohio courts have held that a court is correct in refusing to present special interrogatories to a jury in a criminal case. State v. Rohr, 1998 Ohio App. Lexis 6440, Ninth Appellate District (1998); State v. Johnson, 1985 Ohio App. Lexis 8664, Eighth Appellate District (1985).

Accordingly, the defendant's motion **TO REQUIRE THE JURORS TO ANSWER INTERROGATORIES REGARDING THE MANNER IN WHICH THEY WEIGH THE AGGRAVATING CIRCUMSTANCES AND THE MITIGATING FACTORS** is **OVERRULED**.

XXXIX

This matter is before the Court on the defendant's motion **FOR A CHANGE OF VENUE** which was filed on March 8, 2006.

The standard of review upon a court's decision on a motion for change of venue is abuse of discretion. State v. Fox, 69 Ohio St.3d 183 (1994). The Ohio Supreme Court has defined the term abuse of discretion as implying the court's attitude is ". . . unreasonable, arbitrary, or unconscionable . . ." State v. Adams, 62 Ohio St.2d 151 (1980).

"Voir dire is the best vehicle whereby the court may determine whether a potential juror is unsuited to serve." State v. Swiger, 5 Ohio St.2d 151 (1966). The Court, with the assistance of the attorneys for the State of Ohio and the attorneys for the defendant, will conduct a comprehensive and individual voir dire of prospective jurors on the issue of pre-trial publicity. If a fair and impartial jury can be seated in Clark County, Ohio, there will be no need for a change of venue. If a fair and impartial jury cannot be seated in Clark County, Ohio, a change of venue will be necessary. It would be premature for the Court to make such a determination prior to voir dire.

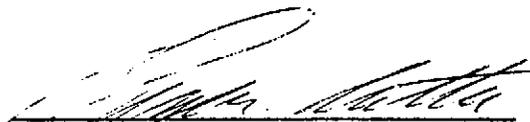
Accordingly, the defendant's motion **FOR A CHANGE OF VENUE** is **OVERRULED** at this time.

XL

This matter is before the Court on the defendant's motion **TO COMPEL DISCLOSURE OF AGGRAVATING FACTORS AND INFORMATION RELATING TO MITIGATING FACTORS** which was filed on March 7, 2006.

All criminal discovery, including this specific issue, is governed by Criminal Rule 16 within the confines of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. There is no evidence to suggest that the State is out of compliance with the rules of discovery.

Accordingly, the defendant's motion **TO COMPEL DISCLOSURE OF AGGRAVATING FACTORS AND INFORMATION RELATING TO MITIGATING FACTORS** is **OVERRULED**.

  
DOUGLAS M. RASTATTER, JUDGE

cc: Stephen A. Schumaker, Attorney for the State of Ohio  
D. Andrew Wilson, Attorney for the State of Ohio  
Richard E. Mayhall, Attorney for the defendant  
John R. Butz, Attorney for the defendant

2006 APR 3 10 48 AM  
CLERK OF COURT

2006 APR -3 A 8:24

FILED

IN THE COMMON PLEAS COURT OF CLARK COUNTY, OHIO

2006 APR 24 PM 4: 23

FILED

|               |   |                        |
|---------------|---|------------------------|
| STATE OF OHIO | * | CASE NUMBER: 05-CR-348 |
| PLAINTIFF,    | * |                        |
| vs.           | * |                        |
| JASON DEAN    | * | ENTRY                  |
| DEFENDANT.    | * |                        |

\* \* \* \* \*

The parties appeared before the Court on this date to address several issues. The defendant was present with one of his attorneys, Richard Mayhall. The defendant waived his right to have co-counsel John Butz present. The State of Ohio was represented by D. Andrew Wilson and Steve Schumaker.

The Court accepted the State's certification that the disclosure of witness Kaboos' address may subject her to physical harm or coercion. Accordingly, pursuant to Criminal Rule 16(B)(1)(e), the State need not disclose to the defense witness Kaboos' address. In the interest of justice and fairness, IT IS HEREBY ORDERED that the State make witness Kaboos available at the Clark County Common Pleas Courthouse the week of May 8, 2006 for defense counsel and their investigator to interview her. The Court, however, is not ordering witness Kaboos to speak with the defense. Whether or not she makes a statement to the defense during this period of time, or any other time, is entirely within her discretion.

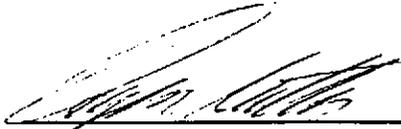
The parties have agreed that Mr. Mayhall will transfer the ballistics evidence to the defense expert on or about April 28, 2006 for an independent examination. The parties have agreed to make necessary stipulations so as to avoid potential chain of custody issues at trial.

The Court addressed with the parties the manner in which it will proceed at trial with respect to Criminal Rule 16(B)(1)(g). The State has already disclosed to the defense virtually all of its audio and video-taped witness statements, therefore, the defense should be alerted, upon a witnesses direct testimony at trial, to any prior inconsistent statements made by that witness. When this occurs, the Court will conduct a bench conference. If there is no dispute among the parties that a prior inconsistent statement exists, the defense will be permitted to impeach the witness. If there is some dispute among the parties, the parties can direct the Court to the relevant portion of the statement and the statement will be reviewed in chambers pursuant to Criminal Rule 16(B)(1)(g). The Court will review all grand jury testimony, which will be prepared and sealed for trial, pursuant to Criminal Rule 16(B)(1)(g).

CLERK OF COURT

138

The two suppression hearings in this case will be heard no sooner than May 8, 2006 since the State has out-of-state witnesses that will not be arriving until that date. The hearings will take place around jury selection.



DOUGLAS M. RASTATTER, JUDGE

cc: Stephen A. Schumaker  
D. Andrew Wilson  
Richard E. Mayhall  
John Butz

FILED  
2006 APR 24 P 4: 23  
ROU MISCENT CLERK  
COURT HOUSE  
COURT ST  
COURT ST

APR 25 2006

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff,

vs.

JASON B. DEAN,

Defendant.

Common Pleas Case No. 05-CR-348

From the Clark County  
Court of Common Pleas

Supreme Court Case No. 06-AP-42

**Judgment Entry**

Attorneys Richard Mayhall and John Butz – counsel for the defendant – have filed an affidavit with the Clerk of this Court under R.C. 2701.03 seeking the disqualification of Judge Douglas Rastatter from acting on any further proceedings in Case No. 05-CR-348 in the Court of Common Pleas for Clark County.

The affiants allege that Judge Rastatter has prejudged their client's guilt on serious felony charges before any evidence has been presented to a jury. They cite a pretrial entry in which the judge suggested that "overwhelming evidence of the defendant's guilt" will be presented during the upcoming trial. In that entry, Judge Rastatter noted that pretrial motions in the case indicate that the government "seized the murder weapon from the defendant's premises." And according to the judge's entry, the government will be providing "compelling ballistics evidence" to the jury, along with "numerous incriminating letters written by the defendant."

The affiants also note that the judge will not allow the defendant to appear at trial without restraints or shackles, and they contend that the judge has refused to consider less restrictive alternatives that might protect public safety just as effectively as shackles.

Judge Rastatter has responded in writing to the affidavit. He states that he wants the defendant to receive a fair trial, and he denies holding any bias or prejudice against the defendant. "I presume him to be innocent of all charges," the judge adds. He explains that his

decision to order the defendant to appear in shackles at trial has nothing to do with the charges now pending against the defendant but instead is based on what the judge describes as the defendant's documented history of violence and a recent escape attempt.

The judge also addresses his written statements about the evidence that he expects to see at the upcoming trial. Those statements were a reflection of his "conditional opinion of the facts" gleaned from remarks made by a prosecuting attorney in court, according to the judge. Judge Rastatter notes that in the entry itself, he pledged that he would not consider those pretrial statements by the prosecutor during the upcoming trial, and in his response to the affidavit, he reiterates that he holds an open mind about the facts and about the defendant's guilt.

Although on their face the judge's statements in his judgment entry may appear to suggest a predisposition about this case, his very thorough response addresses every allegation in the affidavit, and both the tone and the content of that response show that he is neither biased nor prejudiced against the defendant.

The judge's rulings on the shackling issue and on a discovery matter do not provide compelling evidence of bias on the part of the judge. Judicial rulings almost always disappoint one party or another, and absent some evidence that judicial bias or prejudice motivated the rulings, a party's disagreement or dissatisfaction with those rulings does not compel the judge's disqualification. See *In.re Disqualification of Murphy* (1988), 36 Ohio St.3d 605. An affidavit of disqualification "is not a vehicle to contest matters of substantive or procedural law," *In.re Disqualification of Solovan*, 100 Ohio St.3d 1214, 2003-Ohio-5484, ¶ 4, and I therefore cannot address at this stage the legality or propriety of the judge's rulings. I can say, however, that Judge Rastatter was entitled to issue rulings that he felt were correct on the issues before him, and nothing about his decisions to order the shackling of the defendant at trial or to deny particular discovery requests points toward bias or prejudice on his part.

As for the judge's statements in the entry attached to the affidavit, I likewise conclude that those statements do not compel the judge's disqualification. In his response to the affidavit, the judge has offered assurances that he is open-minded and that he presumes the defendant's innocence on the eve of trial. The judge has offered a credible explanation for the "conditional opinion" that he expressed in his earlier judgment entry about the evidence he expects to see at the trial, and he has pledged that any pretrial remarks by the prosecution will not affect the judge's conduct of the trial itself. In light of the judge's assurances, I cannot conclude that he has formed a fixed or anticipatory judgment about disputed factual or legal questions that he or a jury must later resolve during the trial.

I have rejected in previous cases the kinds of concerns voiced by the affiants in this case. As I have said, "A judge rarely hears preliminary aspects of a case without forming conditional opinions of the facts or law. These conditional opinions often assist the parties and their counsel in identifying and narrowing the issues in controversy and facilitate the settlement of cases prior to trial. However, the formation of these conditional opinions is not sufficient to counter the presumption of the judge's ability to render a fair decision based upon the evidence later presented at trial." *In re Disqualification of Brown* (1993), 74 Ohio St.3d 1250, 1251.

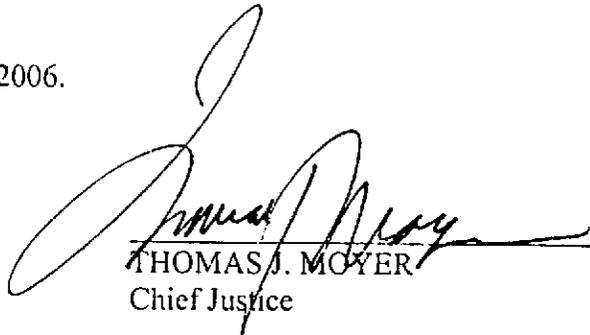
And finally, I cannot conclude on this record that the judge has shown toward the defendant or toward defense counsel the kind of animosity that might warrant disqualification. To be sure, if a judge's words or actions convey the impression that the judge has developed a "hostile feeling or spirit of ill-will," *State ex rel. Pratt v. Weygandt* (1956), 164 Ohio St. 463, 469, or if the judge has reached a "fixed anticipatory judgment" that will prevent the judge from hearing the case with "an open state of mind . . . governed by the law and the facts," *id.*, then the judge should not remain on the case. And Canon 3(B)(4) of the Ohio Code of Judicial Conduct directs judges to be "patient, dignified, and courteous" to parties and their lawyers, even in the

most difficult of circumstances. Still, in the absence of any transcripts reflecting any hostility on the judge's part, and in the face of the judge's assurances about his ability to preside over the case with fairness and courtesy, I find no grounds to disqualify the judge.

As I have said, "[a] judge is presumed to follow the law and not to be biased, and the appearance of bias or prejudice must be compelling to overcome these presumptions." *In re Disqualification of George*, 100 Ohio St.3d 1241, 2003-Ohio-5489, ¶ 5. Those presumptions have not been overcome in this case.

For the reasons stated above, the affidavit of disqualification is denied. The case may proceed before Judge Rastatter.

Dated this 11<sup>TH</sup> day of May, 2006.

  
THOMAS J. MOYER  
Chief Justice

Copies to: Marcia J. Mengel, Clerk of the Supreme Court  
Hon. Douglas M. Rastatter  
Ronald E. Vincent, Clark County Clerk of Courts  
Richard E. Mayhall, Counsel for Defendant  
John R. Butz, Counsel for Defendant  
Stephen A. Schumaker, Clark County Prosecuting Attorney

FILED  
2006 MAY 15 P 5:31  
CLERK OF COURT  
CLARK COUNTY OHIO

IN THE COMMON PLEAS COURT OF CLARK COUNTY, OHIO

STATE OF OHIO

CASE NUMBER: 05-38

PLAINTIFF,

vs.

JASON DEAN

ENTRY

DEFENDANT.

\* \* \* \* \*

RON VINCENT, CLERK  
COMMON PLEAS COURT  
CLARK COUNTY, OHIO

2006 JUN -2 P 12:24

FILED

**Introduction**

On May 25, 2006, following a three-week jury trial, the defendant was convicted of, among other crimes, two counts of aggravated murder with capital specifications for the homicide of Titus Arnold. Those two counts of aggravated murder merge as a matter of law pursuant to Section 2941.25(A) of the Ohio Revised Code. Accordingly, the State of Ohio elected to proceed to the penalty phase on the aggravated murder set forth in count thirteen of the indictment. On May 30, 2006, at the conclusion of the penalty phase, the jury unanimously recommended to this Court that the defendant be sentenced to death. The Court hereby renders this opinion pursuant to Section 2929.03(F) of the Ohio Revised Code.

**Aggravating Circumstances**

The Court has considered and deliberated upon the aggravating circumstances of which the defendant was convicted at trial and which were introduced by the State of Ohio during the penalty phase. These aggravating circumstances include the following:

- A. The defendant committed the aggravated murder of Titus Arnold as part of a course of conduct involving the purposeful killing of, or attempt to kill, two or more people.
- B. The defendant committed the aggravated murder of Titus Arnold while he was committing, or attempting to commit, aggravated robbery, and with prior calculation and design.

**Mitigating Factors**

The Court, pursuant to Section 2929.04(B) of the Ohio Revised Code, has also considered and deliberated upon several mitigating factors which include the following:

- A. The nature and circumstances of the offense.

- B. The specific mitigating factors presented by the defense at the penalty phase of the trial by way of three witnesses (Ron Vincent, Noel Kaech, and Sarah Barrett) and two exhibits (Joshua Wade indictments).
1. The history, character, and background of the defendant pursuant to Section 2929.04(B) of the Ohio Revised Code.
    - a. Evidence that the defendant was physically abused by his father.
    - b. Evidence that the defendant witnessed his father physically abuse his mother.
  2. The degree of the defendant's participation in the offense and the degree of the defendant's participation in the acts that led to the death of the victim pursuant to Section 2929.04(B)(6) of the Ohio Revised Code.
    - a. Evidence that the defendant was not the trigger man.
    - b. Evidence that the trigger man was a juvenile at the time of the crime and is therefore not eligible for the death penalty.
  3. Any other factors that weigh in favor of a sentence other than death pursuant to Section 2929.04(B)(7) of the Ohio Revised Code.
    - a. The emotional testimony of the live-in girlfriend of the defendant's brother, Sarah Barrett.
    - b. Evidence of the ailing health of the defendant's mother and evidence that a death sentence imposed upon the defendant may proximately result in her death.
    - c. The defendant's unsworn statement to the jury.

#### **Findings**

The Court has considered and deliberated upon the aforementioned aggravating circumstances and mitigating factors and has made numerous findings which are set forth below.

The Court finds, as did the jury, that the defendant committed the aggravated murder of Titus Arnold as part of a course of conduct involving the purposeful killing of, or attempt to kill, two or more people. The Court finds that on April 10, 2005, at the Mini-Mart on Selma Road, Springfield, Clark County, Ohio, the defendant attempted to kill Yolanda Lyles and Andre Piersoll. The Court finds that on April 12, 2005, in the 600

block of Dibert Avenue, Springfield, Clark County, Ohio, the defendant attempted to kill Shanta Chilton, Hassan Chilton, Shani Applin, and Jaeada Applin. The Court finds that on April 13, 2005, in the area of Race and High Streets, Springfield, Clark County, Ohio, the defendant purposely killed Titus Arnold.

The Court finds, as did the jury, that the defendant committed the aggravated murder of Titus Arnold while he was committing, or attempting to commit, aggravated robbery, and with prior calculation and design. The Court finds that the defendant and Joshua Wade confronted Titus Arnold with a .25 caliber semi-automatic firearm, demanded his money, and purposely killed him with a .40 caliber semi-automatic firearm when he refused to comply with their demand.

The Court finds there to be nothing mitigating about the nature and circumstances of the offense itself, but for its finding that the defendant was not the principal offender in the homicide of Titus Arnold.

The Court finds that the defendant was physically abused by his father and that he witnessed his father physically abuse his mother. Although the physical abuse evidence was limited to the testimony of one witness, Sarah Barrett, the Court finds her to be a credible witness and accepts her testimony to be true and accurate. Although no testimony was offered to indicate the frequency with which the defendant was physically abused or the frequency with which he witnessed the physical abuse of his mother, the Court finds that one incident of each would have probably resulted in significant psychological trauma to the defendant.

The Court finds that, notwithstanding his father, the defendant has a loving and supportive family. He has been blessed with a supportive mother, close brothers, and a caring sister-in-law in Sarah Barrett. The Court, by way of judicial notice, finds that many of these family members were present in the courtroom during the trial. The Court further finds, by way of judicial notice, that these family members conducted themselves appropriately during the trial and supported the defendant in a positive fashion.

The Court finds that the defendant was not the trigger man in the homicide of Titus Arnold and that the trigger man was Joshua Wade who was a juvenile at the time of the crime and therefore ineligible for the death penalty.

The Court finds that the degree of the defendant's participation in the offense and the degree of the defendant's participation in the acts that led to the death of the victim was extensive. The Court finds that the defendant, as an adult, recruited the juvenile trigger man to engage in the aggravated robbery and aggravated murder of Titus Arnold and exerted great influence over him. The Court finds that the defendant supplied the vehicle, firearms, and ammunition for the commission of these crimes. Finally, the Court finds that the defendant attempted to shoot the victim with a .25 caliber semi-automatic firearm when he and Wade initially confronted him.

The Court finds that the testimony of Sarah Barrett was emotional, heartfelt, and sincere. The Court finds that the defendant's mother is seriously ill and that, quite possibly, a death sentence imposed upon the defendant may proximately result in her death.

Finally, the Court finds nothing mitigating about the unsworn statement the defendant made to the jury on May 30, 2006 during the penalty phase of this case. The Court finds that the defendant has no remorse for his criminal behavior.

### Weighting Analysis

The Court has considered and deliberated upon the aforementioned aggravating circumstances and mitigating factors and has conducted its own, independent, weighting analysis. First, the Court assigned certain weight to the aggravating circumstances and mitigating factors, and then, the Court weighed the mitigating factors against the aggravating circumstances. The Court's objective in conducting this weighing process was to determine whether the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt.

The Court assigns tremendous weight to the aggravating circumstance that the defendant committed the aggravated murder of Titus Arnold as part of a course of conduct involving the purposeful killing of, or attempt to kill, two or more people.

One reason the Court assigns tremendous weight to this aggravating circumstance is that the defendant's course of conduct involved three different and distinct shooting events in Springfield, Ohio over a four-day period. Each of these shooting events was separated by a cooling off period of at least 24 hours, yet the defendant kept coming back for more. He did not stop after the brazen crimes he committed on April 10, 2005. Approximately 48 hours later, he consciously, callously, and deliberately chose to continue the violence with a drive-by shooting on the 12<sup>th</sup>. He did not stop after the bold crimes he committed on the 12<sup>th</sup>. Approximately 24 hours later, he consciously, callously, and deliberately chose to continue the violence with a homicide on the 13<sup>th</sup>.

Another reason why the Court assigns tremendous weight to this aggravating circumstance is that the defendant's course of conduct involved seven victims, one of which was a child, Jacada Applin.

Finally, the Court assigns tremendous weight to this aggravating circumstance because every crime making up the defendant's course of conduct involved the use of a firearm.

The Court assigns tremendous weight to the aggravating circumstance that the defendant committed the aggravated murder of Titus Arnold while he was committing, or attempting to commit, aggravated robbery, and with prior calculation and design. The worst of the worst purposeful killings are those which are committed with prior calculation and design and during the commission of a felony of the first degree.

With respect to the nature and circumstances of the offense, the Court assigns considerable weight to its finding that the defendant was not the trigger man in the homicide of Titus Arnold. I will discuss this mitigating factor in more detail below.

For several reasons, the Court assigns very little weight to its finding that the defendant was physically abused by his father and that he witnessed his father physically abuse his mother. First, notwithstanding his father, the defendant has a loving and supportive family. Second, the defendant's criminal behavior was directed, not at the source of the physical abuse, but at an innocent victim. Third, the Court finds that the defendant was 30 years of age at the time of the crime which means he has had approximately 12 years as an adult to work through the physical and psychological wounds he received as a minor. Finally, the Court finds that the defendant, being an adult citizen of the United States of America, the State of Ohio, and the City of Springfield, had the civil, legal, and moral responsibility to stop the violence, yet he consciously, callously, and deliberately chose to perpetuate it.

The Court assigns no weight to the fact that Joshua Wade is ineligible for the death penalty. Those rendered ineligible for the death penalty by the Supreme Court and Ohio General Assembly are juveniles, not adults who commit capital murder with juveniles. In other words, the Court finds that the defendant herein, as a matter of law and public policy, should not derive any benefit from a law designed to protect a class of individuals of which he is no part.

As previously mentioned, the Court assigns considerable weight to its finding that the defendant was not the trigger man in the homicide of Titus Arnold. There is no question that the defendant and Joshua Wade are both legally responsible for the death of Titus Arnold. The law is clear that when two or more persons have a common purpose to commit a crime and one does one part and another performs the other part, both are equally guilty of the offense. Nevertheless, the Court must evaluate the individual conduct of the defendant in order to arrive at a just sentence for him. In doing so, the Court has found that the defendant did not himself cause the death of Titus Arnold by pulling the trigger of the .40 caliber semi-automatic firearm. Accordingly, the Court gives that finding considerable weight.

The considerable weight the Court has assigned to its finding that the defendant was not the trigger man must be tempered, however, by the Court's finding that the degree of the defendant's participation in the offense and the degree of the defendant's participation in the acts that led to the death of the victim was extensive. Again, the defendant recruited Wade, influenced him, supplied the vehicle, firearms, and ammunition for the commission of the homicide, and attempted to shoot the victim himself with a .25 caliber firearm.

While the Court is sympathetic toward the defendant's mother and her health condition, the Court assigns no weight to its finding that, quite possibly, a death sentence imposed upon the defendant may proximately result in her death. Assigning no weight to

this mitigating factor is certainly no reflection on the defendant's mother. She certainly did not ask to be placed in this position. The Court simply cannot concern itself with the fallout from what it believes to be a just sentence.

The Court has carefully, thoroughly, and deliberately weighed the mitigating factors against the aggravating circumstances in this case and, for the reasons stated above, has come to the conclusion that the aggravating circumstances in count thirteen outweigh the mitigating factors beyond a reasonable doubt.

#### Incidental Issues

The final three issues I will address today played no role in the Court's sentencing determination, however, the Court feels compelled to comment on them since they were raised during the course of the trial.

First, I was outraged by the racial slurs I heard in this case, all of which originated with the defendant. I cannot even imagine the compounded effect they had on juror number eight, Mr. Carter, and the friends and family of Titus Arnold. Yet, in the midst of these horrific slurs, these honorable people continued to conduct themselves with restraint, composure, and dignity. That conduct speaks volumes about their character.

Second, I hope and pray that this case dispels any lingering notion in our community that one race is inferior to another. Jason Dean, a young white man, made Springfield, Ohio a much worse place. I never met Titus Arnold, but I wish I had. He was an honest, hard-working, upstanding young man. He selflessly gave his heart, time, energy, and resources to influence and mold the youth of our community. Titus Arnold, a young black man, made Springfield, Ohio a much better place.

Third, Mr. Butz commented, in his closing argument during the penalty phase, that he knows a loving, merciful, and forgiving God. I appreciated those remarks and they are true indeed. I know that God. Mr. Dean, I hope you come to know that God. No matter how heinous your crimes, he loves you and will forgive you through the blood of His Son, Jesus, if you sincerely choose to repent. But I also know about the wrath of that same God, and how He did not even spare His own Son from the death penalty when His Son took on the sins of the world.

### Sentence

IT IS THE ORDER OF THE COURT that the defendant, having been convicted by jury of all sixteen counts in the indictment, be sentenced to the following:

| <u>Count</u> | <u>Crime</u>                                       | <u>Sentence</u> |
|--------------|--|-----------------|
| 1            | Attempted Murder w/gun spec.                       | 13 years OSP    |
| 2            | Attempted Murder w/gun spec.                       | 13 years OSP    |
| 3            | Aggravated Robbery w/gun spec.                     | 13 years OSP    |
| 4            | Having Weapons While Under Disability              | 5 years OSP     |
| 5            | Discharging Firearm at/into Habitation w/gun spec. | 11 years OSP    |
| 6            | Discharging Firearm at/into Habitation w/gun spec. | 11 years OSP    |
| 7            | Attempted Murder w/gun spec.                       | 13 years OSP    |
| 8            | Attempted Murder w/gun spec.                       | 13 years OSP    |
| 9            | Attempted Murder w/gun spec.                       | 13 years OSP    |
| 10           | Attempted Murder w/gun spec.                       | 13 years OSP    |
| 11           | Having Weapons While Under Disability              | 5 years OSP     |
| 12           | Aggravated Murder w/gun spec. and capital specs.   | Merges w/Ct. 13 |
| 14           | Aggravated Robbery w/gun spec.                     | 13 years OSP    |
| 15           | Having Weapons While Under Disability              | 5 years OSP     |
| 16           | Having Weapons While Under Disability              | 5 years OSP     |

These sentences are ordered to run CONSECUTIVELY for a total of 146 years in the Ohio State Penitentiary.

On count thirteen, for the aggravated murder of Titus Arnold with a firearm specification and two capital specifications, the Court hereby follows the recommendation of the jury and orders that Jason Dean be sentenced to DEATH. This death sentence is to be carried out forthwith.

### Appeal

Mr. Dean, you have a right to appeal these convictions. If you are unable to pay the cost of an appeal, you have the right to appeal without payment. If you are unable to obtain counsel for an appeal, counsel will be appointed without cost. If you are unable to pay the costs of documents necessary for an appeal, the documents will be provided without cost. You have the right to have a notice of appeal timely filed on your behalf. Upon your request, the Court shall appoint counsel for your appeal.

**Closing**

Mr. Dean, may God have mercy on your soul.

These proceedings are closed.

  
DOUGLAS M. RASTATTER, JUDGE

cc: Ohio Supreme Court  
Stephen A. Schumaker  
D. Andrew Wilson  
Darnell E. Carter  
Richard E. Mayhall  
John R. Butz  
Jason Dean

JOURNALIZED  
JUN 5 2006  
RON VINCENT  
CLERK OF COURTS

TO THE CLERK OF THE CLARK COUNTY COMMON PLEAS COURT:

YOU ARE HEREBY ORDERED TO SERVE A COPY OF THE WITHIN OPINION TO THE SUPREME COURT OF OHIO AT 65 SOUTH FRONT STREET, COLUMBUS, OHIO 43215-3431, FORTHWITH, BY CERTIFIED MAIL MAKING THE SAME RETURNABLE ACCORDING TO LAW.

IT IS SO ORDERED



Douglas M. Rastatter, Judge

*mailed 6-2-06  
Postage \$4.65*

**Certified Article Number**  
7160 3901 9849 4485 5317  
**SENDERS RECORD**

05CR0348  
SUPREME COURT OF OHIO  
65 SOUTH FRONT STREET  
COLUMBUS, OHIO 43215-3431

**FILED**  
2006 JUN -2 P 12 24  
RON VINCENT, CLERK  
COMMON PLEAS COURT  
CLARK COUNTY, OHIO

IN THE COMMON PLEAS COURT OF CLARK COUNTY, OHIO

|               |   |                        |
|---------------|---|------------------------|
| STATE OF OHIO | * | CASE NUMBER: 05-CR-348 |
|               | * |                        |
| PLAINTIFF,    | * |                        |
|               | * |                        |
| vs.           | * |                        |
|               | * |                        |
| JASON DEAN    | * | ENTRY                  |
|               | * |                        |
| DEFENDANT.    | * |                        |

\* \* \* \* \*

2006 JUN 13 A 10:47  
 RON VINCENT CLERK  
 COMMON PLEAS COURT  
 CLARK COUNTY, OHIO  
**FILED**

I.

This matter is before the Court to address alleged misconduct of defense counsel, Richard E. Mayhall (#0030017) and John R. Butz (#0003453), during the course of the above-captioned case.

There are two issues before the Court. First, whether defense counsel, in a calculated scheme to remove this Court from the Dean case, manipulated the Court into presiding over a Criminal Rule 16(B)(1)(e) hearing so that the Court would be disqualified from presiding over the Dean trial pursuant to State v. Gillard, 40 Ohio St.3d 226 (1988). Second, whether such conduct, if proven beyond a reasonable doubt, warrants a direct criminal contempt finding by this Court and sanctions commensurate with the gravity of the offense.

II.

The Court, being comprised of Judge Douglas M. Rastatter and Criminal Bailiff Dee Gibson, begins by certifying that all of the facts set forth below occurred in the presence of, or so near to, the Court that it has personal knowledge of them consistent with Evidentiary Rule 602.

On or about Thursday, March 30, 2006, the parties appeared before the Court to address the numerous written motions defense counsel had filed. Just prior to going into the courtroom, the parties met with the Court in chambers to discuss procedure for the motion hearing. Present in chambers with the Court were Mr. Mayhall, Mr. Butz, Stephen A. Schumaker, D. Andrew Wilson, and possibly Darnell E. Carter. During this conference, Mr. Schumaker inquired of defense counsel as to whether they were considering trying the case to a three-judge panel. Mr. Mayhall responded, seemingly in jest, by looking at this Judge and stating, "Not unless you want to get off of the case."

On or about Thursday, April 20, 2006, the State of Ohio, by and through Assistant Prosecuting Attorney Andy Wilson, filed a certification, pursuant to Criminal Rule 16(B)(1)(e), that disclosing the address of their witness, Crystal Kaboos, may subject her

2006 JUN 13 10:10

194

to physical or substantial economic harm or coercion. On or about Friday, April 21, 2006, Mr. Mayhall called the Court's Bailiff, Mrs. Gibson, and requested a hearing on the State's Criminal Rule 16(B)(1)(e) certification.

On Monday, April 24, 2006, the Court held a hearing on the State's Criminal Rule 16(B)(1)(e) certification. Mr. Mayhall was present with his client, Jason Dean. The State was represented by Andy Wilson. Mr. Mayhall made no objection to this Court presiding over the hearing. No testimony, exhibits, or evidence of any kind was offered at the hearing. The hearing consisted solely of statements by counsel. At the conclusion of the hearing, the Court accepted the State's certification and ordered that Crystal Kaboos' address need not be disclosed to the defense. The Court acknowledged that Crystal Kaboos could not be compelled to speak with the defense, however, in the interest of fairness, the Court did order her to be at the courthouse the week of May 8, 2006 so that she would at least be accessible to the defense for interviews in the event she chose to consent thereto.

On or about April 30, 2006, the defendant, who was incarcerated in the Clark County Jail, engaged in a telephone conversation with his brother. Although the Court did not hear the conversation as it was occurring, the Court later acquired personal knowledge of the conversation by listening to an audio recording of the same. The following is a transcription of a pertinent part of that conversation:

Jason Dean: "... but if they find me guilty I already know that judge is going to hit me with maximum consecutive sentences on everything. They [my attorneys] already told me that."

Brother: "Oh yeah that judge is no joke."

Jason Dean: "I might be able to get rid of him though, they [my attorneys] came to see me the other day, right, and they told me that judge might be getting pulled off my case."

Brother: "Get him out of there."

Jason Dean: "He might be getting pulled off my case, because the other day when you guys was in the courtroom and they was sharing that shit..."

Brother: "Yeah"

Jason Dean: "... he wasn't even supposed to be there, he wasn't supposed to be the judge because now he knows that all that shit where they said that I might shoot that bitch in the face and..."

Brother: "Who said that?"

Jason Dean: "He did that day when they was sitting down there trying to . . . oh I don't think you guys was in there . . ."

Brother: "[No] we wasn't"

Jason Dean: "That was the one I went to the other day when nobody . . . I didn't even know I was having a hearing . . ."

Brother: "They try to sneak court dates in . . ."

Jason Dean: "Nah! It was a good one though, but I went in there . . . anyway, then the next day [after the certification hearing], my attorneys came to see me they said he was probably going to be getting pulled off the case because he wasn't never supposed to hear none of that because now that's gonna make his opinion of me biased by letting him know that I'm this violent mother fucker . . ."

On or about Wednesday, May 3, 2006, defense counsel filed a motion, pursuant to State v. Gillard, 40 Ohio St.3d 226 (1988), to disqualify this Court from presiding over the trial. In Gillard, the Ohio Supreme Court held that, when the state seeks to obtain relief from discovery or to perpetuate testimony under Criminal Rule 16(B)(1)(e), the judge who disposes of such a motion may not be the same judge who will conduct the trial.

On Thursday, May 4, 2006, the Court was on the record on other issues when defense counsel informed the Court of their May 3, 2006 motion to disqualify. At that time, Mr. Mayhall cited the Gillard case but conceded that a violation of the rule pronounced therein was often found to be harmless error.

On Friday, May 5, 2006, this Court journalized an Entry addressing the defendant's motion to disqualify. Courts are authorized, under the law, to formulate conditional opinions in cases of the facts or law. "A judge rarely hears preliminary aspects of a case without forming conditional opinions of the facts or law. These conditional opinions often assist the parties and their counsel in identifying and narrowing the issues in controversy and facilitate the settlement of cases prior to trial. However, the formation of these conditional opinions is not sufficient to counter the presumption of the judge's ability to render a fair decision based upon the evidence later presented at trial." In re Disqualification of Brown, 74 Ohio St.3d 1250 (1993)(citing State v. Cox, 21 Ohio Dec. 299, 310 (1911)). In that Entry, the Court expressed its conditional opinion that a violation of the Gillard rule would most likely be harmless error because "the Court anticipates overwhelming evidence of the defendant's guilt at trial . . ." Accordingly, the Court took a calculated risk, overruled the motion to disqualify, and proceeded as the presiding Judge.

On Monday, May 8, 2006, the trial began with individual jury selection. By noon on Wednesday, May 10, 2006, forty-one (41) prospective jurors had been death qualified.

On this same date, defense counsel filed an affidavit of disqualification with the Ohio Supreme Court pursuant to Section 2701.03 of the Ohio Revised Code, seeking the disqualification of this Court from the case. When defense counsel informed the Court that it would be filing said affidavit, Mr. Butz stated, "This is not a personal attack on the Court." The capital murder trial was stayed pursuant to Section 2701.03(D)(1) of the Ohio Revised Code.

On Thursday, May 11, 2006, the Court and the prosecutors filed responses to defense counsel's affidavit with the Ohio Supreme Court. On that same date, approximately 24 hours after counsel filed their affidavit of disqualification, Chief Justice Thomas Moyer vindicated the Court by denying the same.

On Friday morning, May 12, 2006, the Court learned that the affidavit of disqualification had been denied. Immediately thereafter, the Court met with defense counsel and prosecutors in the jury room. The Court informed counsel of the Chief Justice's ruling. The Court told defense counsel that, based upon the prosecutors' response, it had some very serious concerns as to how defense counsel had been operating in this case. The Court mentioned concerns of possible manipulation, deceit, and fraud perpetrated upon the Court. Defense counsel requested that the remainder of this conference be placed on record. Accordingly, we all moved toward the courtroom.

It took a little while for us to reconvene because we decided to secure the attendance of the defendant. Mr. Mayhall and Mr. Butz used this time to secure the appearance of their own counsel, attorney James Heath. While everyone was maneuvering into the courtroom, the Court overheard Mr. Butz state to the defendant, something along the lines of, "This is your fault because you can't keep your mouth shut." The Court then reiterated its statements to counsel on the record and stated that the issue of alleged misconduct by Mr. Mayhall and Mr. Butz would surely be addressed at the conclusion of the capital murder trial.

On Monday morning, May 15, 2006, the parties and prospective jurors were before the Court for general voir dire. Before we began, the parties approached the bench and defense counsel expressed their concerns about their ability to effectively represent the defendant with possible contempt sanctions "hanging over their head." Mr. Mayhall stated,

"I don't understand what rule of professional conduct would be implicated by what we did. As I understand it, the allegation is that we had a Supreme Court case that the State didn't and the issue is was I required to disclose that? I'm not even aware of any rule that said I had to."

After a thorough discussion of the issues, the Court informed counsel that "we're not getting into this now because I told you we'd address that at the conclusion of the case."

The trial continued and, on May 25, 2006, the defendant was convicted of all counts and specifications in the indictment. On May 30, 2006, after the penalty phase, the jury returned a recommendation that the defendant be sentenced to death. On June 2, 2006, the Court followed the jury recommendation and sentenced the defendant to death.

### III.

The Court finds, beyond a reasonable doubt, that defense counsel, in a calculated scheme to remove this Court from the Dean case, manipulated the Court into presiding over a Criminal Rule 16(B)(1)(e) hearing so that the Court would be disqualified from presiding over the Dean trial pursuant to Gillard. This finding is based upon the evidence set forth below.

- A. Upon the State filing its certification pursuant to Criminal Rule 16(B)(1)(e) reference witness Crystal Kaboos, the Court finds that defense counsel immediately recognized an opportunity to have this Court removed from the case, implemented a plan to capitalize on that opportunity, and then manipulatively set in motion a series of events to bring their plan to fruition.
1. With knowledge of the Gillard case and its holding that the judge who disposes of a Criminal Rule 16(B)(1)(e) motion may not be the same judge who will conduct the trial, Mr. Mayhall called Mrs. Gibson and specifically requested a hearing in front of this Court.
  2. On April 24, 2006, when Mr. Mayhall appeared in front of this Court for the Criminal Rule 16(B)(1)(e) hearing, he made no objection, either before, during, or immediately thereafter, with respect to this Court presiding over the hearing.
  3. On or about May 3, 2006, defense counsel filed a motion, pursuant to State v. Gillard, 40 Ohio St.3d 226 (1988), to disqualify this Court from presiding over the trial. The Court finds that defense counsel wanted the Court to sustain its motion since such a ruling would quickly and efficiently accomplish their objective. However, the Court also finds that, at the very least, defense counsel was setting the Court up for their next move.
  4. The Court finds, in hindsight, that Mr. Mayhall invited the Court to overrule the motion to disqualify based upon the harmless error doctrine because such a ruling would then be defense counsel's basis for filing their affidavit of disqualification with the Ohio Supreme Court. On May 4, 2006, the Court was on the record on other issues when Mr. Mayhall informed the Court of his May 3, 2006 motion to disqualify. At that time, Mr. Mayhall cited the

Gillard case but conceded, in a suspiciously enthusiastic tone, that a violation of the rule pronounced therein was often found to be harmless error. The Gillard case held that “violation of the rule we announce today is not per se prejudicial. Thus, while it was error in this case for the judge to have presided at trial after hearing the state's certification, we find that error harmless in light of the overwhelming evidence of guilt . . . .”

5. After the Court overruled, by way of written entry, defense counsel's motion to disqualify based upon the harmless error doctrine, defense counsel filed their affidavit of disqualification with the Ohio Supreme Court pursuant to Section 2701.03 of the Ohio Revised Code.
- B. The Court finds that defense counsel had knowledge of the Gillard case prior to the Criminal Rule 16(B)(1)(e) hearing. This finding is based upon the evidence set forth below.
1. The Court finds that Mr. Mayhall's statement during the March 30, 2006 meeting in chambers exposed defense counsel's intent, or at least desire, to have this Court removed from the case. When Mr. Schumaker inquired of defense counsel as to whether they were considering trying the case to a three-judge panel, Mr. Mayhall responded by looking at this Judge and stating, “Not unless you want to get off of the case.” Although Mr. Mayhall seemingly made that statement in jest, it has given this Court tremendous insight into defense counsel's mens rea heading into the Dean trial. The Court finds that the statement exposed defense counsel's intent, or at least desire, to have this Court removed from the case.
  2. The Court finds that defense counsel had a dual motive for having this Court removed from the case, one of which was articulated by the defendant himself in the April 30, 2006 telephone conversation with his brother, during which he stated, “. . . but if they find me guilty I already know that judge is going to hit me with maximum consecutive sentences on everything. They [my attorneys] already told me that.” Their second motive stems from a longstanding personal revulsion of the Court, dating back to when this Judge was an assistant prosecuting attorney. Accordingly, the Court vehemently disagrees with Mr. Butz's statement that “This is not a personal attack on the Court.”
  3. The Court finds that defense counsel told the defendant, the day after the Criminal Rule 16(B)(1)(e) hearing, that this Court would probably be removed from the case. The Court bases this finding on the defendant's statement to his brother in the April 30, 2006

recorded telephone conversation, during which he stated, “anyway, then the next day [after the certification hearing], my attorneys came to see me they said he was probably going to be getting pulled off the case because he wasn’t never supposed to hear none of that because now that’s gonna make his opinion of me biased by letting him know that I’m this violent mother fucker . . .” The Court finds the timing of this attorney-client communication to be compelling evidence of defense counsel’s prior knowledge of the Gillard case because it would be extremely unlikely that defense counsel just happened upon the case within 24 hours of the Criminal Rule 16(B)(1)(e) hearing.

4. The Court finds that Mr. Butz’s statement to his client in the courtroom on May 12, 2006 to the effect of, “This is your fault because you can’t keep your mouth shut,” is compelling evidence of the existence of a calculated scheme implemented by defense counsel for which they got caught.
5. The Court finds that defense counsel’s repeated expression, during the course of the trial, of their overwhelming concern regarding sanctions is evidence of their consciousness of guilt. If they did nothing wrong, they would have nothing to be concerned about.
6. The Court finds that, during the numerous dialogues between the Court and defense counsel regarding their alleged misconduct, defense counsel never stated that they had no prior knowledge of the Gillard case. On the contrary, defense counsel implied prior knowledge of the Gillard case by framing the issue as to whether or not they had a duty to disclose it to the Court. Specifically, on May 15, 2006, Mr. Mayhall stated, “I don’t understand what rule of professional conduct would be implicated by what we did. As I understand it, the allegation is that we had a Supreme Court case that the State didn’t and the issue is was I required to disclose that? I’m not even aware of any rule that said I had to.” The Court finds this to be compelling evidence of their prior knowledge of the Gillard case.

#### IV.

Having found, beyond a reasonable doubt, that defense counsel, in a calculated scheme to remove this Court from the Dean case, manipulated the Court into presiding over a Criminal Rule 16(B)(1)(e) hearing so that the Court would be disqualified from presiding over the Dean trial pursuant to Gillard, the Court will now address the second issue for review.

The Court finds that defense counsel's conduct warrants (1) a direct criminal contempt finding by this Court, and (2) sanctions commensurate with the gravity of the offense.

Contempt is considered an act or omission that substantially disrupts the judicial process in a particular case. In re Contempt of Morris, 110 Ohio App.3d 475 (1996). The Ohio Supreme Court has defined contempt as "conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions." Windham Bank v. Tomaszczyk, 27 Ohio St.2d 55 (1951).

Under Ohio law, there are two types of contempt, direct and indirect. A direct contempt is any act performed in the presence of the court, whether in the court's actual presence or constructive presence, which offends the dignity of the court or impairs its efficient administration of justice. State v. Kilbane, 61 Ohio St.2d 201 (1980). Direct contempt usually involves some form of misbehavior in the courtroom and in the presence of the judge. In re Cox, 1999 Ohio App. LEXIS 6266 (1999). When a judge has viewed and/or heard such misbehavior, he or she is said to have personal knowledge of the contemptible actions. See In re Neff, 20 Ohio App.2d 213 (1969). Courts, in their sound discretion, have the power to determine the kind and character of conduct which constitutes direct contempt of court. State v. Kilbane, 61 Ohio St.2d 201 (1980).

A judge may summarily punish direct contempt pursuant to its inherent authority. Zakany v. Zakany, 9 Ohio St.3d 192 (1984); Ratcliff v. Adkins, 1992 Ohio App. LEXIS 4723 (1992). Further, authority to summarily punish direct contempt is granted by Section 2705.01 of the Ohio Revised Code which provides that "a court, or judge at chambers, may summarily punish a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice." Summary punishment of direct contempt is justified in order to promptly and expediently vindicate the authority of the court and the integrity of the judicial system. In re McGinty, 30 Ohio App.3d 219 (1986).

The power of a court to hold an individual in contempt without prior notice and a hearing "is justified because the trial judge is personally aware of the relevant facts. It is necessary . . . so that there can be immediate punishment to vindicate the court's authority and to prevent a continuing obstruction of justice." State v. Kilbane, 61 Ohio St.2d 201 (1980).

Where a direct contempt is involved, the limits placed on contempt sanctions by Chapter 2705 of the Ohio Revised Code are inapplicable. See Kilbane (citing Myers v. State, 46 Ohio St. 473 (1889) and In re Roberts, 175 Ohio St.123 (1963)). "In imposing punishment for acts of direct contempt, courts are not limited by legislation but have the power to impose a penalty commensurate with the gravity of the offense." See Kilbane at Syllabus 1.

Indirect contempt, on the other hand, involves acts committed outside the presence of the court that demonstrate a lack of respect for the court or its lawful orders. First Bank of Marietta v. Mascrote, Inc., 125 Ohio App. 3d 257 (1998). Acts of indirect contempt may not be punished summarily. Rather, the accused is entitled to procedural safeguards such as written notice, an adversary hearing, and the opportunity for legal representation. R.C. 2705.03 ; State ex rel. Seventh Urban, Inc. v. McFaul, 5 Ohio St.3d 120 (1983); State v. Belcastro, 139 Ohio App. 3d 498 (2000). "Where a judge has no personal knowledge of the alleged act of contempt because of its commission beyond the court's actual physical presence, the court should strictly adhere to the procedure outlined in R.C. 2705.03 requiring a written charge, notice to the defendant of the charge, the opportunity for the defendant to be represented by counsel, and an adversary hearing upon the issues." In re Cox, 1999 Ohio App. LEXIS 6266 (1999)(citing State v. Local Union 5760, 172 Ohio St. 75 (1961)).

The Court finds that defense counsel's conduct warrants a direct criminal contempt finding because it was performed in the actual and constructive presence of the Court and it offended the dignity of the Court and impaired its efficient administration of justice. See Kilbane. The Court cannot imagine a greater attack on its dignity than defense counsel using the Court's very own bailiff, courtroom, time, energy, and resources to deceive and manipulate the Court in a calculated scheme to have it removed from a capital case.

There is no question that defense counsel's conduct impaired the efficient administration of justice. A capital trial was stayed for two and one half days, jeopardizing the work that had already been completed and inconveniencing the Court, prosecutors, law enforcement officers, victim/witness advocates, witnesses, and 41 prospective jurors. Even when the trial resumed, there were countless encounters and delays during the course of the trial revolving around defense counsel's alleged misconduct.

The Court further finds that it can lawfully hold defense counsel in contempt without a hearing "because the trial judge is personally aware of the relevant facts [and] it is necessary . . . so that there can be immediate punishment to vindicate the court's authority and to prevent a continuing obstruction of justice." Id. Even Mr. Mayhall, on May 15, 2006, stated on the record, "Well, your Honor, I don't think the facts are significantly in dispute. Okay. And most of everything appears on the record."

Courts may further classify contempt as either civil or criminal. See State ex rel. Corn v. Russo, 90 Ohio St.3d 551, 554 (2001). The distinction depends largely upon the character and purpose of the sanction imposed. Brown v. Executive 200, Inc., 64 Ohio St.2d 250 (1980). Civil contempt sanctions are remedial or coercive in nature and are for the benefit of the complainant. Id. Criminal contempt sanctions, however, are punitive in nature and are designed to vindicate the authority of the court. State ex rel. Johnson v. Perry Cty. Court, 25 Ohio St.3d 53 (1986)(quoting State v. Local Union 5760, 172 Ohio St. 75 (1961)). Criminal contempt sanctions are usually characterized by an unconditional prison term or fine. See Brown.

The Court finds that the contempt herein can be classified as criminal contempt due to the punitive character and purpose of the sanction that will be imposed.

V.

Mr. Mayhall and Mr. Butz make a good portion of their living challenging the conduct of prosecutors and law enforcement officers, and often seek sanctions from the Court against them in the form of evidence suppression. Suppression of evidence can be devastating to a case, and, accordingly, prosecutors and law enforcement officers must always be careful to conduct themselves within the bounds of the law.

Mr. Mayhall and Mr. Butz seem to believe they have a free pass to engage in any and all conduct so long as they advance the position that they are zealously representing their client. On May 15, 2006, Mr. Mayhall stated, "I don't think I did anything wrong." On that same date, Mr. Butz stated, "I've been doing this for 36 and a half years, and no judge has ever suggested that anything that I did was contemptuous or in violation of any rule, and to now be faced with when the case is over the possibility of being sanctioned for things I don't think we did wrong." The Court is astonished that they do not see the misrepresentation, dishonesty, fraud, and deceit in their conduct.

Certainly, they can, and should, zealously represent their client, however, they too must always be careful to conduct themselves within the bounds of the law. If they do not, there must be consequences.

The Court must determine what consequences, or sanctions, are commensurate with the gravity of the offense. When reviewing a finding of contempt, including a trial court's imposition of penalties, an appellate court must apply an abuse of discretion standard. In re Contempt of Morris, 110 Ohio App. 3d 475 (1996)(citing Dozer v. Dozer, 88 Ohio App.3d 296 (1993); Arthur Young & Co. v. Kelly, 68 Ohio App.3d 287 (1990)). An abuse of discretion connotes more than an error of law or judgment. It implies the trial court's attitude is unreasonable, arbitrary or unconscionable. Blakemore v. Blakemore, 5 Ohio St.3d 217 (1983).

As the Court already noted, it cannot imagine a greater attack on its dignity than defense counsel using the Court's very own bailiff, courtroom, time, energy, and resources to deceive and manipulate the Court in a calculated scheme to have it removed from a case. Defense counsel's conduct is exacerbated by the following facts: (1) It occurred in a capital murder case, (2) they are lawyers and therefore prohibited, pursuant to DR 1-102(A)(4) of the Code of Professional Responsibility, from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, (3) they are lawyers and are called to "maintain high standards of professional conduct" pursuant to EC 1-5 of the Code of Professional Responsibility, (4) they believe they did nothing wrong, and (5) in an effort to coerce the Court into retreating from its firm stance on their misconduct, they sought leverage over the Court by continually arguing ineffective assistance of counsel.

The Court hereby finds Mr. Mayhall and Mr. Butz in direct criminal contempt of this Court, and IT IS HEREBY ORDERED that each be fined in the amount of \$2,000, a sum which the Court will deduct from their court-appointed attorney fees in this case.



DOUGLAS M. RASTATTER, JUDGE

cc: Stephen A. Schumaker  
Darnell E. Carter  
D. Andrew Wilson  
Richard E. Mayhall  
John R. Butz

RON VINCENT, CLERK  
COURT CLERK'S OFFICE  
JUN 13 2006

2006 JUN 13 A 10:47

**FILED**

IN THE COMMON PLEAS COURT OF CLARK COUNTY, OHIO

STATE OF OHIO \* CASE NUMBER: 05-CR-0048  
 PLAINTIFF, \*  
 vs. \*  
 JASON DEAN \* ENTRY  
 DEFENDANT. \*

2006 JUN 13 A 10:47  
 SPON. VICINENT, CLERK  
 CLARK COUNTY, OHIO

FILED

\* \* \* \* \*

On May 2, 2005, the defendant was indicted by the Clark County Grand Jury on a total of sixteen counts, two of which were aggravated murder charges with firearm and capital specifications. Upon the defendant's oral and written waiver of his right to a speedy trial, the case was set for trial on May 8, 2006.

The trial did in fact commence on May 8, 2006. On May 25, 2006, the jury returned a verdict of guilty on all sixteen counts and their corresponding specifications. The Court ruled that the two aggravated murder convictions merge for sentencing purposes and the State of Ohio elected to proceed on count thirteen. The defendant waived his right to a pre-sentence investigation and mental examination pursuant to Section 2929.03 of the Ohio Revised Code.

On May 30, 2006, the second phase of the trial commenced. On that same date, the jury found that the aggravating circumstances of which the defendant was convicted outweighed the mitigating factors beyond a reasonable doubt and returned a verdict recommending that the defendant be sentenced to death.

On June 2, 2006, the defendant appeared before the Court for sentencing. With respect to count thirteen, the Court limited its consideration to the aggravating circumstances and the mitigating factors and found that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. The reasons upon which the Court made this finding are set forth in a separate opinion. With respect to all other counts, the Court considered the evidence presented at trial, the defendant's prior criminal record, and the arguments of counsel.

IT IS HEREBY ORDERED that the defendant, having been convicted by jury of all sixteen counts in the indictment, be sentenced to the following:

| <u>Count</u> | <u>Crime</u>                   | <u>Sentence</u> |
|--------------|--------------------------------|-----------------|
| 1            | Attempted Murder w/gun spec.   | 13 years OSP    |
| 2            | Attempted Murder w/gun spec.   | 13 years OSP    |
| 3            | Aggravated Robbery w/gun spec. | 13 years OSP    |

|    |  |                 |
|----|--|-----------------|
| 4  | Having Weapons While Under Disability              | 5 years OSP     |
| 5  | Discharging Firearm at/into Habitation w/gun spec. | 11 years OSP    |
| 6  | Discharging Firearm at/into Habitation w/gun spec. | 11 years OSP    |
| 7  | Attempted Murder w/gun spec.                       | 13 years OSP    |
| 8  | Attempted Murder w/gun spec.                       | 13 years OSP    |
| 9  | Attempted Murder w/gun spec.                       | 13 years OSP    |
| 10 | Attempted Murder w/gun spec.                       | 13 years OSP    |
| 11 | Having Weapons While Under Disability              | 5 years OSP     |
| 12 | Aggravated Murder w/gun spec. and capital specs.   | Merges w/Ct. 13 |
| 14 | Aggravated Robbery w/gun spec.                     | 13 years OSP    |
| 15 | Having Weapons While Under Disability              | 5 years OSP     |
| 16 | Having Weapons While Under Disability              | 5 years OSP     |

These sentences are ordered to run CONSECUTIVELY for a total of 146 years in the Ohio State Penitentiary.

On count thirteen, the aggravated murder of Titus Arnold with a firearm specification and two capital specifications, the Court hereby follows the recommendation of the jury and orders that Jason Dean be sentenced to DEATH.

The Court then advised the defendant of his appellate rights as follows:

“Mr. Dean, you have a right to appeal these convictions. If you are unable to pay the cost of an appeal, you have the right to appeal without payment. If you are unable to obtain counsel for an appeal, counsel will be appointed without cost. If you are unable to pay the costs of documents necessary for an appeal, the documents will be provided without cost. You have the right to have a notice of appeal timely filed on your behalf. Upon your request, the Court shall appoint counsel for your appeal.”

The defendant shall receive jail time credit from April 21, 2005 to September 26, 2005.

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

  
 DOUGLAS M. RASTATTER, JUDGE

2006 JUL 10 10:47  
 FILED  
 COURT OF APPEALS  
 OHIO

cc: Ohio Supreme Court                      Richard Mayhall  
 Stephen A. Schumaker                      John Butz  
 D. Andrew Wilson                              Jason Dean  
 Darnell E. Carter

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

|                             |   |                        |
|-----------------------------|---|------------------------|
|                             | : |                        |
| STATE ex rel. FRANK DAVIS,  | : |                        |
| Petitioner                  | : | C.A. CASE NO. 06-CA-66 |
| vs.                         | : |                        |
|                             | : |                        |
| JUDGE DOUGLAS M. RASTATTER, | : | WRIT OF MANDAMUS       |
| Respondent                  | : |                        |

. . . . .

Rendered on the 29th day of September, 2006.

. . . . .

{¶ 1} This matter is before the court on a petition for Writ of Mandamus filed by Petitioner, Frank Davis, on July 6, 2006, against Respondent, Judge Douglas M. Rastatter. Petitioner subsequently filed a motion for default judgment, Judge Rastatter having failed to file a responsive pleading after being served by certified mail on July 11, 2006.

{¶ 2} In an appeal filed by Petitioner Davis, we reversed his convictions for three drug offenses and the sentences Respondent imposed on them, and we remanded the case to the trial court for further proceedings on the charges against Petitioner from which those convictions arose. *State v. Davis* (March 31, 2006), Clark App. No. 2005-CA-43.

{¶ 3} "A court that reverses or affirms a final order,

judgment, or decree of a lower court upon appeal on questions of law, shall not issue execution, but shall send a special mandate to the lower court for execution or further proceedings.

{¶ 4} "The court to which such mandate is sent shall proceed as if the final order, judgment, or decree had been rendered in it. On motion and for good cause shown, it may suspend an execution made returnable before it, as if the execution had been issued from its own court. Such suspension shall extend only to stay proceedings until the matter can be further heard by the court of appeals or the supreme court." R.C. 2505.39.

{¶ 5} An order of remand is directed to the trial court, and it is the responsibility of the trial court to see that the order is carried out. *Mid-Ohio Liquid Fertilizers, Inc. v. Lowe* (1984), 14 Ohio App.3d 36. The judgment of the court of appeals is the law of the case binding the trial court on remand. *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 1996-Ohio-174. In the absence of extraordinary circumstances, the court to which a case is remanded has no discretion to disregard the order of the remand from the court of appeals. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1.

{¶ 6} Respondent is the judge of the Court of Common Pleas

of Clark County assigned to preside in the State's case against Petitioner to which our remand applies. On July 26, 2006, disregarding our mandate, Respondent journalized an order requiring Petitioner to continue to serve two of the three sentences on convictions we reversed. That was not only contrary to the law of the case as we decided it; it was also a failure to exercise the discretion we had ordered Respondent to exercise.

{¶ 7} Petitioner's motion for default judgment is Granted.

Respondent is ordered to assign the case in which the indictment charging Petitioner with three drug offenses was filed for trial on the court's docket and to order Petitioner released from imprisonment to stand trial on those charges, forthwith, and to proceed to trial on any of those charges not dismissed by the State.

So Ordered.

---

THOMAS J. GRADY, PRESIDING JUDGE

---

JAMES A. BROGAN, JUDGE

---

MIKE FAIN, JUDGE

Copies mailed to:

Matthew Ryan Arntz, Esq.  
George A. Katchmer, Esq.  
17 S. St. Clair St.  
Suite 320  
Dayton, OH 45401-4235

Hon. Douglas A. Rastatter  
101 N. Limestone Street  
Springfield, OH 45502

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO :  
Plaintiff-Appellee : C.A. CASE NOS. 2006CA61/2006CA63  
v. : T.C. NO. 05CR348  
JASON DEAN : (Criminal Appeal from  
JOHN BUTZ AND RICHARD MAYHALL : Common Pleas Court)  
Defendants-Appellants :  
:

.....  
**OPINION**

Rendered on the 9<sup>th</sup> day of March, 2007.  
.....

WILLIAM H. LAMB, Atty. Reg. No. 0051808, Assistant Prosecuting Attorney, P. O. Box 1608,  
Springfield, Ohio 45501  
Attorney for Plaintiff-Appellee

RICHARD A. CLINE, Atty. Reg. No. 0001854, 580 South High St., Suite 200, Columbus, Ohio  
43215  
Attorney for Defendants-Appellants John Butz and Richard Mayhall  
.....

WOLFF, P.J.

{¶ 1} Richard Mayhall and John Butz, trial counsel for Jason Dean in his capital murder case, appeal from a judgment of the Clark County Court of Common Pleas, which found them to be in direct criminal contempt and imposed a fine of \$2,000 each. Mayhall and Butz appeal from

and Butz appeal from the contempt citations. As discussed infra, we agree with Mayhall and Butz that the trial court erred in holding them in contempt without notice and the opportunity to be heard and without the benefit of a neutral and detached judicial officer.

{¶ 2} The following facts are relevant to this appeal.

{¶ 3} Mayhall and Butz represented Dean in his capital murder case, which involved six counts of attempted murder, two counts of aggravated murder, four counts of having weapons while under disability, two counts of aggravated robbery, and two counts of improperly discharging a firearm into a habitation. Prior to trial, Dean's counsel filed numerous motions, including a motion for disclosure of exculpatory evidence and a demand for discovery. On April 20, 2006, the state filed a certification that disclosure of the address of a witness, Crystal Kaboos, might subject her to physical harm or coercion (Doc. #126). Dean requested a hearing on the state's certification.

{¶ 4} On April 24, 2006, the court held a hearing on the state's certification as well as other issues. No witnesses testified. The trial court "accepted the State's certification that the disclosure of witness Kaboos' address may subject her to physical harm or coercion," and it held that the state need not disclose Kaboos' address to the defense. In the interest of justice and fairness, the court further required the state to make Kaboos available at the Clark County Common Pleas Courthouse the week of May 8, 2006 for defense counsel and their investigator to interview her; however, the court did not order Kaboos to speak with the defense. (Doc. #128).

{¶ 5} On May 3, 2006, Dean filed a motion for the court to disqualify itself. (Doc. #138). Citing *State v. Gillard* (1988), 40 Ohio St.3d 266, 533 N.E.2d 272, Dean asserted that, because the trial court heard the evidence regarding the Crim.R. 16(B)(1)(e) certification, the court may not

certification, the court may not preside over his trial. The *Gillard* court held that “when the state seeks to obtain relief from discovery or to perpetuate testimony under Crim.R. 16(B)(1)(e), the judge who disposes of such motion may not be the same judge who will conduct the trial.” *Gillard*, 40 Ohio St.3d 226 at paragraph one of the syllabus. Dean noted that, at the April 24, 2006 hearing, the prosecutor had represented to the court that Kaboos had been threatened with death, including a specific threat to shoot her in the face.

{¶ 6} On May 5, 2006, the court held another hearing to address several pending motions, including the motion to disqualify. The court determined that it would take the matter under advisement. (Doc. #142). Later that day, the court filed an entry overruling the motion to disqualify. The court cited two reasons: (1) that the court anticipated “overwhelming evidence of the defendant’s guilt at trial which would render a *Gillard* violation harmless,” and (2) that the court did not hear any evidence about Dean and whether he had made threats. The court noted that the April 24<sup>th</sup> hearing was not an evidentiary hearing and consisted of only statements by counsel. (Doc. #143).

{¶ 7} Jury selection began on May 8, 2006. On May 11, 2006, Mayhall and Butz filed an application for the disqualification of the trial judge with the Supreme Court of Ohio. (Doc. #149). They cited the judge’s entry denying the motion to disqualify, among other things, as evidence of the court’s bias and prejudice. Chief Justice Moyer denied the application for disqualification on May 11, 2006.

{¶ 8} On May 12, 2006, the trial court informed counsel that it had “very serious concerns about defense counsel and the manner in which they’re operating in this courtroom.” However, the court further stated that it would “take that matter up at a later time \*\*\*, preferably at the conclusion of this case.”

{¶ 9} On May 15, 2006, Mayhall and Butz filed a motion to withdraw as counsel for Dean, stating that the court's "great concern" about defense counsel's conduct and the implication that they had done something unethical and/or contemptuous would impair their ability to effectively represent their client. The court denied the motion. The court also repeatedly denied defense counsel's subsequent requests to address their conduct and not to wait until the end of trial.

{¶ 10} On June 13, 2006 – after trial had concluded and Dean had been sentenced – the trial court filed an entry addressing the alleged misconduct by Mayhall and Butz. The trial court found that "defense counsel, in a calculated scheme to remove [the judge] from the Dean case, manipulated the Court into presiding over a Criminal Rule 16(B)(1)(e) hearing so that the Court would be disqualified from presiding over the Dean trial pursuant to *Gillard*." The court determined that the conduct warranted a direct criminal contempt finding, and it fined both counsel \$2,000. The court collected the fines by discounting \$2,000 from the compensation of each attorney for representing Dean.

{¶ 11} Mayhall and Butz raise two assignments of error on appeal. We address the assignments in reverse order.

{¶ 12} II. "THE COURT BELOW ERRED IN SUMMARILY FINDING DEFENSE COUNSEL IN DIRECT CRIMINAL CONTEMPT OF COURT FOR CONDUCT THAT DID NOT OCCUR IN THE PRESENCE OF THE COURT. FURTHERMORE, THE TRIAL COURT WAS SO EMBROILED IN THE CONTROVERSY THAT IT SHOULD HAVE REFERRED THE FACT FINDING TO ANOTHER JUDGE. THESE ERRORS VIOLATED DEFENSE COUNSEL'S RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§

## CONSTITUTION AND ARTICLE I, §§ 10 AND 16 OF THE OHIO CONSTITUTION.”

{¶ 13} In their second assignment of error, Mayhall and Butz argue that, to the extent their conduct was contemptuous, it constituted indirect contempt and, therefore, they should have been afforded due process protections. Alternatively, Mayhall and Butz contend that, even if the conduct constituted direct contempt, there was no imminent threat to the administration of justice and, consequently, a summary proceeding was inappropriate.

{¶ 14} “Contempt of court consists of an act or omission substantially disrupting the judicial process in a particular case.” *In re Davis* (1991), 77 Ohio App.3d 257, 262, 602 N.E.2d 270. Courts have inherent authority to punish contemptuous conduct. *Id.* at 262-63. “The propriety of imposing punishment for contempt often turns on whether the contempt is direct or indirect, and on whether it is civil or criminal in nature.” *State v. Kitchen* (1998), 128 Ohio App.3d 335, 341, 714 N.E.2d 976.

{¶ 15} Contempt falls within two general categories – civil and criminal – based on the character and purpose of the sanction. *Id.* “Sanctions for criminal contempt are punitive in nature and unconditional.” *State v. Montgomery*, Montgomery App. No. 20036, 2004-Ohio-1699, at ¶18. They are intended to punish the offender for past disobedience of a court order or other contemptuous conduct and to vindicate the authority of the court. *Id.* “Civil contempt sanctions, on the other hand, are remedial and are intended to coerce the contemnor into complying with the court’s order.” *Id.* The punishment for civil contempt is conditional, and the contemnor has an opportunity to purge himself of the contempt and avoid the punishment by complying with the court’s order. *Id.*

{¶ 16} Mayhall and Butz assert – and we agree – that this case involves criminal, as

opposed to civil, contempt. The trial court's contempt order operated as punishment for the defense counsel's alleged manipulation of the court and "to vindicate the authority of the law and the court." *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 254, 416 N.E.2d 610; *State v. Palmer*, Montgomery App. No. 19921, 2004-Ohio-779, at ¶6. The contempt finding had no remedial or coercive purpose, nor was it for the benefit of a complainant. *Brown*, 64 Ohio St.2d at 253.

{¶ 17} Contempt may also be either direct or indirect, and the distinction lies in where the conduct occurs. With direct contempt, the conduct occurs in the presence of the court; indirect contempt occurs outside the court's presence but obstructs the orderly administration of justice. *State v. Perkins*, 154 Ohio App.3d 631, 2003-Ohio-5092, 798 N.E.2d 646, ¶36. "Direct contempt usually involves some misbehavior which takes place in the actual courtroom." *In re Purola* (1991), 73 Ohio App.3d 306, 310, 596 N.E.2d 1140.

{¶ 18} "Whether and how a court may punish contempt depends in large part on whether the contempt is classified as 'direct' or as 'indirect.'" *Davis*, 77 Ohio App.3d at 263. With indirect contempt, the contemnor must be afforded certain procedural safeguards, including a written charge, entry on the court's journal, an adversary hearing, and an opportunity for legal representation. *City of Xenia v. Billingham* (Oct. 9, 1998), Greene App. No. 97-CA-124; R.C. 2705.03.

{¶ 19} In contrast, R.C. 2705.01, which governs direct contempt, "permits a court to punish a direct contempt summarily, and due process does not require that the contemnor be granted a hearing." *Kitchen*, 128 Ohio App.3d at 341. However, as we stated in *Davis*, the power to punish summarily is limited in two ways:

{¶ 20} "First, the locus of the contumacious act or acts must be such that the determinative

determinative issues of the offense are known to the court personally. Under those circumstances, because the 'external facts' of the contempt are known, no fact-finding determination is required and a summary proceeding is appropriate.

{¶ 21} "Second, the nature or quality of the contumacious act must be such that the orderly and effective conduct of the court's business requires its immediate suppression and punishment. *In re Oliver* (1948), 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682. The particular conduct must create 'an open threat to the orderly procedure of the court' such that if 'not instantly suppressed and punished, demoralization of the court's authority will follow.' *Cooke v. United States* (1925), 267 U.S. 517, at 536, 45 S.Ct. 390, at 395, 69 L.Ed. 767, at 773. In authorizing exercise of the summary power to punish, the *Oliver* court 'gave no encouragement to its expansion beyond the suppression and punishment of the court disrupting misconduct which alone justified its exercise.' *Id.*, 333 U.S. at 274, 68 S.Ct. at 508, 92 L.Ed. at 695. Further, the limits of the contempt authority are, in general, 'the least possible power adequate to the end proposed.' *Id.*, quoting *Ex Parte Terry* (1888), 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405, citing *Anderson v. Dunn* (1821), 19 U.S. (6 Wheat.) 204, 5 L.Ed. 242.

{¶ 22} "It seems clear that under the rules of *Cooke* and *Oliver* a summary proceeding is not authorized simply because the conduct constitutes direct contempt. Even if the external facts are clear because they took place in the presence of the judge, the effect of the contumacious conduct must create a 'need for speed' to immediately suppress the court-disrupting misbehavior and restore order to the proceedings. *Dobbs, supra*, 56 Cornell L.Rev. at 229. Absent that need, an evidentiary hearing is required even though the contempt is 'direct.'" *Davis*, 77 Ohio App.3d at 263-64.

{¶ 23} Upon review of the record, we doubt that the trial court properly deemed Mayhall's and Butz's action to be direct contempt. Although certain actions occurred in the presence of the court, the trial court's ruling also cited to motions filed by defense counsel and to an audio recording of a conversation between Dean and his brother while Dean was incarcerated at the Clark County Jail. We have held that the libeling of the trial court in motions and memoranda does not constitute direct contempt. See *State v. Daly*, Clark App. No. 06-CA-20, 2006-Ohio-6818. Moreover, it is apparent from the record that the court developed its concerns after reviewing the state's response to the application to the Supreme Court of Ohio for the disqualification of the trial judge. In other words, the trial court became concerned that defense counsel had attempted to manipulate the court *after* the critical events had occurred, not contemporaneously with defense counsel's conduct.

{¶ 24} Regardless of whether the contempt was direct or indirect, we find that Mayhall and Butz should have been afforded an evidentiary hearing because there was no "need for speed" to address the allegedly contemptuous conduct. This lack of urgency is amply illustrated in the record.

{¶ 25} When the trial court initially informed counsel on May 12, 2006, that it had "very serious concerns about defense counsel and the manner in which they're operating in this courtroom," the court indicated that it would address its concerns at the conclusion of the trial. On May 15, 2006, defense counsel indicated that they were greatly concerned that they would be charged with contempt at the conclusion of trial, that they were intimidated, and that they believed their ability to represent Dean effectively would be affected by "this hanging over [their] head[s]." The court responded that it "simply told [them] on Friday that it would handle the matter at the conclusion of these proceedings" and it reiterated that "[w]e're not getting into this now because I

and it reiterated that “[w]e’re not getting into this now because I told you we’d address that at the conclusion of the case.”

{¶ 26} On May 16, 2006, Dean expressed to the court his concerns that Mayhall and Butz could not effectively represent him. Defense counsel reiterated their feeling that the situation was having a “chilling effect on [their] ability to represent [their] client.” The court responded that they would be held accountable if they engaged in unethical conduct. The court further stated: “I’ve told you three times that I’m not going to prejudge that. There’s been accusations made that if I believe that they’re founded, that it does mean that you engaged in unethical activity. It appears on the face of the allegations that there’s facts that would corroborate the allegations so I have serious concerns about it. I’m not going to make a determination at this time because we’re in the middle of a capital trial.” The court reassured counsel, however, that they had “free reign and wide latitude to defend [their] client in an ethical manner.”

{¶ 27} On May 17, 2006, Dean again expressed concerns to the court about Mayhall’s and Butz’s continued representation. Dean “implored” the court to address the issue of his counsel’s alleged unethical conduct “because I feel as though that is the only way that I will receive justice in this courtroom.” The court explained possible options for addressing the misconduct issue – stay the trial until the issue is resolved, turn the issue over to another judge, or inform defense counsel that they would receive no punishment. The court rejected each of these possibilities and decided to proceed with the trial. The court ultimately addressed the issue on June 13, 2006.

{¶ 28} In light of the trial court’s repeated determinations that it need not give immediate attention to evaluating defense counsel’s conduct, we find no basis for the court to resolve the

to resolve the matter in a summary fashion. Because there was no "need for speed," Mayhall and Butz were entitled to an evidentiary hearing on the contempt allegations.

{¶ 29} Mayhall and Butz further assert that the trial court should have referred the fact-finding to another judge, because the court was "too embroiled in the controversy to act as a neutral and detached fact finder." The record supports defense counsel's assertion.

{¶ 30} In his affidavit in support of his motion to withdraw as counsel, Mayhall stated that on May 12, 2006, he, Butz, and the prosecutors met with the court in chambers, during which the court informed defense counsel that the supreme court had dismissed the affidavit of prejudice. Mayhall indicated that the judge appeared to be "angry: his face was flushed and he was glaring at defense counsel." During the trial, the court repeatedly stated that it had "serious concerns" with defense counsel's behavior and told defense counsel that "you guys got yourself into this situation."

{¶ 31} When Dean also expressed concern about whether Mayhall and Butz could adequately represent him, he indicated that the court appeared to "have taken this personally; and [that Mayhall and Butz] have offended you in some way, shape, or form. Whatever it is, I don't know. I'm not a lawyer myself. But I'm fairly telling you as an individual, I feel you're taking this personally; and it's impeding their ability to defend me properly. \*\*\*"

{¶ 32} Most significantly, statements from the trial court indicated that the court's impartiality was impaired. In responding to defense counsel's affidavit of disqualification, the trial court indicated that it felt compelled to respond to the affidavit "since it appears, in part, to be a personal attack on my integrity and competence as a Judge." Later, in its ruling on the contempt, the trial

ruling on the contempt, the trial court found that “defense counsel had a dual motive for having this Court removed from the case. \*\*\* Their second motive stems from a longstanding personal revulsion of the Court, dating back to when this Judge was an assistant prosecuting attorney. Accordingly, the Court vehemently disagrees with Mr. Butz’s statement that ‘This is not a personal attack on the Court.’”

{¶ 33} Although the trial court repeatedly stated that it would not prejudge the issue, the record supports defense counsel’s assertion that the court was “too embroiled in the controversy to act as a neutral and detached fact finder” and that a different judge should have conducted an evidentiary hearing.

{¶ 34} The second assignment of error is sustained.

{¶ 35} I. “THE COURT BELOW ERRED WHEN IT FOUND DEFENSE COUNSEL IN CRIMINAL CONTEMPT OF COURT WHEN THE EVIDENCE WAS INSUFFICIENT, AS A MATTER OF LAW, TO PROVE CONTEMPT BEYOND A REASONABLE DOUBT. IN THE ALTERNATIVE, THE FINDING OF CONTEMPT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶ 36} In their first assignment of error, Mayhall and Butz claim that there was insufficient evidence to support the contempt finding or, alternatively, the contempt was against the manifest weight of the evidence.

{¶ 37} Given our disposition of the second assignment of error, we find it unnecessary to address the merits of this assignment, which we overrule as moot.

{¶ 38} The judgment of the trial court will be reversed and the case will be remanded for the sole purpose of the trial court’s ordering that Richard Mayhall and John Butz each be paid \$2,000, these sums representing money that the trial court ordered deducted as fines from the

finer from the compensation due each for representing Jason Dean. The trial court shall order these payments within seven days of the file stamp date appearing on the final entry filed in this case.

.....

GRADY, J. and DONOVAN, J., concur.

Copies mailed to:  
William H. Lamb  
Richard A. Cline  
Hon. Douglas M. Rastatter

## EXHIBIT A

### I.

This matter is before the Court to address alleged misconduct of defense counsel, Richard E. Mayhall (#0030017) and John R. Butz (#0003453), during the course of the above-captioned case.

There are two issues before the Court. First, whether defense counsel, in a calculated scheme to remove this Court from the Dean case, manipulated the Court into presiding over a Criminal Rule 16(B)(1)(e) hearing so that the Court would be disqualified from presiding over the Dean trial pursuant to State v. Gillard, 40 Ohio St.3d 226 (1988). Second, whether such conduct, if proven beyond a reasonable doubt, warrants a criminal contempt finding by this Court and sanctions commensurate with the gravity of the offense.

### II.

The Court, being comprised of Judge Douglas M. Rastatter and Criminal Bailiff Dee Gibson, begins by certifying that all of the facts set forth below occurred in the presence of, or so near to, the Court that it has personal knowledge of them consistent with Evidentiary Rule 602.

On or about Thursday, March 30, 2006, the parties appeared before the Court to address the numerous written motions defense counsel had filed. Just prior to going into the courtroom, the parties met with the Court in chambers to discuss procedure for the motion hearing. Present in chambers with the Court were Mr. Mayhall, Mr. Butz, Stephen A. Schumaker, D. Andrew Wilson, and possibly Darnell E. Carter. During this conference, Mr. Schumaker inquired of defense counsel as to whether they were considering trying the case to a three-judge panel. Mr. Mayhall responded, seemingly in jest, by looking at this Judge and stating, "Not unless you want to get off of the case."

On or about Thursday, April 20, 2006, the State of Ohio, by and through Assistant Prosecuting Attorney Andy Wilson, filed a certification, pursuant to Criminal Rule 16(B)(1)(e), that disclosing the address of their witness, Crystal Kaboos, may subject her to physical or substantial economic harm or coercion. On or about Friday, April 21, 2006, Mr. Mayhall called the Court's Bailiff, Mrs. Gibson, and requested a hearing on the State's Criminal Rule 16(B)(1)(e) certification.

On Monday, April 24, 2006, the Court held a hearing on the State's Criminal Rule 16(B)(1)(e) certification. Mr. Mayhall was present with his client, Jason Dean. The State was represented by Andy Wilson. Mr. Mayhall made no objection to this Court presiding over the hearing. No testimony, exhibits, or evidence of any kind was offered at the hearing. The hearing consisted solely of statements by counsel. At the conclusion of the hearing, the Court accepted the State's certification and ordered that Crystal Kaboos'

address need not be disclosed to the defense. The Court acknowledged that Crystal Kaboos could not be compelled to speak with the defense, however, in the interest of fairness, the Court did order her to be at the courthouse the week of May 8, 2006 so that she would at least be accessible to the defense for interviews in the event she chose to consent thereto.

On or about April 30, 2006, the defendant, who was incarcerated in the Clark County Jail, engaged in a telephone conversation with his brother. Although the Court did not hear the conversation as it was occurring, the Court later acquired personal knowledge of the conversation by listening to an audio recording of the same. The following is a transcription of a pertinent part of that conversation:

Jason Dean: "... but if they find me guilty I already know that judge is going to hit me with maximum consecutive sentences on everything. They [my attorneys] already told me that."

Brother: "Oh yeah that judge is no joke."

Jason Dean: "I might be able to get rid of him though, they [my attorneys] came to see me the other day, right, and they told me that judge might be getting pulled off my case."

Brother: "Get him out of there."

Jason Dean: "He might be getting pulled off my case, because the other day when you guys was in the courtroom and they was sharing that shit . . ."

Brother: "Yeah"

Jason Dean: "... he wasn't even supposed to be there, he wasn't supposed to be the judge because now he knows that all that shit where they said that I might shoot that bitch in the face and . . ."

Brother: "Who said that?"

Jason Dean: "He did that day when they was sitting down there trying to . . . oh I don't think you guys was in there . . ."

Brother: "[No] we wasn't"

Jason Dean: "That was the one I went to the other day when nobody . . . I didn't even know I was having a hearing . . ."

Brother: "They try to sneak court dates in . . ."

Jason Dean: "Nah! It was a good one though, but I went in there . . . anyway, then the next day [after the certification hearing], my attorneys came to see me they said he was probably going to be getting pulled off the case because he wasn't never supposed to hear none of that because now that's gonna make his opinion of me biased by letting him know that I'm this violent mother fucker . . . ."

On or about Wednesday, May 3, 2006, defense counsel filed a motion, pursuant to State v. Gillard, 40 Ohio St.3d 226 (1988), to disqualify this Court from presiding over the trial. In Gillard, the Ohio Supreme Court held that, when the state seeks to obtain relief from discovery or to perpetuate testimony under Criminal Rule 16(B)(1)(e), the judge who disposes of such a motion may not be the same judge who will conduct the trial.

On Thursday, May 4, 2006, the Court was on the record on other issues when defense counsel informed the Court of their May 3, 2006 motion to disqualify. At that time, Mr. Mayhall cited the Gillard case but conceded that a violation of the rule pronounced therein was often found to be harmless error.

On Friday, May 5, 2006, this Court journalized an Entry addressing the defendant's motion to disqualify. Courts are authorized, under the law, to formulate conditional opinions in cases of the facts or law. "A judge rarely hears preliminary aspects of a case without forming conditional opinions of the facts or law. These conditional opinions often assist the parties and their counsel in identifying and narrowing the issues in controversy and facilitate the settlement of cases prior to trial. However, the formation of these conditional opinions is not sufficient to counter the presumption of the judge's ability to render a fair decision based upon the evidence later presented at trial." In re Disqualification of Brown, 74 Ohio St.3d 1250 (1993)(citing State v. Cox, 21 Ohio Dec. 299, 310 (1911)). In that Entry, the Court expressed its conditional opinion that a violation of the Gillard rule would most likely be harmless error because "the Court anticipates overwhelming evidence of the defendant's guilt at trial . . . ." Accordingly, the Court took a calculated risk, overruled the motion to disqualify, and proceeded as the presiding Judge.

On Monday, May 8, 2006, the trial began with individual jury selection. By noon on Wednesday, May 10, 2006, forty-one (41) prospective jurors had been death qualified. On this same date, defense counsel filed an affidavit of disqualification with the Ohio Supreme Court pursuant to Section 2701.03 of the Ohio Revised Code, seeking the disqualification of this Court from the case. When defense counsel informed the Court that it would be filing said affidavit, Mr. Butz stated, "This is not a personal attack on the Court." The capital murder trial was stayed pursuant to Section 2701.03(D)(1) of the Ohio Revised Code.

On Thursday, May 11, 2006, the Court and the prosecutors filed responses to defense counsel's affidavit with the Ohio Supreme Court. On that same date,

5. After the Court overruled, by way of written entry, defense counsel's motion to disqualify based upon the harmless error doctrine, defense counsel filed their affidavit of disqualification with the Ohio Supreme Court pursuant to Section 2701.03 of the Ohio Revised Code.
- B. The Court finds that defense counsel had knowledge of the Gillard case prior to the Criminal Rule 16(B)(1)(e) hearing. This finding is based upon the evidence set forth below.
1. The Court finds that Mr. Mayhall's statement during the March 30, 2006 meeting in chambers exposed defense counsel's intent, or at least desire, to have this Court removed from the case. When Mr. Schumaker inquired of defense counsel as to whether they were considering trying the case to a three-judge panel, Mr. Mayhall responded by looking at this Judge and stating, "Not unless you want to get off of the case." Although Mr. Mayhall seemingly made that statement in jest, it has given this Court tremendous insight into defense counsel's mens rea heading into the Dean trial. The Court finds that the statement exposed defense counsel's intent, or at least desire, to have this Court removed from the case.
  2. The Court finds that defense counsel had a dual motive for having this Court removed from the case, one of which was articulated by the defendant himself in the April 30, 2006 telephone conversation with his brother, during which he stated, ". . . but if they find me guilty I already know that judge is going to hit me with maximum consecutive sentences on everything. They [my attorneys] already told me that." Their second motive stems from a longstanding personal revulsion of the Court, dating back to when this Judge was an assistant prosecuting attorney. Accordingly, the Court vehemently disagrees with Mr. Butz's statement that "This is not a personal attack on the Court."
  3. The Court finds that defense counsel told the defendant, the day after the Criminal Rule 16(B)(1)(e) hearing, that this Court would probably be removed from the case. The Court bases this finding on the defendant's statement to his brother in the April 30, 2006 recorded telephone conversation, during which he stated, "anyway, then the next day [after the certification hearing], my attorneys came to see me they said he was probably going to be getting pulled off the case because he wasn't never supposed to hear none of that because now that's gonna make his opinion of me biased by letting him know that I'm this violent mother fucker . . ." The Court finds the timing of this attorney-client communication to be compelling evidence of defense counsel's prior knowledge of the

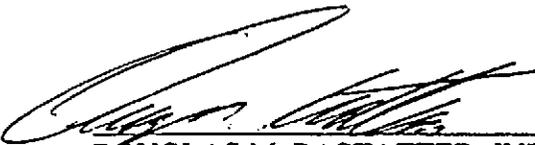
Gillard case because it would be extremely unlikely that defense counsel just happened upon the case within 24 hours of the Criminal Rule 16(B)(1)(e) hearing.

4. The Court finds that Mr. Butz's statement to his client in the courtroom on May 12, 2006 to the effect of, "This is your fault because you can't keep your mouth shut," is compelling evidence of the existence of a calculated scheme implemented by defense counsel for which they got caught.
5. The Court finds that defense counsel's repeated expression, during the course of the trial, of their overwhelming concern regarding sanctions is evidence of their consciousness of guilt. If they did nothing wrong, they would have nothing to be concerned about.
6. The Court finds that, during the numerous dialogues between the Court and defense counsel regarding their alleged misconduct, defense counsel never stated that they had no prior knowledge of the Gillard case. On the contrary, defense counsel implied prior knowledge of the Gillard case by framing the issue as to whether or not they had a duty to disclose it to the Court. Specifically, on May 15, 2006, Mr. Mayhall stated, "I don't understand what rule of professional conduct would be implicated by what we did. As I understand it, the allegation is that we had a Supreme Court case that the State didn't and the issue is was I required to disclose that? I'm not even aware of any rule that said I had to." The Court finds this to be compelling evidence of their prior knowledge of the Gillard case.

#### IV.

Having cited counsel for indirect criminal contempt for engaging in a calculated scheme to remove this Court from the Dean case, the Court will now address the second issue for review. The Court finds that if the aforementioned alleged conduct is proven beyond a reasonable doubt, it warrants an indirect criminal contempt finding and sanctions commensurate with the gravity of the offense.

In order to comply with the opinion of the Second District Court of Appeals, Mr. Butz and Mr. Mayhall shall be given an evidentiary hearing on the contempt citation before a neutral and detached fact finder.



DOUGLAS M. RASTATTER, JUDGE

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 § 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.

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

Sec. 2, Cl 1. Commander in Chief--Opinions of department heads--Reprieves and pardons.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

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.

Sec. 2, Cl 3. Appointments during recess of Senate.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

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 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 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.

(3) In addition to any other sanctions imposed pursuant to division (E)(1) of this section for an attempt to commit aggravated murder or murder in violation of division (A) of this section, if the offender used a motor vehicle as the means to attempt to commit the offense, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(F) As used in this section:

(1) "Drug abuse offense" has the same meaning as

in section 2925.01 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code

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 2923. CONSPIRACY, ATTEMPT, AND COMPLICITY; WEAPONS CONTROL; CORRUPT  
ACTIVITY  
WEAPONS CONTROL

ORC Ann. 2923.161 (2006)

§ 2923.161. Improperly discharging firearm at or into habitation; school-related offenses

(A) No person, without privilege to do so, shall knowingly do any of the following:

(1) Discharge a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual;

(2) Discharge a firearm at, in, or into a school safety zone;

(3) Discharge a firearm within one thousand feet of any school building or of the boundaries of any school premises, with the intent to do any of the following:

(a) Cause physical harm to another who is in the school, in the school building, or at a function or activity associated with the school;

(b) Cause panic or fear of physical harm to another who is in the school, in the school building, or at a function or activity associated with the school;

(c) Cause the evacuation of the school, the school building, or a function or activity associated with the school.

(B) This section does not apply to any officer, agent, or employee of this or any other state or the United States, or to any law enforcement officer, who discharges the firearm while acting within the scope of the officer's, agent's, or employee's duties.

(C) Whoever violates this section is guilty of improperly discharging a firearm at or into a habitation, in a school safety zone, or with the intent to cause harm or panic to persons in a school, in a school building, or at a school function or the evacuation of a school function, a felony of the second degree.

(D) As used in this section, "occupied structure" has the same meaning as in section 2909.01 of the Revised Code.

OHIO REVISED CODE

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

ORC Ann. 2929.02 (2006)

§ 2929.02. Penalties for aggravated murder or 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.

(D) (1) In addition to any other sanctions imposed for a violation of section 2903.01 or 2903.02 of the Revised Code, if the offender used a motor vehicle as the means to commit the violation, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(2) As used in division (D) of this section, "motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

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 2929. PENALTIES AND SENTENCING  
PENALTIES FOR FELONY

ORC Ann. 2929.14 (2006)

§ 2929.14. Basic prison terms

(A) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(4), (D)(5), (D)(6), (G), or (L) of this section and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.

(2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.

(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years.

(4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

(5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(5), (D)(6), (G), or (L) of this section, in section 2907.02 or 2907.05 of the Revised Code, or in Chapter 2925. of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

(1) The offender was serving a prison term at the time of the offense, or the offender previously had

served a prison term.

(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

(C) Except as provided in division (G) or (L) of this section or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

(D) (1) (a) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.141 [2941.14.1], 2941.144 [2941.14.4], or 2941.145 [2941.14.5] of the Revised Code, the court shall impose on the offender one of the following prison terms:

(i) A prison term of six years if the specification is of the type described in section 2941.144 [2941.14.4] of the Revised Code that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or silencer on or about the offender's person or under the offender's control while committing the felony;

(ii) A prison term of three years if the specification is of the type described in section 2941.145 [2941.14.5] of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;

(iii) A prison term of one year if the specification is of the type described in section 2941.141 [2941.14.1] of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the felony.

(b) If a court imposes a prison term on an offender under division (D)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(1)(a) of this section for felonies committed as part of the same act or transaction.

(c) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of section 2923.161 [2923.16.1] of the Revised Code or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in section 2941.146 [2941.14.6] of the Revised Code that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of section 2923.161 [2923.16.1] of the Revised Code or for the other felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (D)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (D)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (D)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.1411 [2941.14.11] of the Revised Code that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on

the offender a prison term of two years. The prison term so imposed shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (D)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (D)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of section 2923.12 or 2923.123 [2923.12.3] of the Revised Code. The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of section 2923.13 of the Revised Code unless all of the following apply:

(i) The offender previously has been convicted of aggravated murder, murder, or any felony of the first or second degree.

(ii) Less than five years have passed since the offender was released from prison or post-release control, whichever is later, for the prior offense.

(f) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in section 2941.1412 [2941.14.12] of the Revised Code that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in section 2935.01 of the Revised Code or a corrections officer as defined in section 2941.1412 [2941.14.12] of the Revised Code, the court, after imposing a prison term on the offender for the felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (D)(1)(f) of this section for felonies committed as part of the same act or transaction. If a court imposes an

additional prison term on an offender under division (D)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (D)(1)(a) or (c) of this section relative to the same offense.

(2) (a) If division (D)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 [2941.14.9] of the Revised Code that the offender is a repeat violent offender.

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

(iv) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(v) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and

they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

(b) The court shall impose on an offender the longest prison term authorized or required for the offense and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 [2941.14.9] of the Revised Code that the offender is a repeat violent offender.

(ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (DD)(1) of section 2929.01 of the Revised Code, including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that division of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.

(iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(c) For purposes of division (D)(2)(b) of this section, two or more offenses committed at the same time or as part of the same act or event shall be considered one offense, and that one offense shall be the offense with the greatest penalty.

(d) A sentence imposed under division (D)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20 or section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender shall serve an additional prison term imposed under this section

consecutively to and prior to the prison term imposed for the underlying offense.

(e) When imposing a sentence pursuant to division (D)(2)(a) or (b) of this section, the court shall state its findings explaining the imposed sentence.

(3) (a) Except when an offender commits a violation of section 2903.01 or 2907.02 of the Revised Code and the penalty imposed for the violation is life imprisonment or commits a violation of section 2903.02 of the Revised Code, if the offender commits a violation of section 2925.03 or 2925.11 of the Revised Code and that section classifies the offender as a major drug offender and requires the imposition of a ten-year prison term on the offender, if the offender commits a felony violation of section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161 [3719.16.1], 4729.37, or 4729.61, division (C) or (D) of section 3719.172 [3719.17.2], division (C) of section 4729.51, or division (J) of section 4729.54 of the Revised Code that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marijuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in section 2941.1410 [2941.14.10] of the Revised Code charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of section 2907.02 of the Revised Code and, had the offender completed the violation of section 2907.02 of the Revised Code that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of section 2907.02 of the Revised Code, the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.

(b) The court imposing a prison term on an offender under division (D)(3)(a) of this section may impose an additional prison term of one, two, three, four, five, six, seven, eight, nine, or ten years, if the court, with respect to the term imposed under division (D)(3)(a) of this section and, if applicable, divisions (D)(1) and (2) of this section, makes both of the findings set forth in divisions (D)(2)(a)(iv) and (v) of this section.

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (D)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (D)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (D)(4) of this section, the court also may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of section 2929.13 of the Revised Code and the court imposes a mandatory term of local incarceration, the court may impose a prison term as described in division (A)(1) of that section.

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1413 [2941.14.13] of the Revised Code that charges that the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, or an investigator of the bureau of criminal identification and

investigation, as defined in section 2903.11 of the Revised Code, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (D)(5) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1414 [2941.14.14] of the Revised Code that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of section 4511.19 of the Revised Code or an equivalent offense, as defined in section 2941.1414 [2941.14.14] of the Revised Code, or three or more violations of any combination of those divisions and offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (D)(6) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(6) of this section for felonies committed as part of the same act.

(E) (1) (a) Subject to division (E)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (D)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(b) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (D)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(c) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(f) of this section, the offender shall serve the mandatory prison term so imposed consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates section 2917.02, 2917.03, 2921.34, or 2921.35 of the Revised Code, if an offender who is under detention at a detention facility commits a felony violation of section 2923.131 [2923.13.1] of the Revised Code, or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of section 2921.34 of the Revised Code, any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

(3) If a prison term is imposed for a violation of division (B) of section 2911.01 of the Revised Code, a violation of division (A) of section 2913.02 of the Revised Code in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of section 2921.331 [2921.33.1] of the Revised Code, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

(5) If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) or (6) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of section 2903.06 of the Revised Code pursuant to division (A) of this section or section 2929.142 [2929.14.2] of the Revised Code. If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) of this section, and if a mandatory prison term also is imposed upon the offender pursuant to division (D)(6) of this section in relation to the same violation, the offender shall serve the mandatory prison term imposed pursuant to division (D)(5) of this section consecutively to and prior to the mandatory prison term imposed pursuant to division (D)(6) of this section and consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of section 2903.06 of the Revised Code pursuant to division (A) of this section or section 2929.142 [2929.14.2] of the Revised Code.

(6) When consecutive prison terms are imposed

pursuant to division (E)(1), (2), (3), (4), or (5) of this section, the term to be served is the aggregate of all of the terms so imposed.

(F) (1) If a court imposes a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under division (B) of section 2967.28 of the Revised Code. Section 2929.191 [2929.19.1] of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(2) If a court imposes a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (F)(1) of this section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary. Section 2929.191 [2929.19.1] of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(G) If a person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense and, in relation to that offense, the offender is adjudicated a sexually violent predator, if a person is convicted of or pleads guilty to a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or after the effective date of this amendment and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of section 2907.02 of the Revised Code or division (B) of section 2907.02 of the Revised Code provides that the court shall not sentence the offender pursuant to

section 2971.03 of the Revised Code, or if a person is convicted of or pleads guilty to attempted rape committed on or after the effective date of this amendment and 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 court shall impose sentence upon the offender in accordance with section 2971.03 of the Revised Code, and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment.

(H) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a prison term or term of imprisonment under this section, sections 2929.02 to 2929.06 of the Revised Code, section 2929.142 [2929.14.2] of the Revised Code, or section 2971.03 of the Revised Code, or any other provision of law, section 5120.163 [5120.16.3] of the Revised Code applies regarding the person while the person is confined in a state correctional institution.

(I) If an offender who is convicted of or pleads guilty to a felony that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.142 [2941.14.2] of the Revised Code that charges the offender with having committed the felony while participating in a criminal gang, the court shall impose upon the offender an additional prison term of one, two, or three years.

(J) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.143 [2941.14.3] of the Revised Code that charges the offender with having committed the offense in a school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an additional prison term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.

(K) At the time of sentencing, the court may recommend the offender for placement in a program of shock incarceration under section 5120.031 [5120.03.1] of the Revised Code or for placement in an intensive program prison under section 5120.032 [5120.03.2] of the Revised Code, disapprove placement of the offender in a program of shock incarceration or an intensive program prison of that nature, or make no recommendation on placement of

the offender. In no case shall the department of rehabilitation and correction place the offender in a program or prison of that nature unless the department determines as specified in section 5120.031 [5120.03.1] or 5120.032 [5120.03.2] of the Revised Code, whichever is applicable, that the offender is eligible for the placement.

If the court disapproves placement of the offender in a program or prison of that nature, the department of rehabilitation and correction shall not place the offender in any program of shock incarceration or intensive program prison.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison, and if the offender is subsequently placed in the recommended program or prison, the department shall notify the court of the placement and shall include with the notice a brief description of the placement.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison and the department does not subsequently place the offender in the recommended program or prison, the department shall send a notice to the court indicating why the offender was not placed in the recommended program or prison.

If the court does not make a recommendation under this division with respect to an offender and if the department determines as specified in section 5120.031 [5120.03.1] or 5120.032 [5120.03.2] of the Revised Code, whichever is applicable, that the offender is eligible for placement in a program or prison of that nature, the department shall screen the offender and determine if there is an available program of shock incarceration or an intensive program prison for which the offender is suited. If there is an available program of shock incarceration or an intensive program prison for which the offender is suited, the department shall notify the court of the proposed placement of the offender as specified in section 5120.031 [5120.03.1] or 5120.032 [5120.03.2] of the Revised Code and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

(L) If a person is convicted of or pleads guilty to aggravated vehicular homicide in violation of division (A) (1) of section 2903.06 of the Revised Code and division (B)(2)(c) of that section applies, the person shall be sentenced pursuant to section 2929.142 [2929.14.2] of the Revised Code.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2941. INDICTMENT  
FORM AND SUFFICIENCY

ORC Ann. 2941.145 (2006)

§ 2941.145. Specification that offender displayed, brandished, indicated possession of or used firearm

(A) Imposition of a three-year mandatory prison term upon an offender under division (D)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be stated in substantially the following form:

"SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense)."

(B) Imposition of a three-year mandatory prison term upon an offender under division (D)(1)(a) of section 2929.14 of the Revised Code is precluded if a court imposes a one-year or six-year mandatory prison term on the offender under that division relative to the same felony.

(C) The specification described in division (A) of this section may be used in a delinquent child proceeding in the manner and for the purpose described in section 2152.17 of the Revised Code.

(D) As used in this section, "firearm" has the same meaning as in section 2923.11 of the Revised Code.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2941. INDICTMENT  
FORM AND SUFFICIENCY

ORC Ann. 2941.25 (2006)

§ 2941.25. Multiple counts

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them..

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2945. TRIAL  
TRIAL BY COURT

ORC Ann. 2945.06 (2006)

§ 2945.06. Jurisdiction of judge when jury trial is waived; three-judge court

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court. The judges or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty. If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. The court shall follow the procedures contained in sections 2929.03 and 2929.04 of the Revised Code in all cases in which the accused is charged with an offense punishable by death. If in the composition of the court it is necessary that a judge from another county be assigned by the chief justice, the judge from another county shall be compensated for his services as provided by section 141.07 of the Revised Code.

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. 16 (2006)

Rule 16. DISCOVERY AND INSPECTION

(A) *Demand for discovery.* --Upon written request each party shall forthwith provide the discovery herein allowed. Motions for discovery shall certify that demand for discovery has been made and the discovery has not been provided.

(B) *Disclosure of evidence by the prosecuting attorney.*

(1) Information subject to disclosure.

(a) Statement of defendant or co-defendant. Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any of the following which are available to, or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:

(i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof;

(ii) Written summaries of any oral statement, or copies thereof, made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer;

(iii) Recorded testimony of the defendant or co-defendant before a grand jury.

(b) Defendant's prior record. Upon motion of the defendant the court shall order the prosecuting attorney to furnish defendant a copy of defendant's prior criminal record, which is available to or within the possession, custody or control of the state.

(c) Documents and tangible objects. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong

to the defendant.

(d) Reports of examination and tests. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, available to or within the possession, custody or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney.

(e) Witness names and addresses; record. Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. Where a motion for discovery of the names and addresses of witnesses has been made by a defendant, the prosecuting attorney may move the court to perpetuate the testimony of such witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(f) Disclosure of evidence favorable to defendant. Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment. The certification and the perpetuation provisions of subsection (B)(1)(e) apply to this subsection.

(g) In camera inspection of witness' statement. Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall

conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Information not subject to disclosure. Except as provided in subsections (B)(1)(a), (b), (d), (f), and (g), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents.

(3) Grand jury transcripts. The discovery or inspection of recorded proceedings of a grand jury shall be governed by Rule 6(E) and subsection (B)(1)(a) of this rule.

(4) Witness list; no comment. The fact that a witness' name is on a list furnished under subsections (B)(1)(b) and (f), and that such witness is not called shall not be commented upon at the trial.

(C) *Disclosure of evidence by the defendant.*

(1) Information subject to disclosure.

(a) Documents and tangible objects. If on request or motion the defendant obtains discovery under subsection (B)(1)(c), the court shall, upon motion of the prosecuting attorney order the defendant to permit the prosecuting attorney to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, available to or within the possession, custody or control of the defendant and which the defendant intends to introduce in evidence at the trial.

(b) Reports of examinations and tests. If on request or motion the defendant obtains discovery under subsection (B)(1)(d), the court shall, upon motion of the prosecuting attorney, order the defendant to permit the prosecuting attorney to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, available to or within the possession or control of the defendant, and which the defendant intends to introduce in evidence at the trial, or which were prepared by a witness whom the defendant intends to call at the trial, when such results or reports relate to his testimony.

(c) Witness names and addresses. If on request or motion the defendant obtains discovery under subsection (B)(1)(e), the court shall, upon motion of the prosecuting attorney, order the defendant to furnish the prosecuting attorney a list of the names and addresses of the witnesses he intends to call at the trial. Where a motion for discovery of the names and addresses of witnesses has been made by the prosecuting attorney, the defendant may move the court to perpetuate the testimony of such witnesses in a hearing before the court in which hearing the prosecuting attorney shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the defendant's case in chief in the event the witness has become unavailable through no fault of the defendant.

(d) In camera inspection of witness' statement. Upon completion of the direct examination, at trial, of a witness other than the defendant, the court on motion of the prosecuting attorney shall conduct an in camera inspection of the witness' written or recorded statement obtained by the defense attorney or his agents with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist the statement shall be given to the prosecuting attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the prosecuting attorney, and he shall not be permitted to cross-examine or comment thereon.

Whenever the prosecuting attorney is not given

the entire statement it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Information not subject to disclosure. Except as provided in subsections (C)(1)(b) and (d), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the defense attorney or his agents in connection with the investigation or defense of the case, or of statements made by witnesses or prospective witnesses to the defense attorney or his agents.

(3) Witness list; no comment. The fact that a witness' name is on a list furnished under subsection (C)(1)(c), and that the witness is not called shall not be commented upon at the trial.

(D) *Continuing duty to disclose.* --If, subsequent to compliance with a request or order pursuant to this rule, and prior to or during trial, a party discovers additional matter which would have been subject to discovery or inspection under the original request or order, he shall promptly make such matter available for discovery or inspection, or notify the other party or his attorney or the court of the existence of the additional matter, in order to allow the court to modify its previous order, or to allow the other party to make an appropriate request for additional discovery or inspection.

(E) *Regulation of discovery.*

(1) Protective orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party the court may permit a party to make such showing, or part of such showing, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Time, place and manner of discovery and inspection. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted, and may prescribe such terms and conditions as are just.

(3) Failure to comply. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this

rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(F) *Time of motions.* --A defendant shall make his motion for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. The prosecuting attorney shall make his motion for discovery within seven days after defendant obtains discovery or three days before trial, whichever is earlier. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

OHIO RULES OF CRIMINAL PROCEDURE

Ohio Crim. R. 52 (2006)

Rule 52. HARMLESS ERROR AND PLAIN ERROR

(A) *Harmless error.* --Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) *Plain error.* --Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

OHIO RULES OF EVIDENCE  
ARTICLE IV. RELEVANCY AND ITS LIMITS

Ohio Evid. R. 401 (2006)

Rule 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

OHIO RULES OF 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. 615 (2006)

Rule 615. SEPARATION AND EXCLUSION OF WITNESSES

(A) Except as provided in division (B) of this rule, at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. An order directing the "exclusion" or "separation" of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses.

(B) This rule does not authorize exclusion of any of the following persons from the hearing:

- (1) a party who is a natural person;
- (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney;
- (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause;
- (4) in a criminal proceeding, a victim of the charged offense to the extent that the victim's presence is authorized by statute enacted by the General Assembly. As used in this rule, "victim" has the same meaning as in the provisions of the Ohio Constitution providing rights for victims of crimes.

OHIO RULES OF EVIDENCE  
ARTICLE VIII. HEARSAY

Ohio Evid. R. 801 (2006)

Rule 801. DEFINITIONS

The following definitions apply under this article:

(A) *Statement.* --A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(B) *Declarant.* --A "declarant" is a person who makes a statement.

(C) *Hearsay.* "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(D) *Statements which are not hearsay.* --A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with his testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (c) one of identification of a person soon after perceiving him, if the circumstances demonstrate the reliability of the prior identification.

(2) *Admission by party-opponent.* The statement is offered against a party and is (a) his own statement, in either his individual or a representative capacity, or (b) a statement of which he has manifested his adoption or belief in its truth, or (c) a statement by a person authorized by him to make a statement concerning the subject, or (d) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

OHIO RULES OF EVIDENCE  
ARTICLE VIII. HEARSAY

Ohio Evid. R. 802 (2006)

Rule 802. HEARSAY RULE

Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio.

OHIO RULES OF EVIDENCE  
ARTICLE VIII. HEARSAY

Ohio Evid. R. 803 (2006)

Rule 803. HEARSAY EXCEPTIONS;  
AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing, mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A

memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in record kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirement of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report,

statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 901(B)(10) or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular

occupations.

(18) To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of his family by blood, adoption, or marriage or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among his associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest or the equivalent plea from another jurisdiction), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

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 truthworthiness 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.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25